NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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Kimberly Woodell Sieredzki

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1. Assigned by Chief Justice I. Beverly, Lake, Jr. effective 8 January 2001.
2. Appointed by Chief Justice I. Beverly Lake, Jr. effective 14 February 2001.

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1. Retired 30 June 2001.
2. Appointed and sworn in 12 June 2001.

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28	J. ROBERT HUFSTADER	Asheville

G.S.	
1-254	Ripley v. Day, 630
1-278	Brooks v. Wal-Mart Stores, Inc., 637
	Gaunt v. Pittaway, 778
1A-1	See Rules of Civil Procedure, infra
1B-1	Brooks v. Wal-Mart Stores, Inc., 637
5A-14(b)	Peaches v. Payne, 580
7A-97	State v. Smith, 209
7A-289.31	In re Brim, 733
7A-289.32	In re Brim, 733
7A-289.32(2)	In re Brim, 733
7A-289.32(3)	In re Brim, 733
7A-289.32(4)	In re Brim, 733
7A-289.32(7)	In re Brim, 733
7A-651	In re Brim, 733
8C-1	See Rules of Evidence, infra
14-7.1	State v. Smith, 209
14-27.4	State v. Bowen, 18
	State v. Hutchings, 184
14-27.7A	State v. Bowen, 18
14-33(c)(2)	State v. Smith, 209
14-33.2	State v. Smith, 209
14-72.1(c)	Redding v. Shelton's Harley Davidson, Inc., 816
14-100	State v. Hutchinson, 132
14-134.3(a)	State v. Dye, 148
14-202.1	State v. Hutchings, 184
14-288.4	State v. Smith, 209
14-415.1(b)	State v. Jackson, 721
15A-534.1	State v. Gilbert, 657
15A-630	State v. Hutchings, 184
15A-903(d)	State v. Manning, 454
15A-926(a)	State v. Bowen, 18
15A-1002	State v. McRae, 387
15A-1032(b)(2)	State v. Smith, 209
15A-1231	State v. Smith, 209
15A-1340.14(c)(4)	State v. Smith, 209
20-16.2(a)(5)	State v. Tappe, 33
20-139.1(b)	State v. Tappe, 33
20-139.1(d)	State v. Tappe, 33

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

CONSTITUTION OF UNITED STATES CITED

CONSTITUTION OF NORTH CAROLINA CITED

RULES OF APPELLATE PROCEDURE CITED

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ROBINSON, BRADSHAW & HINSON, P.A., PLAINTIFF V. BONITA HARRIS SMITH AND OLLEN BRUTON SMITH, DEFENDANTS

No. COA99-750

(Filed 18 July 2000)

1. **Attorneys— contingency fee—equitable distribution—cross-claims under settlement agreement**

In an action to collect attorney fees arising under a contingent fee agreement in an equitable distribution action, the trial court erred by granting summary judgment for Mrs. Smith on cross-claims for indemnity and for breach of an agreement where both cross-claims concerned the same issue and affidavits established a genuine issue of fact as to whether a settlement was reached and whether Mrs. Smith breached the agreement by failing to cooperate.

2. **Attorneys— contingency fee—equitable distribution—cross-claims under settlement agreement**

In an action to collect attorney fees arising under a contingent fee agreement in an equitable distribution action, the trial court erred by entering summary judgment for RB&H (the law firm attempting to collect the fee) against Mr. Smith where there were disputed issues of fact as to who would be ultimately liable for the fee award.

3. **Pleadings— amendment—defense not specifically pleaded**

Pleadings were deemed to be amended in an action to collect attorney fees arising under a contingent fee agreement in an

equitable distribution action where the law firm attempting to collect the fee (RB&H) contended that Mr. Smith did not specifically plead Mrs. Smith's breach of an agreement in defense of RB&H's claim against him and that the defense was waived as to RB&H, but the record clearly reflects that RB&H had ample notice of the issue and it cannot be said that deeming Mr. Smith's pleadings to be amended to assert the breach would work any prejudice to RB&H.

4. Appeal and Error— ripeness—prior decision

The issue of whether the present value of a settlement was a proper method of calculating attorneys' fees under a contingency contract for an equitable distribution action became ripe for appeal only in this appeal, following a remand, as the trial court's original calculation did not disclose that a present value calculation was used to determine the fee and the trial court has since made the requisite findings. The Court of Appeals disagreed with the contention that this issue was previously decided in that the same assignment of error was raised relating to the present value issue, the issue was not discussed, and the previous opinion (129 N.C. App. 305) stated that the Court of Appeals had reviewed any remaining assignments of error and found them to be without merit.

5. Appeal and Error— motion to amend record—reasons not given

A Motion to Amend the Record on Appeal was denied where one of the defendants wanted to add to the record portions of depositions included in the record on a prior appeal but provided no explanation of why they are necessary or why they were not included in the first record.

6. Attorneys— contingency fee—present value of award

The trial court correctly determined on summary judgment the present value of a contingent fee recovery for an equitable distribution claim where the phrase "value of recovery" in the contingent fee contract could only mean the present value of the total recovery. The words "value of" would be meaningless if the phrase was defined to mean total recovery rather than present value, and such a construction is not favored. Moreover, the court correctly awarded the attorneys (plaintiffs in this action) twenty percent of the present value, rather than first calculating

the attorneys' fees on the total award and reducing those figures to present value, as defendant Mr. Smith urged.

Appeal by defendant Ollen Bruton Smith from order and judgment filed 25 January 1999 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 March 2000.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr. and Allison M. Grimm, for plaintiff-appellee.

Lawing, Sharpless & Stavola, P.A., by Frederick K. Sharpless and Eugene E. Lester, III, for defendant-appellee Bonita Harris Smith.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr. and Anne L. Hester, for defendant-appellant Ollen Bruton Smith.

SMITH, Judge.

Defendant Ollen Bruton Smith (Mr. Smith) appeals from an "Order and Judgment" of the trial court (1) holding Mr. Smith and Bonita Harris Smith (Mrs. Smith) jointly and severally liable to plaintiff Robinson, Bradshaw & Hinson, P.A. (RB&H); (2) ordering Mr. Smith to indemnify Mrs. Smith; (3) dismissing Mr. Smith's cross-claims against Mrs. Smith; and (4) ordering Mr. Smith to pay Mrs. Smith's costs and attorneys' fees in the instant action, with the amount thereof to be determined at a later hearing. We affirm in part and reverse in part the decision of the trial court.

The parties to this action are before this Court for the third time. *See Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993) (*Smith I*), *rev'd in part*, 336 N.C. 575, 444 S.E.2d 420 (1994) (*Smith II*); *Robinson, Bradshaw & Hinson v. Smith*, 129 N.C. App. 305, 498 S.E.2d 841 (*Robinson*), *disc. review denied*, 348 N.C. 695, 511 S.E.2d 649 (1998). Lengthy discussion of the facts is unnecessary in light of the extensive factual rendition in *Smith I* and *Robinson*. Briefly, the facts are as follows:

Mr. and Mrs. Smith were married in 1972, separated in 1988, and granted an absolute divorce 5 February 1990. An equitable distribution judgment was entered 5 April 1991, from which both parties appealed. *See Smith I*, 111 N.C. App. at 468, 433 S.E.2d at 201. Although the trial court's judgment was largely upheld on appeal, por-

tions of the case were remanded to the trial court for further proceedings. *See Smith II*, 336 N.C. at 580, 444 S.E.2d at 423.

RB&H represented Mrs. Smith on a contingency fee basis throughout the duration of the equitable distribution trial and its subsequent appeals. After the Supreme Court's June 1994 opinion in *Smith II*, Mrs. Smith met with RB&H attorneys to discuss terms of a potential settlement with Mr. Smith.

In the fall of 1994, Mrs. Smith began settlement negotiations with Mr. Smith and retained the services of an attorney, Pamela H. Simon (Simon), not affiliated with RB&H. RB&H, unaware of these activities, continued to pursue Mrs. Smith's case.

Simon filed a new equitable distribution action in Iredell County 7 November 1994 on Mrs. Smith's behalf and shortly thereafter informed the trial court that the parties had reached a settlement. On 15 November 1994, Mrs. Smith voluntarily dismissed her still pending Mecklenburg County equitable distribution action and placed a discharge letter to RB&H in a mailbox outside the courthouse. The trial court subsequently entered judgment in the Iredell County case (the Iredell judgment).

The Iredell judgment contained the following provisions pertinent to this appeal:

> 3. . . . .
>
> [Mr. Smith] shall . . . pay, upon entry of this order, $449,047.00 into an escrow account, . . . which funds shall be paid by the escrow agent to [RB&H] . . . .
>
> [Mr. Smith] shall also be liable, and shall pay, . . . for any other reasonable attorneys' fees and costs for which [Mrs. Smith] is liable to [RB&H] as a result of that law firm's representation of [Mrs. Smith] in other litigation between [Mrs. Smith] and [Mr. Smith]; provided, however, that [Mrs. Smith] and [Mr. Smith] shall have the right to contest any demand for fees in excess of the amount described above, and [Mr. Smith] shall pay any additional amount to [RB&H] only as he may agree or as ordered by a court of law making a determination as to the liability, if any, of [Mrs. Smith] for such additional amount, and the reasonableness of such additional amount, if any. . . .
>
> . . . .

> 17. . . . In the event that any claim is made or action filed against [Mrs. Smith] for . . . attorneys' fees, [Mrs. Smith] shall notify [Mr. Smith] of the claim or action . . . and [Mr. Smith] shall be entitled to defend against such claim or action in any manner that [Mr. Smith] deems appropriate, including, but not limited to, filing a declaratory judgment action for a determination of liability, if any. *[Mrs. Smith] shall cooperate with [Mr. Smith] in defense of such claim or action in defending against such claims or in connection with any declaratory judgment action.* [Mr. Smith] shall pay all costs, fees, and expenses in connection with any such declaratory judgment action. [Mrs. Smith] shall not be entitled to bind [Mr. Smith] to payment of any settlement of such tax or attorneys' fee liability without the prior written consent of [Mr. Smith].

(emphasis added).

On the same day the Iredell judgment was entered, Mr. and Mrs. Smith signed a "Contract and Agreement" (the Agreement) containing almost identical language to that of paragraph 17, above, but with the following addition:

> 2. . . . [Mr. Smith] shall advance to [Mrs. Smith] as partial compliance with the Iredell County [judgment] requiring him to indemnify [Mrs. Smith], any costs, fees, attorneys' fees or other expenses of litigation that may be required to establish or contest the claims of any of the attorneys or experts.

We note that Mr. Smith alleges Mrs. Smith breached the Iredell judgment and the Agreement by failing to settle the case *sub judice* in December 1995, an issue we later discuss in detail.

RB&H filed suit against the Smiths on 23 January 1995, asserting claims for, *inter alia*, (1) breach of contract against Mrs. Smith; (2) tortious interference with contract, including punitive damages, against Mr. Smith; (3) tortious interference with economic advantage against Mr. Smith; and, (4) breach of contract for the benefit of a third party against Mr. Smith. On 23 March 1995, Mrs. Smith filed her answer and a cross-claim against Mr. Smith alleging the Iredell judgment and the Agreement required Mr. Smith "to indemnify Mrs. Smith against, and pay on behalf of Mrs. Smith, all expenses of litigation . . . incurred on Mrs. Smith's behalf," as well as "any judgment for fees, costs and/or interest that may be awarded" to RB&H.

The Smiths moved for summary judgment as to all of RB&H's claims on 13 October 1995, while RB&H filed a motion for partial summary judgment on 17 October 1995 as to its claims against Mrs. Smith "for fees owed for legal services" and against Mr. Smith for breach of his contract with Mrs. Smith to pay her attorneys' fees.

Mr. Smith filed a motion to amend his answer 12 February 1996 in order to assert as a defense to Mrs. Smith's cross-claim Mrs. Smith's alleged breach of her obligation under the Agreement "to cooperate with Mr. Smith in his defense of this lawsuit . . . ." The amended answer also contained several cross-claims against Mrs. Smith, including a claim for damages resulting from Mrs. Smith's alleged breach. The trial court granted Mr. Smith's motion to amend on 15 November 1996.

The trial court also entered judgment 15 November 1996 on the parties' cross-motions for summary judgment. The court's judgment (1) dismissed RB&H's claims against Mr. Smith for tortious interference with contract and with prospective economic advantage; (2) found the contingency fee contract between RB&H and Mrs. Smith valid and binding against Mrs. Smith; and, (3) held that RB&H was "entitled to recover against [Mr. Smith] as provided" in the Iredell judgment. The court entered judgment against the Smiths "jointly and severally" in the amount of $1,597,152.50 plus interest. All parties appealed.

In the previous appeal, this Court determined that a provision in the contingency fee contract prohibiting Mrs. Smith from communicating with Mr. Smith regarding the equitable distribution claim was invalid, but upheld the remainder of the contract as enforceable as it was "severable from, and not dependent on, the void portion." *Robinson*, 129 N.C. App. at 314, 498 S.E.2d at 847.

We then held that since Mrs. Smith did not discharge RB&H until after the settlement with Mr. Smith had been finalized, the contingency fee contract between the parties was still in effect, thus entitling RB&H to collect under its terms. *Id.* at 316, 498 S.E.2d at 849. However, because a review of the record

> d[id] not disclose how the trial judge determined the appropriate amount of attorneys' fees awarded to RB&H,

id. at 316, 498 S.E.2d at 850, we remanded this issue

> for entry of an order with findings of fact and a determination of the appropriate amount of attorneys' fees for RB&H based on the contingency fee contract and the value of the judgment in effect at the time of the termination,

id.

We next held that it was error for the trial court to grant Mr. Smith's motions for summary judgment on RB&H's tortious interference with contract and with prospective economic advantage claims, and remanded those issues to the trial court as well. *Id.* at 318-19, 498 S.E.2d at 851.

Finally, we addressed Mrs. Smith's contention that the trial court should have entered summary judgment in her favor on the issue of Mr. Smith's liability for any attorneys' fees Mrs. Smith may owe to RB&H.

> Since Mr. Smith's pleading was amended the same day as the summary judgment hearing, and because the trial court's summary judgment d[id] not specifically address the issue, we [we]re unable to determine from the record before us whether the trial court considered the issue of Mr. Smith's liability for Mrs. Smith's attorneys' fees.

Id. at 320, 498 S.E.2d at 852. We therefore ordered the trial court upon remand to

> determine Mr. Smith's obligation, if any, for payment of Mrs. Smith's attorneys' fees and expenses to RB&H.

Id. at 321, 498 S.E.2d at 852. Mr. Smith petitioned the Supreme Court for discretionary review of our decision, which review was denied 29 July 1998. *See Robinson, Bradshaw & Hinson v. Smith*, 348 N.C. 695, 511 S.E.2d 649 (1998).

Mrs. Smith moved for summary judgment 16 October 1998 as to her cross-claim against Mr. Smith for indemnity and as to Mr. Smith's cross-claims against her. The motion was supported by affidavits from Mrs. Smith and A. Ward McKeithen (McKeithen), a shareholder of RB&H. Mr. Smith and his attorney, William K. Diehl, Jr. (Diehl), submitted affidavits in opposition to the motion.

The trial court heard oral arguments on all pending motions 9 November 1998. On 25 January 1999, the trial court entered an "Order

and Judgment" pursuant to the outstanding motions for summary judgment, which said judgment provided in pertinent part:

> 1. [RB&H] shall have and recover of [Mr. and Mrs. Smith], jointly and severally, the principal sum of $1,553,157.00 . . . .
>
> . . . .
>
> 3. [Mrs. Smith] shall have and recover of [Mr. Smith], and [Mr. Smith] shall indemnify [Mrs. Smith], for any amounts she shall be compelled to pay to [RB&H] pursuant to this judgment, and [Mr. Smith] shall have no right of contribution . . . for any amounts paid to satisfy this judgment.
>
> 4. The cross-claims of [Mr. Smith] against [Mrs. Smith] are dismissed with prejudice.
>
> 5. Pursuant to the cross-claim of [Mrs. Smith . . .], [Mr. Smith] is found liable to pay the costs and attorneys' fees incurred by [Mrs. Smith] in this action. The amount of such costs and fees shall be determined on further motions or at trial.

Mr. Smith timely appealed, bringing forward nineteen assignments of error. Mrs. Smith filed one cross-assignment of error; however, her cross-assignment of error is deemed abandoned as her appellate brief contained "no reason or argument" in support of that alleged error. N.C.R. App. P. 28(b)(5).

Preliminarily, we note the instant appeal is interlocutory as the order appealed from

> does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy.

Howerton v. Grace Hospital, Inc., 124 N.C. App. 199, 201, 476 S.E.2d 440, 442 (1996). RB&H's claims against Mr. Smith for tortious interference with contract and with prospective economic advantage remain outstanding, *see Robinson*, 129 N.C. App. at 320, 498 S.E.2d at 852 (reversing trial court's grant of summary judgment in favor of Mr. Smith as to those claims and ordering trial court to proceed on those claims upon remand), and the trial court has also reserved for further determination the amount of costs and attorneys' fees Mrs. Smith is entitled to recover from Mr. Smith for the instant action.

"There is generally no right to appeal an interlocutory order." *Howerton*, 124 N.C. App. at 201, 476 S.E.2d at 442. Although the trial

court attempted to certify this case for appellate review pursuant to N.C.G.S. § 1A-1, Rule 54(b) (1999) (Rule 54(b)), "a trial judge by denominating his decree a 'final judgment' [cannot] make it immediately appealable under Rule 54(b) if it is not such a judgment," *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979). However, we elect to review the instant appeal in the interests of judicial economy and pursuant to our discretionary powers. *See* N.C.R. App. P. 2; N.C.G.S. § 7A-32(c) (1999); *Trust Co. v. Morgan, Attorney General*, 9 N.C. App. 460, 466, 176 S.E.2d 860, 864 (1970) (Court of Appeals, in exercise of supervisory power under G.S. § 7A-32(c), could consider appeal subject to dismissal).

[1] Mr. Smith first asserts the trial court erred in entering summary judgment in favor of Mrs. Smith on her cross-claim against Mr. Smith for indemnity and Mr. Smith's cross-claims against her for, *inter alia*, breach of the Agreement. We agree.

> 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) (Rule 56(c)). Summary judgment may be entered in favor of the non-moving party in an appropriate case. *Candid Camera Video World v. Matthews*, 76 N.C. App. 634, 637-38, 334 S.E.2d 94, 96-97 (1985), *disc. review denied*, 315 N.C. 390, 338 S.E.2d 879 (1986).

Mr. and Mrs. Smith's cross-claims concern the same issue: whether, under the Iredell judgment and the Agreement, Mr. Smith is required to indemnify Mrs. Smith for RB&H's attorneys' fees in the underlying equitable distribution matter and for the expenses of litigation in the instant action. We thus consolidate for discussion the parties' cross-claims and motions for summary judgment.

For Mrs. Smith to prevail at summary judgment, she must show that there is no genuine issue as to any material fact, such that she is entitled to a judgment as a matter of law. Rule 56(c). Mr. Smith contends summary judgment was inappropriate as there is a genuine issue of material fact as to whether Mrs. Smith breached the provision in the Agreement requiring her to "cooperate" with Mr. Smith "in defense of [RB&H's] claim."

Affidavits presented by each party establish that settlement negotiations were taking place between Diehl (Mr. Smith's attorney) and RB&H in December 1995. Mr. Smith contends the negotiations were complete and merely required assent on the part of Mrs. Smith to close the transaction, but he asserts that Mrs. Smith breached her duty to cooperate by adamantly refusing to agree to the settlement under the terms set by Mr. Smith and RB&H. Mrs. Smith and RB&H argue, however, that no settlement was ever reached, as Mr. Smith and RB&H disagreed over material terms of the settlement.

While an affidavit from McKeithen of RB&H asserts there was no "meeting of the minds on any agreement to settle," Diehl submitted an affidavit asserting that settlement negotiations took place between Diehl and Jim Williams (Williams) of RB&H, not McKeithen, and that an agreement was reached with Williams. Suffice it to say, we find the affidavits establish a genuine issue of material fact as to whether a settlement was reached and whether Mrs. Smith breached the Agreement by failing to cooperate in the culmination of that settlement. Summary judgment was thus improper. *See* Rule 56(c). We reverse the grants of summary judgment on this issue and remand this portion of the case to the trial court for further proceedings. As both RB&H and Mr. Smith demanded a jury trial in their pleadings, these issues must be resolved by a jury unless such demand is waived by the parties.

[2] Mr. Smith next argues "the trial court erred in entering summary judgment in favor of RB&H against Mr. Smith." Mr. Smith contends that this Court in *Robinson* intended to reverse the trial court's initial grant of summary judgment in RB&H's favor as to Mr. Smith, and that it was error for the trial court *sub judice* to once again enter summary judgment holding Mr. and Mrs. Smith jointly and severally liable to RB&H. We agree.

In *Robinson* this Court upheld the trial court's grant of summary judgment in favor of RB&H, finding the contingency fee contract to be valid and enforceable and that RB&H was entitled to recover under it. *Robinson*, 129 N.C. App. at 316, 498 S.E.2d at 849-50. We remanded the issue solely for the trial court to make "findings of fact and a determination of the appropriate amount of attorneys' fees." *Id.*

We further held the issue of Mr. Smith's indemnification of Mrs. Smith was not "ripe or proper for consideration at the time the [trial] court ruled," *id.* at 320, 498 S.E.2d at 852, and thus ordered the court

on remand to "determine Mr. Smith's obligation, if any, for payment of Mrs. Smith's attorneys' fees and expenses to RB&H," *id.* at 321, 498 S.E.2d at 852.

The essence of Mr. Smith's argument is that summary judgment should not have been entered entitling RB&H to recover against *him*, in that the contingency fee contract was between RB&H and Mrs. Smith, and his cross-claims against Mrs. Smith are an attempt to shield him from liability for RB&H's fees arising under the Iredell judgment and Agreement. We agree with this formulation of the issue.

Given that we have decided that a genuine issue of material fact still exists so as to preclude summary judgment on Mr. and Mrs. Smith's cross-claims against one another, it is also premature at this stage to determine whether Mr. Smith will be liable for RB&H's fees. Our decision in *Robinson* held only that RB&H was entitled to recover under the contingency fee contract, pursuant to which Mrs. Smith is solely liable.

We regret that our earlier decision may have been misinterpreted by the trial court as instructing it to determine at summary judgment the Smiths' cross-claims. However, given that there are disputed issues of fact that must be resolved, this determination is properly one for the finder of fact. Thus, on remand the jury must dispose of Mr. and Mrs. Smith's cross-claims and determine who will be ultimately liable for the fee award to RB&H. While Mrs. Smith remains primarily liable under the contingency fee contract for RB&H's fees, Mr. Smith may be forced to indemnify her for such fees pursuant to the Iredell judgment and Agreement if Mrs. Smith prevails on her cross-claim.

[3] RB&H contends that Mr. Smith did not specifically plead Mrs. Smith's breach in defense to RB&H's claim against him for breach of his contract with Mrs. Smith, and that as such the defense is waived as to RB&H. It is true that Mr. Smith's motion to amend his answer, granted 15 November 1996, pled Mrs. Smith's breach as an affirmative defense only to Mrs. Smith's cross-claims.

While failure to plead an affirmative defense "generally results in a waiver thereof," *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998), "the issue may still be raised by express or implied consent," *Miller v. Talton*, 112 N.C. App. 484, 487, 435 S.E.2d 793, 796 (1993). "[A]bsent [evidence of] prejudice to plaintiff, an affirmative

defense may be raised by a motion for summary judgment regardless of whether or not it was pleaded in the answer." *Id.* Even if, as here, the affirmative defense was not referred to in the party's motion for summary judgment[1],

> the failure to expressly mention the defense in the motion will not bar the trial court from [considering] the motion on that ground. This is especially true where the party opposing the motion has not been surprised and has had full opportunity to argue and present evidence.

Id. (citation omitted).

Though Mr. Smith's amended answer was directed solely to Mrs. Smith's cross-claims, a copy of the proposed amended answer was mailed to RB&H's attorneys of record several months before the summary judgment hearing was held. The record clearly reflects that the issue of Mrs. Smith's breach was before the trial court and that RB&H had ample notice of such issue. Thus, we cannot find, and RB&H does not suggest, that deeming Mr. Smith's pleadings to be amended to assert the defense of breach against RB&H would work, at this stage of the proceedings, any prejudice to RB&H. We therefore deem the pleadings to be so amended. *See id.* at 487-88, 435 S.E.2d at 797 (amending pleadings to conform to evidence where issue was "clearly before the trial court," plaintiffs were not "surprised" by the defense, and plaintiffs made no argument they were prejudiced).

[4] Finally, Mr. Smith argues the trial court erred by calculating the amount of RB&H's fee "based on the 'present value' of the settlement received by Mrs. Smith." Before proceeding, we address RB&H's contention that this issue was previously decided in *Robinson*, as Mr. Smith raised the same assignments of error in that appeal relating to the present value issue. Although our opinion did not discuss this issue, RB&H asserts we overruled Mr. Smith's assignments of error when we stated that we had reviewed any remaining assignments of error and found them "to be without merit." *Robinson*, 129 N.C. App. at 320, 498 S.E.2d at 852.

We disagree. We remanded the cause in *Robinson* for the trial court to make a "determination with findings of fact of the appropriate amount of RB&H's attorneys' fees," *id.*, as a review of the record

1. Mr. Smith's motion for summary judgment was submitted to the trial court 13 October 1995, several months before the negotiations began on the proposed settlement that ultimately led to his claim for breach against Mrs. Smith.

did not disclose how the trial court had determined its original figure, *id.* at 316, 498 S.E.2d at 850. RB&H had argued to this Court that the amount of attorneys' fees should not be based on the final settlement between Mr. and Mrs. Smith, but rather should be based on the original judgment obtained by RB&H in 1991 for Mrs. Smith. We disagreed, and held that on remand the trial court should base the fee on "value of the judgment in effect at the time of the termination of RB&H as counsel." *Id.* at 320, 498 S.E.2d at 852.

As the trial court's original judgment did not disclose that a present value calculation was used to determine RB&H's fee, and as we ordered the court upon remand to re-calculate the fee and support such calculation with findings of fact, the issue of whether present value of the settlement is a proper method of calculating attorneys' fees under a contingency fee contract was not ripe for appellate review at the time of *Robinson*. The issue has only now become ripe for appellate review, as the trial court has since made the requisite findings of fact.

[5] We must also address Mr. Smith's pending "Motion to Amend Record on Appeal." Mr. Smith moves this Court to add to the instant record portions of depositions that were presented to the trial court and included in the prior Record on Appeal for the *Robinson* case, and that ostensibly relate to this assignment of error.

Mr. Smith asserts that these materials "are necessary to an understanding of the errors assigned," *see* N.C.R. App. P. 9(a)(1)(e), but does not provide an explanation of why they are necessary or why they were not included in the current record, given that they were included in the first Record on Appeal. We thus deny the motion.

[6] The contingency fee contract prepared by RB&H provided:

> [O]ur fee will be based on and determined by the value of the recovery obtained for you by settlement or by court order following trial. Our fee will be based on the amount recovered and will be determined based on the following schedule:
>
> . . . .
>
> (b) A fee of twenty percent (20%) of the recovery will be paid from any . . . recovery up to the first $10,000,000;
>
> (c) A fee of fifteen percent (15%) of the recovery will be paid on any portion of the recovery between $10,000,000 and $20,000,000. . . .

On remand, the trial court made the following relevant findings of fact to support its calculation of the amount owed to RB&H:

> e. The uncontradicted evidence before the court was that the total present value of the settlement of the equitable distribution claim pursuant to the judgment entered between [Mrs. Smith] and [Mr. Smith] as of November 15, 1994 is $7,765,787.00, representing the value of cash payments to Mrs. Smith. (Affidavit of Joseph Johnston at ¶ 5).
>
> f. The contingent fee contract provides that [RB&H] will be paid a contingency fee of 20% on the value of any recovery up to $10 million.
>
> g. Applying the contingent fee contract to the present value of the settlement pursuant to the judgment entered on the equitable distribution claim, [RB&H's] fees relating to the equitable distribution claim are 20% x $7,765,787.00 = $1,553,157.00.
>
> h. The amount of $1,553,157.00 is the appropriate fee for [RB&H] . . . and said amount is reasonable as a matter of law.

Mr. Smith argues that the contingency fee contract between RB&H and Mrs. Smith is "subject to more than one interpretation" as to how RB&H's fee is to be determined if, as here, Mrs. Smith agreed to a structured settlement. Although an affidavit from an economist indicated the present value of Mrs. Smith's settlement to be $7,765,787.00, the total amount of payments to be made to Mrs. Smith is $19.4 million ($1.9 million payable immediately, with $500,000 payable annually thereafter for thirty-five years).

Mr. Smith interprets the contract to require RB&H to be paid as Mrs. Smith is paid, such that RB&H would receive twenty percent of each of Mr. Smith's payments to Mrs. Smith up to $10 million, and then fifteen percent of all remaining payments. Alternatively, Mr. Smith argues that even if RB&H is entitled to be paid a lump sum fee based on the present value of the settlement, RB&H's fee

> should be determined by calculating 20 percent of each payment Mrs. Smith will receive in the future up to the aggregate amount of $10 million, calculating 15 percent of each payment she will receive in excess of $10 million, and reducing the amount of those fees to present value.

"Contract language which is 'plain and unambiguous on its face' can be interpreted as a matter of law; however, if it is ambiguous, it is

a question for the jury." *Taha v. Thompson*, 120 N.C. App. 697, 701, 463 S.E.2d 553, 556 (1995) (citing *Cleland v. Children's Home*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983)), *disc. review denied*, 344 N.C. 443, 476 S.E.2d 130 (1996). "Parties can differ as to the interpretation of language without its being ambiguous . . . ." *Walton v. City of Raleigh*, 342 N.C. 879, 881-82, 467 S.E.2d 410, 412 (1996).

The contested language at issue herein is the phrase "the value of the recovery." RB&H contends such language refers to the present value of Mrs. Smith's settlement, while Mr. Smith contends it refers to the total value of all payments to be made to Mrs. Smith.

We stated in *Robinson* that

> [i]t is common knowledge that the legal profession, jurors, and the courts decide the value of many items including the value of recovery or judgments on a daily basis. This is particularly true in the areas of class actions and structured settlements to name just a few instances. The term "value of the recovery" is a sufficient definition for the parties to have had a meeting of the minds,

Robinson, 129 N.C. App. at 313, 498 S.E.2d at 848, such that the contingency fee contract was a valid and enforceable contract. We did not reach the separate issue of whether the term "value of the recovery" is ambiguous. We hold today that it is not ambiguous.

We believe "value of the recovery" can have only one meaning: the present value of the total recovery. The words "value of" modify "recovery," indicating that the fee is to be based not on the total "recovery" alone, but rather on the "value of the recovery." The words "value of" would be meaningless if we defined the phrase to mean total recovery rather than present value of the recovery. Such a construction is not favored. *See Williams v. Insurance Co.*, 269 N.C. 235, 240, 152 S.E.2d 102, 107 (1967) (each word in a contract must "be given effect if possible by any reasonable construction").

The concept of present value has long been recognized by our courts. For example, our Supreme Court in 1912 held that "[w]here future payments . . . are to be anticipated by the jury and capitalized in a verdict, the plaintiff is entitled only to their present worth." *Fry v. R.R.*, 159 N.C. 357, 362, 74 S.E. 971, 973 (1912). Further, the North Carolina State Bar, in Ethics Opinion RPC 141, prescribes that

> where an attorney is entitled to receive a contingent fee calculated as a percentage of any amount recovered and arrangements

> are made for the payment of sums certain over a . . . period of time in the form of a structured settlement, the attorney may collect immediately only the prescribed percentage of the total settlement reduced to its present value.

We thus hold that the contingency fee contract between the parties must be interpreted to award RB&H a percentage of the present value of Mrs. Smith's total recovery. Courts in other states have reached the same conclusion on similar facts. *See, e.g., Ravsten v. Dept. of Labor and Industries*, 736 P.2d 265, 273-74 (Wash. 1987) (holding contingency fee must be calculated on present value of structured settlement and paid in lump sum); *Johnson v. Sears, Roebuck & Co.*, 436 A.2d 675, 678 (Pa. Super. Ct. 1981) (paying attorneys' contingency fee as each payment, under structured settlement, is made to client would be "unwieldly and impractical;" attorney entitled to lump sum distribution based on cost of annuity used to fund structured settlement); *but cf. Cardenas v. Ramsey County*, 322 N.W.2d 191, 193 (Minn. 1982) (contingency fee contract entitling attorney to percentage of "total amount recovered" is ambiguous in light of structured settlement and must be interpreted to require payment to attorney only as client receives payments); *Sayble v. Feinman*, 142 Cal. Rptr. 895, 899 (Cal. Ct. App. 1978) (annuity does not constitute "money" for purposes of contingency fee contract entitling attorney to percentage of "any money recovered;" attorney must receive fee as client receives annuity payment).

Further, we hold the trial court correctly awarded RB&H twenty percent of the present value of the recovery, rather than first calculating the attorneys' fees on the total award ($19.4 million) and then reducing those figures to present value, as Mr. Smith urges should have been done. Mr. Smith's suggested procedure is not expressly contemplated by the contract, and we decline to impose such a strained reading on the document's provisions.

The contract states simply that the fee is to be based on the "value of the recovery," and that RB&H is entitled to twenty percent of the "recovery up to the first $10,000,000." Neither Mr. nor Mrs. Smith challenged, in this appeal or the previous appeal, the court's calculation of the present value of the $19.4 million settlement or argues that $1,553,157.00 is not a reasonable fee. In fact, the evidence that the present value of the recovery is $7,765,787.00 is uncontradicted. As there is no genuine issue of material fact to be resolved, we hold the trial court correctly determined on summary judgment the

present value of the recovery. Thus, RB&H's fee is twenty percent of $7,765,787.00, or $1,553,157.00.

Because of the possibility that settlements will ultimately be structured, attorneys relying on contingency fee arrangements would be wise to draft their fee contracts specifically contemplating a structured settlement in addition to the percentage contract. While we hold that the contract at issue *sub judice* mandates a lump sum payment of attorneys' fees, contracts could be drafted to provide for payment of fees as payments are received by the client under a structured settlement arrangement.

The attorneys' fee award in the instant case is less than the up-front cash award received by Mrs. Smith, and could thus conceivably be paid from those funds if the trier of fact determines Mrs. Smith is solely liable for payment of RB&H's fees. However, it is also possible that a lump sum attorney's fee award based on the present value of a structured settlement could be larger than any up-front cash received or could be a large percentage of the up-front award, thus potentially working a hardship on the client. *See Wyatt v. U.S.*, 783 F.2d 45, 49 (6th Cir. 1986) ("payment in full on the front end of a 25% attorney fee . . . where substantial payments are to be made to the claimant-plaintiff in the future may work a serious hardship on the very person intended to be benefited [sic]"). Attorneys must tread carefully in dealing with structured settlements to ensure that the timing of payment of their fee does not result in the collection of a "clearly excessive fee." Revised Rules of Professional Conduct Rule 1.5(a).

To summarize, in *Robinson* this Court (1) reversed the trial court's grant of summary judgment in favor of Mr. Smith on RB&H's tortious interference with contract and with prospective economic advantage claims, *Robinson*, 129 N.C. App. at 318-19, 498 S.E.2d at 851; (2) determined the contingency fee contract between Mrs. Smith and RB&H to be valid and enforceable and that RB&H is entitled to recover under that contract, *id.* at 316, 498 S.E.2d at 849-50; (3) held it was premature to determine Mr. Smith's "obligation, if any, for payment of Mrs. Smith's attorneys' fees," *id.* at 321, 498 S.E.2d at 852; and, (4) remanded the case to the trial court to determine Mr. Smith's obligation and to determine the "appropriate amount of attorneys' fees for RB&H based on the contingency fee contract," *id.* at 316, 498 S.E.2d at 850.

We now (1) reverse the trial court's grant of summary judgment against Mr. Smith as to Mr. and Mrs. Smith's cross-claims; (2) reverse

the trial court's grant of summary judgment in favor of RB&H against Mr. Smith; and, (3) affirm the trial court's determination of the amount of attorneys' fees to be awarded to RB&H pursuant to the contingency fee contract.

Mrs. Smith, having never challenged the calculation or reasonableness of RB&H's fee, is liable for the $1,553,157.00 award. However, on remand, the trier of fact must determine if Mrs. Smith breached the Iredell judgment and Agreement, and if so, whether such breach relieves Mr. Smith of any obligation to indemnify Mrs. Smith for RB&H's attorneys' fees and for the costs and attorneys' fees incurred by Mrs. Smith in the instant action. Mr. Smith's obligation for any such fees is to be determined by the appropriate trier of fact.

RB&H's tortious interference claims must also be resolved by the trier of fact. We note that a recent decision of this Court addresses the elements of a claim for tortious interference with prospective economic advantage. *See Dalton v. Camp*, 138 N.C. App. 201, 211, — S.E.2d —, — (2000) (to maintain action, "plaintiff must show that defendants induced [a third party] to refrain from entering into a contract with plaintiff without justification"). The trial court and the parties may wish to examine RB&H's claim in light of this decision and determine under the facts alleged the viability of that claim for relief.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and HORTON concur.

STATE OF NORTH CAROLINA v. CLARENCE BOWEN

No. COA99-623

(Filed 18 July 2000)

1. Sexual Offenses— conviction for offense not charged— plain error

The trial court committed plain error by instructing the jury on statutory sexual offense instead of first-degree sexual offense as charged in the indictment for case numbers 97 CRS 6333, 6336,

and 6338, because a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment.

2. Sexual Offenses— instructions—age difference—lack of notice

The trial court committed plain error in case 96 CRS 5439 by instructing the jury on the elements of statutory sexual offense under N.C.G.S. § 14-27.7A, based on lack of notice, since the indictment did not allege that defendant was at least six years older than the minor victim, because the age difference is one of the key differences between an indictment for statutory sexual offense under N.C.G.S. § 14-27.7A and an indictment for forcible first-degree sexual offense under N.C.G.S. § 14-27.4.

3. Indecent Liberties— instructions—failure to give

Although the jury had already been instructed on the other four indecent liberties charges and the record reveals the indictment and verdict sheet were completely consistent, the trial court committed plain error by failing to give any instructions to the jury on the necessary elements for the indecent liberties charge in 97 CRS 6341.

4. Indictment and Information— variance—victim's name

The trial court did not err by allowing the State to change the indictment in case 98 CRS 4124 to read "SB" instead of "SR" for the victim's name, based on the evidence revealing that SB was adopted by her grandparents after the indictment had been issued against defendant, because: (1) the indictment and the proof were not at variance, tending to show that defendant sexually abused SB while she was still SR; and (2) the amendment to the indictment was permissible since it did not substantially alter the charge in the original indictment.

5. Criminal Law— joinder—sex offenses—multiple victims—improper but not prejudicial

Although the trial court erred by granting the State's motion for joinder of sexual offenses under N.C.G.S. § 15A-926(a) because the length of time between offenses and the differing nature of the individual acts indicated the charged acts did not constitute a single scheme or plan, it was not prejudicial error since: (1) evidence of each of these offenses would be admissible in the separate trials of the others under N.C.G.S. § 8C-1, Rule

404(b); and (2) there is no evidence that the jury may have come to a different conclusion had the charges not been consolidated.

6. Sexual Offenses— motion to set aside verdict—substantial evidence

The trial court did not abuse its discretion by denying defendant's motion to set aside all of the verdicts, including three counts of first-degree sexual offense, one count of statutory sexual offense, and five counts of taking indecent liberties with a minor, based on the jury convicting defendant of an indecent liberties charge in 97 CRS 6341 without having been given instructions as to that offense, because the record contains substantial evidence upon which a jury could have found defendant guilty.

7. Evidence— expert—cause of injury—speculative testimony

The trial court did not err by sustaining the State's objection to its own expert witness's speculative testimony during cross-examination by defendant, concerning the cause or circumstances of the minor victim's possible sexual abuse, because: (1) the testimony would not have assisted the jury to understand evidence or to determine any fact in issue; and (2) an expert is no better qualified than the jury to have an opinion where he is simply speculating as to the cause of an injury without any medical ground upon which to base his opinion.

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

Although defendant contends the trial court erred by failing to instruct the jury concerning which incidents involving one of the minor sex abuse victims were the basis of the charges against defendant versus which ones were admitted under N.C.G.S. § 8C-1, Rule 404(b), defendant did not preserve this issue because he failed to state distinctly the reasons he objected in order to preserve that objection for appellate review as required by N.C. R. App. P. 10(b)(2).

Appeal by defendant from judgments entered 4 November 1998 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 14 March 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Sarah Ann Lannom, for the State.

Daniel Shatz for defendant-appellant.

HUNTER, Judge.

Clarence Bowen ("defendant") appeals his convictions of three counts of first degree sexual offense, and one count of statutory sexual offense, and five counts of taking indecent liberties with a minor child. Defendant argues that: (1) the trial court committed plain error by instructing the jury on statutory sexual offense instead of forcible sexual offense as charged in indictments numbered 97 CRS 6333, 97 CRS 6336, and 97 CRS 6338; (2) the trial court committed plain error by instructing the jury on the elements of statutory sexual offense when the indictment on that charge was incomplete; (3) the trial court committed plain error by failing to instruct the jury on the elements necessary in one of the five indecent liberties charges; (4) the trial court committed plain error by denying defendant's motion to set aside all the verdicts when it appeared the jury was not following the court's instructions; (5) the trial court erred in granting the State's motion for joinder; (6) the trial court erred in sustaining the State's objection to parts of an expert's testimony; (7) the trial court erred in failing to instruct the jury about what evidence was admitted only for purposes under N.C.R. Evid. 404(b); (8) the trial court erred by instructing the jury that a sexual act is fellatio or cunnilingus where the evidence did not support the instructions; and (9) the trial court erred in allowing the State to change the indictment in one of the cases. Having found merit in several of defendant's arguments, we vacate and remand in part and find no prejudicial error in part.

The State presented evidence at trial to show the defendant is the natural father of victims "CJ" and "NJ." CJ, born 28 July 1982, testified that on 4 May 1996, defendant forced her onto a bed, pinned her down and inserted his fingers into her vagina. She further testified that defendant had inappropriately touched her on a regular basis for several years. NJ testified that after she and her cousin, "Buck" heard CJ screaming "get off me," they knocked on the door, asked for CJ, looked under the door, saw defendant on top of CJ, and called Buck's mother, Mary Ann. Mary Ann corroborated CJ, NJ, and Buck's testimonies. Furthermore, she testified that it was she who brought the family's attention to the matter.

Victim "SB" (formerly, SR) born in August 1988, testified that in the summer of 1996, defendant forcibly touched her private parts, reaching into her shorts and inside her blouse. Just after the incident, SB told her cousin Buck what happened. Buck corroborated SB's testimony.

Another victim, "Tammy" testified that at the time of trial she was 19 and defendant, her uncle, was over 40. She stated that for "as far back as [she could] remember" defendant had been sexually abusing her, including: when she was too small to see over the dashboard of a car, he made her perform oral sex on him; when she was 6 years old, in 1984, defendant again made her perform oral sex on him and then ejaculated on her; defendant accosted her just outside her house in 1987 where he forcibly performed oral sex on her; around Christmas 1989, she awoke on her grandmother's couch to find defendant "playing in [her] butt," then he stuck his fingers into her vagina and then he masturbated. Tammy further testified that defendant had threatened to beat her if she told anyone, that defendant had, in fact, cut her stomach with a fishing knife and burnt her with a cigarette. Tammy displayed scars from these injuries to the jury.

Defendant's evidence consisted of several of his relatives testifying that they knew nothing of the alleged abuse. His wife, Sheila Bowen, testified that on 4 May 1996 she asked CJ if defendant had ever touched her before and CJ said no. However, she also stated that after 4 May 1996, CJ went to live with Mary Ann. Defendant's brother, Glen Bowen, testified that he had not heard about Tammy's accusations until she testified. He further stated there had never been a cornfield (only soybeans) behind his mother's house (which was another place Tammy testified defendant had abused her). Bernice Bowen Simpson, defendant's sister testified that Tammy told her she had been pressured in to signing papers about the defendant's abuse of her. Defendant testified on his own behalf and denied having ever abused CJ, Tammy or SB.

[1] We begin by addressing defendant's arguments regarding his indictments. Defendant first contends that the trial court committed plain error by instructing the jury on statutory sexual offense instead of first degree sexual offense as charged in the indictments for case numbers 97 CRS 6333, 6336 and 6338. In its brief, the State concedes the trial court's error and we agree. Therefore, we vacate the trial court's judgment regarding those three charges.

N.C.R. App. P. 10(b)(2) reads:

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . ; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(See also State v. Morgan, 315 N.C. 626, 644, 340 S.E.2d 84, 95 (1986), where our Supreme Court held that Rule 10(b)(2) operated to preclude a defendant from assigning as error on appeal a trial judge's failure to so instruct unless defendant preserves the error by making a timely objection at trial.)

However, in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983), the court held that although Rule 10(b)(2) bars a defendant from assigning error to an omitted jury instruction not objected to at trial, where the omission is so fundamental that it "tilted the scales" and caused the jury to reach a different verdict than it would have otherwise, that error is plain error. In reviewing defendant's assignment of plain error, this Court must find that

> ". . . the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or '[that the error] is grave error which amounts to a denial of a fundamental right of the accused' . . . or [that] it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

Id. at 660, 300 S.E.2d at 378 (emphasis in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)). Therefore,

> "[b]efore deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. . . . [T]he test for 'plain error' places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 . . . (defendant not prejudiced by error resulting from his own conduct)."

Morgan, 315 N.C. at 645, 340 S.E.2d at 96 *(citing State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986)).

It is uncontradicted—the transcript attesting to it—that the trial judge gave instructions to the jury on statutory sexual offense, *not* first degree (forcible) sexual offense, as was charged in the three indictments. In fact, in each of these cases, the trial judge began by stating that defendant "has been accused of a first degree sexual offense," yet he continued by listing the elements of statutory sexual offense. Having reviewed the indictments and the trial court's instructions to the jury, we hold that the trial court did, in fact, commit plain error.

> It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment.
>
> [H]aving brought defendant to trial, the State was bound to prove all the material elements of that charge . . . . The failure of the trial court to submit the case to the jury pursuant to the crime charged in the indictment amounted to a dismissal of that charge and all lesser offenses. . . .

State v. Williams, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986) (citations omitted). Therefore, we hold the trial judge, by his failure to submit the proper jury instructions for the three counts of first degree (forcible) sexual offense against defendant, effectively dismissed those charges. Hence we must now vacate the judgment in case numbers 97 CRS 6333, 6336 and 6338.

[2] Secondly, defendant argues the trial court committed plain error in case number 96CRS 5439 by instructing the jury on the elements of statutory sexual offense as denoted under N.C. Gen. Stat. § 14-27.7A when the indictment for that charge was incomplete, not having alleged that defendant was at least six years older than C.J. Under *Williams*, *supra*, we must vacate this conviction as well.

The purpose of an indictment is to give a defendant notice of the crime for which he is being charged; and it has long been established that

> [a]n indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in the event of conviction.
>
> It is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended.

State v. Coker, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984) (citations omitted).

The indictment for case number 96CRS 5439 charged defendant with: "unlawfully, willfully and feloniously engag[ing] in a sex offense with [CJ], a child under the age of 16 years by force and against that

victim's will," (that is, first degree (forcible) sexual offense) as denoted under N.C. Gen. Stat. § 14-27.4. (1999). The indictment did not include, as part of its allegation, the age difference between victim and perpetrator as required under our statutory sexual offense statute, N.C. Gen. Stat. § 14-27.7A. However, the trial court's instructions to the jury were as follows:

> In case number 96-CRS-5439, the defendant . . . has been accused of sexual offense of a person who is 13, 14 or 15 years old with the victim [CJ] . . . . Now, I charge that for you to find the defendant guilty of sexual offense of a person who was 13, 14 or 15 years old, the State must prove three things beyond a reasonable doubt. First, that the defendant engaged in a sexual act with a victim. . . . Second, that at the time of the acts alleged, the victim was a child 13, 14 or 15 years old. And third, that at the time of the alleged offense, the defendant was at least six years older than the victim.

These instructions are proper for charging the jury on statutory sexual offense under N.C. Gen. Stat. § 14-27.7A, which requires that the perpetrator be at least six years older than the victim but *does not* require that the sexual act be done forcibly against the victim's will. Contrarily, the instructions are *not* proper for charging the jury on first degree sexual offense under N.C. Gen. Stat. § 14-27.4 which is forcible and against the victim's will. (*See State v. Johnson*, 226 N.C. 266, 37 S.E.2d 678 (1946), in a rape indictment (and jury instructions), the absence of "forcibly" and "against her will" is fatal.)

In its brief to this Court, the State concedes "that the indictment does not allege the Defendant's age vis-a-vis the victim's age," but argues that the lack thereof is neither error nor prejudicial to defendant. We disagree, finding that the age difference is one of the key differences between an indictment for statutory sexual offense and an indictment for forcible, first degree sexual offense. Thus the defendant lacked notice of the charge against him. Applying *Williams*, *supra*, we again find that by its failure to submit the proper jury instructions to the jury, the trial court effectively dismissed this charge. Therefore, we hold that where the jury is instructed and reaches its verdict on the basis of the elements set out in N.C. Gen. Stat. § 14-27.7A, but defendant was indicted and brought to trial on the basis of the elements set out in N.C. Gen. Stat. § 14-27.4, the indictment under which defendant was brought to trial cannot be considered valid and any judgment made thereon, must be vacated.

Williams, 318 N.C. at 628, 350 S.E.2d at 356. Such a mistake is plain error. *See Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

[3] Thirdly, defendant assigns error to the trial court's failure to instruct the jury of the necessary elements for one of the five indecent liberties charges, specifically case number 97 CRS 6341. It is defendant's contention that by omitting the instruction, the trial court committed plain error and therefore, the conviction should be vacated. We again agree that *Williams* controls.

The State argues that the evidence presented at trial supports defendant's conviction of this charge. Moreover, since the jury had already been instructed on the other four indecent liberties charges, one of which was for the same victim (Tammy) as in this case, the State contends "the jury was fully and completely aware of the elements of the offense . . . ." The State further argues the trial judge's omission is harmless error because the omission was "overlooked by everyone—including Defendant"; that because the defendant failed to object at trial, N.C.R. App. P. 10(b)(2) applies and defendant has waived his right to raise the issue on appeal. In the interest of justice, we cannot agree.

The State contends that the record shows the indictment and the verdict sheet were completely consistent, thus the judge's omitting the jury instructions was harmless error. This argument is completely contrary to *State v. Williams*, 318 N.C. 624, 350 S.E.2d 353 (as discussed above), in which our Supreme Court held that a trial judge who instructs on a different charge than the one defendant is indicted on, has essentially dismissed the indictment. Granted, there were *no* instructions given on the charge in 97 CRS 6341. However, this Court has just vacated defendant's three convictions for first degree sexual offenses by necessarily applying *Williams*, and in all three of those instances, the defendant was indicted and found guilty for the same offense. Thus, as the State has argued, the indictments and the verdict sheets were completely consistent for those three charges. Nevertheless, to follow the State's reasoning that such consistency is all that should be necessary for us to affirm defendant's conviction, is completely against the fairness and justice upon which our judicial system is based. It is "more than erroneous; [it is] a basic violation of due process . . . ." *Williams*, 318 N.C. at 629, 350 S.E.2d at 356. We therefore hold that by *not* instructing the jury on case number 97 CRS 6341, the trial court effectively dismissed the indictment of the same. Thus, we vacate the trial court's judgment in case number 97 CRS 6341.

[4] We next address defendant's assigning error to the trial court's allowing the State to change the indictment in case number 98CRS 4124 to read "[SB]" from "[SR]" as victim. The State presented evidence that SB was adopted by her grandparents *after* the indictment had been issued against defendant. The State further points out to this Court that, at trial, defendant "specifically stated he had no objection to the change." However, arguing *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994) applies, defendant contends that the change in names ". . . 'substantially alter[ed] the charge set forth in the indictment.' " *Id.* at 340, 451 S.E.2d at 144 (quoting *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984)). We are unpersuaded by defendant's argument.

Under N.C.R. App. P. 10(a) and (b), where defendant did not object at trial to the State's request to change names on the indictment, ordinarily defendant would have failed to preserve the issue for this Court's review. Nevertheless, we recognize that our case law precedent is clear, that "[w]here an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal." *State v. Abraham*, 338 N.C. at 340, 451 S.E.2d at 144. However, in the case at bar, *at the time the indictment was issued*, SB *was* SR. The evidence revealed that it was only *after* the indictment—and due to the incidents leading up to the indictment—that SB's grandparents adopted her, giving her their last name, "B." Further, in the case at bar, the indictment and the proof were not at variance—tending to show that defendant sexually abused SB while she was still SR. *Id.* at 341, 451 S.E.2d at 144.

As noted earlier in this opinion, the purpose of an indictment is to give a defendant notice of the crime for which he is being charged. *State v. Coker*, 312 N.C. 432, 323 S.E.2d 343. Additionally, North Carolina case law has long held that "an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.' " *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (quoting *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478, *disc. review denied*, 294 N.C. 737, 244 S.E.2d 155 (1978)).

Finding that the proof was in line with the indictment, we hold "the amendment to the indictment was permissible because it did not substantially alter the charge in the original indictment." *Id.* Defendant's assignment of error is thus overruled.

[5] We next address defendant's assigning error to the trial court's granting the State's motion for joinder. Under N.C. Gen. Stat. § 15A-926,

> Two or more offenses may be joined . . . for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. . . .

N.C. Gen. Stat. § 15A-926(a) (1999). Furthermore, this Court has held that:

> "In ruling upon a motion for joinder, the trial judge should consider whether the accused can be fairly tried upon more than one charge at the same trial. If such consolidation hinders or deprives the accused of his ability to present his defense, the cases should not be consolidated. [On appellate review,] [i]n determining whether defendant has been prejudiced, the question posed is whether the offenses are *so separate in time and place* and *so distinct in circumstances* as to render a consolidation unjust and prejudicial to an accused. However, it is well established that the motion to join is addressed to the sound discretion of the trial judge and his ruling will not be disturbed absent a showing of abuse of discretion. . . ."

State v. Wilson, 57 N.C. App. 444, 448, 291 S.E.2d 830, 832-33, *disc. review denied*, 306 N.C. 563, 294 S.E.2d 375 (1982) (emphasis added) (citations omitted) (quoting *State v. Clark*, 301 N.C. 176, 180, 270 S.E.2d 425, 428 (1980)).

The record reflects that at the time the State moved for joinder, the trial judge asked defendant for his argument against joinder. Stating only his objection to the motion, defendant offered no argument to support his objection, nor did he suggest to the court that joinder would prejudice him. Based on this Court's holding in *State v. Owens*, 135 N.C. App. 456, 520 S.E.2d 590 (1999), we find that although joinder of defendant's remaining four charges was error, it was not prejudicial to defendant.

In *Owens*, the defendant was indicted on numerous charges for sex offenses against his live-in girlfriend's three daughters over the course of seven years. The defendant there, as here, asserted that the trial court erred in allowing joinder of all the offenses. Upon appeal, Judge Robert Edmunds opined for the Court that:

Traditionally, North Carolina appellate courts have been willing to find a transactional connection in cases involving sexual abuse of children. . . .

. . .

[However,] the length of time between [the subject] offenses, along with the differing nature of most of the individual acts, indicates that defendant did not have a "single scheme or plan." N.C. Gen. Stat. § 15A-926(a). . . . [Therefore,] [i]n light of (1) the extended interval of as much as several years between some of these offenses and (2) the lack of a consistent pattern in defendant's molesting behavior, we hold that, as a matter of law, all of the charged acts did not constitute part of a single scheme or plan. *The trial court erred in joining the cases for trial.*

[Nonetheless,] [e]ven though the offenses were improperly joined, defendant has not articulated any resulting prejudice in his appellate brief, nor do we perceive any. If the offenses had not been joined, then at the trial of any one offense, evidence of the other molestations would have been admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) (1992) to show "intent, plan or design." *Effler*, 309 N.C. at 752, 309 S.E.2d at 209. Such a Rule 404(b) "plan" may be established by a lower threshold of proof than that needed to establish the "series of acts or transactions connected together or constituting parts of a single scheme or plan," which must be shown for joinder of offenses for trial under section 15A-926(a). The very terms used in section 15A-926(a) requiring a "single scheme or plan," are more exacting than the term "plan" used in Rule 404(b). . . . [T]herefore[,] . . . a "plan" (Rule 404(b)) and a "single plan" (15A-926(a)) are not equivalent.

[However,] "[o]ur Court has been very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule [of 404(b)]." *State v. Greene*, 294 N.C. 418, 423, 241 S.E. 2d 662, 665 (1978). While the admissibility of this evidence pursuant to Rule 404(b) is not conclusive evidence of the absence of prejudice, it is a factor that we may consider. *See Corbett*, 309 N.C. at 389, 307 S.E.2d at 144. There is no evidence defendant was "hindered or deprived of his ability to defend one or more of the charges." *Id.* (citation omitted). The trial court's error in joining the offenses for trial was harmless. . . .

Owens, 135 N.C. App. at 458-61, 520 S.E.2d at 592-94 (emphasis added).

In the present case, the record before us reveals that the crimes charged against defendant occurred over a period of twelve years, from 1984 to 1996, and involved three different victims (one being defendant's daughter, his niece and the third unrelated). Although all of the charges alleged sexual crimes against children, the evidence did not show that defendant went about committing them in any special way, or place. Thus, we find that "the length of time between [the subject] offenses, along with the differing nature of most of the individual acts, indicate that defendant did not have a 'single scheme or plan.' " *Id.* at 459, 520 S.E.2d at 593. Therefore, we hold that it was error for the trial court to allow joinder. However, applying *Owens*, we conclude that the trial court's error was not prejudicial, as

> [e]vidence of each of these offenses would have been admissible in the separate trials of the others in order to prove [modus operandi under Rule 404(b)]. . . .
>
> [Therefore,] [it] may be considered in determining whether the consolidation was unjust and prejudicial to the defendant. . . .

State v. Corbett, 309 N.C. 382, 388-89, 307 S.E.2d 139, 144 (1983).

We recognize that *Owens*, *supra*, does not stand for the proposition that cases which meet the requirements of 404(b) evidence may be joined for trial. Instead, a motion for joinder is controlled by the higher standard set out in N.C. Gen. Stat. § 15A-926(a). However, should the trial court allow joinder, and on appeal that joinder be deemed error, this Court should review any resulting prejudice with reference to Rule 404(b). *Id.* Defendant argued no prejudice at trial and his argument to this Court is based on the idea that "the jury apparently lumped all of the various charges together, to [defendant's] prejudice." However, defendant suggests no alternate outcome where the jury would have heard evidence of the other charges due to its being admitted under 404(b), but where the charges were not joined; neither do we find evidence in the record to show that the jury may have come to a different conclusion had the charges not been consolidated. Thus, we hold that joinder did not prejudice defendant and the trial court therefore did not commit plain error by allowing joinder.

[6] We next address defendant's assigning error to the trial court's denying his motion to set aside all the verdicts when it was found that

the jury had convicted him of case number 97 CRS 6341's indecent liberties charge without having been given instructions as to that offense. It is defendant's position that the jury's finding him guilty of 97 CRS 6341 is a direct result of its complete disregard for the trial court's instructions. Thus "[t]he entire result based on the jury's disregard for the court's instructions should be vacated," that is, *all* of the verdicts handed down should be vacated. We disagree.

Defendant offers no applicable criminal case law to support his contention. He cites *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982), a civil case in which the trial court *did* set aside the jury's verdict on the grounds that its damage award was excessive. In affirming the trial judge's ruling, our Supreme Court stated:

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge. . . .

Id. at 482, 290 S.E.2d at 602 (citations omitted). "In sum, it is plain that a trial judge's *discretionary* order pursuant to G.S. 1A-1, Rule 59 for or against a new trial upon *any* [emphasis in original] ground may be reversed on appeal *only* [emphasis added] in those exceptional cases where an abuse of discretion is clearly shown." *Id.* at 484, 290 S.E.2d at 603. We find nothing in the record at bar to "clearly show" an abuse of discretion on the part of the trial judge in his ruling to deny defendant's motion to set aside the verdicts. Our courts have long held that "the trial judge ha[s] a *manifest duty* to exercise such power to prevent injustice 'when in his opinion the verdict is not supported by the evidence or is against the weight of the evidence.' " *Id.* at 484, 290 S.E.2d at 603 (emphasis in original) (quoting *Edwards v. Upchurch*, 212 N.C. 249, 250, 193 S.E. 19, 19 (1937)). However here, the record contains substantial evidence upon which a jury could have found defendant guilty. Therefore, we find no error in the trial court's denial to set aside the verdicts.

[7] Defendant next assigns error to the trial court's sustaining the State's objection to the speculative testimony of its own witness, Dr. Ammar, during cross-examination by the defendant. We find no error.

The State introduced Dr. Ammar to the court as an obstetrician/gynecologist in private practice who regularly examined children for possible sexual abuse. Defendant did not object to the court's receiving Dr. Ammar as such. On *voir dire*, Dr. Ammar testified that he had examined CJ and found that her hymen was not intact, thus, he was certain "penetration happened one way or another." However, due to the lack of bruising or lacerations found on CJ, Dr. Ammar stated that he was unable to say for "certain" that CJ had been sexually abused. Instead, Dr. Ammar opined that it was "possible" that CJ had been sexually abused. The State objected to Dr. Ammar's testimony as to any issue about which he was uncertain and the trial court ruled that Dr. Ammar could only testify as to that which he was certain. Defendant objected to the trial court's refusal to allow the jury to hear that Dr. Ammar was uncertain as to whether CJ had been sexually abused.

In *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989), our Supreme Court held that the trial court properly excluded expert testimony which would not have assisted the jury to understand evidence or to determine any fact in issue. Furthermore, this Court has held that where an expert is simply speculating as to the cause of an injury—having no medical ground upon which to base his opinion—he is no better qualified than the jury to have an opinion. Thus, exclusion of that portion of his testimony is proper. *State v. Marshall*, 92 N.C. App. 398, 374 S.E.2d 874 (1988), *cert. denied*, 328 N.C. 273, 400 S.E.2d 459 (1991). Therefore, we hold that since Dr. Ammar could not, with relative certainty, state the cause or circumstances of CJ's penetration, the trial court properly excluded his speculative testimony.

[8] Finally, we do not reach defendant's assigning error to the trial court's failure to instruct the jury as to which of the incidents involving Tammy were the basis of the charges against defendant and which were admitted under N.C.R. Evidence 404(b), because it was improperly preserved. Regarding jury instructions, N.C.R. App. P. 10(b)(2) specifically requires a defendant to "stat[e] distinctly that to which he objects and the grounds of his objection" in order to preserve that objection for appellate review. The trial court followed the model jury instructions for 404(b) evidence, and gave each party the opportunity to be heard accordingly. However, the record is devoid of any evidence of defendant's reasoning for objecting to the 404(b) instructions, revealing only defendant's argument that "[t]he acts are not similar. I heard nothing between the two ladies' testimony that sounded like similar acts, and they were far removed in time. And the

defendant objects to consolidating the cases for trial and allowing the similar acts instruction to be given." Thus, it is clear from the record that although defendant categorized his objection as that against the 404(b) evidence, in fact defendant's objection was clearly against joinder. Therefore, defendant has failed to preserve his right to argue this issue on appeal, and we decline to address it under this standard. *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84. *See also State v. Eason*, 328 N.C. 409, 402 S.E.2d 809 (1991). Furthermore, our review of the record finds no error in the trial court's jury instruction regarding the 404(b) evidence—plain or otherwise.

Defendant's judgments in case numbers: 96CRS 5439, 97 CRS 6333, 6341, 6336 and 6338 are vacated. In defendant's remaining judgments, case numbers: 96CRS 5440, 97 CRS 6344, 6346 and 98CRS 4124, we find no prejudicial error. However, we remand case numbers: 96CRS 5440, 97 CRS 6344 and 97 CRS 6346 for resentencing due to those sentences being combined with judgments now vacated. The judgment in case number 98CRS 4124 stands. Thus the trial court's judgment is

Vacated and remanded in part, no prejudicial error in part.

Judges WYNN and MARTIN concur.

STATE OF NORTH CAROLINA v. PETER GEORGE TAPPE, DEFENDANT

No. COA99-168

(Filed 18 July 2000)

1. Evidence— motion to suppress—driving while impaired—officer's observations

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress all evidence obtained subsequent to defendant's arrest because the police officer had sufficient probable cause to arrest defendant based on the officer's observations of defendant's vehicle crossing the center line; defendant's glassy, watery eyes; and a strong odor of alcohol on defendant's breath.

2. Motor Vehicles— driving while impaired—breathalyzer test results—customary and required procedures

The trial court did not err in a driving while impaired case by admitting the results of defendant's breathalyzer test, even though pertinent documents were destroyed in accordance with standard procedures during the ten-year period between defendant's arrest and the hearing date, because: (1) the qualified individual who administered the test related the customary and required procedures he and other chemical analysts followed in administering breathalyzer tests, including performance of a simulator test prior to obtaining an actual breath sample, to show the test was administered in conformity with the habit or routine practice, N.C.G.S. § 8C-1, Rule 406; (2) the individual who administered the test related his personal experience in operating the Breathalyzer 900; and (3) the individual's testimony comprised a proper and acceptable manner of establishing compliance with the requirements of N.C.G.S. § 20-139.1(b) for a valid chemical analysis.

3. Motor Vehicles— driving while impaired—blood test—right to assistance

Defendant's statutory right under N.C.G.S. § 20-16.2(a)(5) and N.C.G.S. § 20-139.1(d) to assistance in obtaining a blood test after his submission to a chemical analysis was not violated in a driving while impaired case, because: (1) an officer's duty goes no further than allowing a defendant access to a telephone and allowing medical personnel access to a driver held in custody; and (2) defendant acknowledged that he was afforded an opportunity to telephone both his girlfriend and his attorney in Virginia, which reveals that defendant could have telephoned a medical expert or hospital for the purposes of conducting a blood test.

Appeal by defendant from judgment entered 15 September 1998 by Judge J. Richard Parker in Camden County Superior Court. Heard in the Court of Appeals 6 January 2000.

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

D. Keith Teague, P.A., by Danny Glover, Jr., for defendant-appellant.

JOHN, Judge.

Defendant appeals judgment entered upon conviction by a jury of driving while impaired. Defendant contends the trial court erred by denying his motion to suppress results of a breathalyzer test. We conclude the trial court did not err.

The State's evidence at trial tended to show the following: On 21 August 1988, North Carolina Highway Patrol (the Patrol) Sergeant Roscoe Spencer (Spencer), while operating his Patrol automobile, passed a vehicle traveling in the opposite direction and thereupon "observed [it] . . . cross[] the center line." Spencer immediately pursued and stopped the vehicle, operated by defendant. Upon approaching, Spencer noticed a "strong odor of alcohol about [defendant's] breath [and that] his eyes were glassy and watery." Spencer asked defendant if he had been drinking. The latter acknowledged he had consumed one-half the contents of an open beer container located in his vehicle, but denied having done so while driving. He also remarked that he was of German origin and that "in Germany they drank beer for water."

Based upon his observations of and conversation with defendant, Spencer arrested the latter on a charge of driving while impaired. Spencer instructed one of the two passengers in defendant's vehicle to drive it to the Sheriff's Department in Camden while defendant was being transported in the Patrol automobile.

Upon arriving at the Sheriff's Department, Spencer began filling out an Alcohol Influence Report (A.I.R.) and conducted certain sobriety tests. Spencer's notes on the tests had been destroyed approximately five years following the date of defendant's arrest, and Spencer was unable to recall his characterization of defendant's performance on the tests.

Following the sobriety tests, Patrol Sergeant Raymond Potts (Potts), a certified chemical analyst, administered a breathalyzer test to defendant, which revealed a 0.34 blood alcohol concentration. Thereafter, both Spencer and Potts accompanied defendant to the magistrate's office, where bond was set at $250.00 and defendant was ordered detained for sixteen (16) hours unless released into the custody of a responsible adult. Defendant contacted both his girlfriend and his attorney in Virginia, defendant's home state, and was released upon the latter's arrival approximately two and one-half hours later.

Defendant returned to Virginia and did not address the DWI charge until 1998, when he attempted to renew his Virginia driver's license. During the ten year period following defendant's arrest, most documents pertaining to his case were purged and destroyed in accordance with standard Patrol procedures. The sole documents remaining at the time of trial were Spencer's affidavit (Spencer's affidavit) filled out as charging officer the afternoon of defendant's arrest and the original "Breathalyzer Test Record" signed by Potts, indicating a 0.34 blood alcohol concentration.

In his testimony, defendant related that he had conveyed to Spencer his lack of familiarity with the area and explained that he had crossed the center line in order to see a real estate agent whom he was following to view property in the area. Further, upon learning of the 0.34 alcohol concentration reading, he had requested a blood test several times because he had consumed only one-half to three-quarters of the beer from the can in his vehicle. Defendant testified Spencer responded he had "enough evidence . . . [and] need[ed] no blood test," and that he was never given access to a telephone or an opportunity to contact a hospital or doctor. Defendant recalled performing sobriety tests at the Sheriff's Department.

[1] Defendant first contends the trial court erred in denying his motion to suppress all evidence obtained subsequent to his arrest. Defendant asserts Spencer lacked probable cause for the arrest. We disagree.

> Probable cause for an arrest is
>
> a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.

State v. Harris, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) (citation omitted). To justify a warrantless arrest, it is

> not necessary to show that the offense was actually committed, only that the officer had a reasonable ground to believe it was committed.

State v. Thomas, 127 N.C. App. 431, 433, 492 S.E.2d 41, 42 (1997). The existence of such grounds is determined by the "practical and factual considerations of everyday life on which reasonable and prudent people act." *State v. Crawford*, 125 N.C. App. 279, 281, 480 S.E.2d 422, 424 (1997). If there is no probable cause to arrest, evidence obtained as a

result of that arrest and any evidence resulting from the defendant's having been placed in custody, should be suppressed. *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992).

At the *voir dire* hearing conducted upon defendant's motion to suppress, Spencer testified he met a vehicle traveling in the opposite direction on 21 August 1988 and "observed [it] . . . cross[] the center line" after passing Spencer's Patrol automobile. Spencer related that upon stopping the vehicle, he "could smell alcohol that was inside" it and noted that defendant, the driver, "had a strong odor of alcohol about his breath" when he talked. As defendant accompanied Spencer to the Patrol automobile, Spencer observed "a strong odor of alcohol about [defendant's] breath, [and] his eyes were watery and glassy."

Based upon the foregoing observations and his conversation with defendant, Spencer formed the opinion that defendant was "impaired" and placed him under arrest. Spencer indicated he had completed a citation at the scene which included notes taken prior to and after defendant's arrest, but explained the citation was not introduced at trial because it had been purged five years following institution of the charge against defendant. However, Spencer's affidavit was used to refresh his recollection of defendant's behavior and appearance on 21 August 1988.

During the hearing, defendant indicated that a real estate agent had offered him a beer on the date in question prior to defendant's viewing property in the Camden County area. Defendant maintained:

> I got me this Milwaukee beer and I didn't like it, it was terrible. So I drink [sic] only a little bit and put it there in the car. I did not even drink it in the car. What I drink [sic] out of this beer was on his property there.

Defendant claimed he drank one half the can of beer and left the remaining portion in his vehicle. After being stopped by Spencer, defendant explained he had crossed the center line because he was attempting to follow the real estate agent traveling in front of him.

Following the hearing, the trial court rendered the following pertinent findings of fact:

> 2. That [Defendant] was observed by Trooper Roscoe Spencer . . . crossing the center line of the highway and that he was thereafter stopped. . . .

3. It was observed that the Defendant had a strong odor of alcohol on his breath and had glassy, watery eyes.

4. Upon making this observation, Trooper Spencer formed an opinion that the Defendant was, in his opinion, under the influence of an impairing substance and he was arrested for the same.

Based upon these findings, the court concluded "Spencer had sufficient probable cause to arrest the defendant for driving while impaired."

It is well established that

[t]he scope of review on appeal of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law.

State v. Cabe, 136 N.C. App. 510, 512, 524 S.E.2d 828, 830, *disc. review denied*, 351 N.C. 475, S.E.2d (2000) (citations omitted).

In the case *sub judice*, the trial court's findings are supported by evidence adduced at the suppression hearing, are thereby conclusive on appeal, and fully warrant the trial court's conclusion of law "that Trooper Spencer had sufficient probable cause to arrest the Defendant for driving while impaired." Spencer's observations of defendant, set forth fully above and including his observation of defendant's vehicle crossing the center line, defendant's glassy, watery eyes, and the strong odor of alcohol on defendant's breath, provided sufficient evidence of probable cause to justify the warrantless arrest of defendant. *See, e.g., State v. Rogers*, 124 N.C. App. 364, 369-70, 477 S.E.2d 221, 224 (1996), *disc. review denied*, 345 N.C. 352, 483 S.E.2d 187 (1997) (probable cause for driving while impaired arrest based upon officer's opportunity to observe defendant, to speak with him and officer's noting of strong odor of alcohol on defendant), and *State v. Adkerson*, 90 N.C. App. 333, 336-37, 368 S.E.2d 434, 436 (1988) (probable cause for driving while impaired arrest based upon trooper's observations of defendant's driving, appearance and behavior). The trial court did not err in denying defendant's motion to suppress.

[2] Defendant next challenges admission into evidence of the results of defendant's breathalyzer test. Defendant contends N.C.G.S. § 20-139.1(b) (1984, amended 1997) was contravened at trial in that

the State failed to prove a simulator test had been satisfactorily performed prior to administration of defendant's actual test. Again, we disagree.

The version of G.S. § 20-139.1(b) in effect at the time of defendant's 1988 arrest contained two prerequisites for a valid chemical analysis:

> First, it require[d] that such analysis shall have been performed according to methods approved by the [Commission for Health Services]. Second, it require[d] that such analysis shall have been made by an individual possessing a valid permit issued by the State Board of Health for this purpose.

State v. Powell, 10 N.C. App. 726, 728, 179 S.E.2d 785, 786, *aff'd*, 279 N.C. 608, 184 S.E.2d 243 (1971). Methods approved by the Commission for Health Services included performance by the chemical analyst, as part of the testing process, of a simulator test on the breathalyzer machine prior to testing a defendant's breath sample. *State v. Shuping*, 312 N.C. 421, 427, 323 S.E.2d 350, 354 (1984). Such testing constituted a "control test" to "verify the accuracy of the machine." *Id.*

Defendant does not argue that Potts, who administered the test and testified as to the results, was not shown to possess the qualifications required by G.S. § 20-139.1(b). Rather, the thrust of defendant's argument is that it was incumbent upon the State under G.S. § 20-139.1(b) to introduce evidence of simulator test results, and that without such evidence the State failed to prove defendant's breathalyzer test was administered in accordance with "approved methods."

In its order denying defendant's motion to suppress, the trial court found as fact that Spencer made "efforts to obtain copies" of his A.I.R. and the citation copy containing Spencer's personal notes concerning defendant's case, but that these documents had "been discarded over the course of time." As noted above, standard operating procedure of the Patrol caused destruction of such documents upon expiration of approximately five (5) years. *See State v. Jones*, 106 N.C. App. 214, 217-18, 415 S.E.2d 774, 776 (1992) (defendant's federal due process rights not violated by police officer's disposal of control and test ampules used in performing breathalyzer test in accordance with standard procedures where defendant did not challenge such procedures or present evidence to the contrary). More importantly,

defendant presented no evidence to indicate the simulator results or other destroyed documents would have been exculpatory. *See id.* (State's failure to take and preserve an additional breath sample or produce the control and test ampules for defendant's examination did not violate state and federal due process).

Significantly, this Court held in *State v. Powell*, 10 N.C. App. at 728, 179 S.E.2d at 786, that compliance with the two G.S. § 20-139.1(b) requirements may be shown in "any proper and acceptable manner." *Id.* In the instant case, due to the destruction of pertinent documents in accordance with standard procedures during the ten year period between defendant's arrest and the hearing date, Spencer and Potts, without the benefit of their documented notes, were unable to recall specific details surrounding defendant's breathalyzer or simulator test. Nonetheless, Potts related the customary and required procedures he and other chemical analysts followed in administering breathalyzer tests, including performance of a simulator test prior to obtaining an actual breath sample.

N.C.G.S. § 8C-1, Rule 406 (1983) (Rule 406), provides that

> [e]vidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Id. "Habit" may be proven by testimony of a witness who is sufficiently familiar with a person's conduct to conclude that the conduct in question is habitual. *Crawford v. Fayez*, 112 N.C. App. 328, 332, 435 S.E.2d 545, 548 (1993), *disc. review denied*, 335 N.C. 553, 441 S.E.2d 113 (1994) ("habit may be proven by testimony of a witness who is sufficiently familiar with the person's conduct to conclude that the conduct in question is habitual," and specific instances of conduct may be used to prove habit if such evidence is found to be reliable and probative; testimony of five former patients thus sufficient to establish doctor had habit of warning his patients about side effects of infertility drug); *see State v. Simpson*, 299 N.C. 335, 346, 261 S.E.2d 818, 825 (1980) (rest home employee properly testified regarding her habit of keeping screens and windows of the business closed).

Potts, specially trained to operate the Breathalyzer model 900 machine used to record defendant's breath sample, testified as to the customary procedures followed in administering tests with that

model. He indicated the methods approved by the Commission of Health Services for administration of such a test were set forth in an operational checklist routinely followed by all chemist analysts, including himself. Although the original operational checklist used in defendant's case had been destroyed, Potts referred to an identical form in effect at the time of defendant's test to relate the procedures he followed in August of 1988.

Potts stated the 1988 checklist had likewise been approved by the Commission of Health Services, and that, in completing the form, he had entered defendant's name, the date and time of observation, the "instrument number, the simulator number and ampule control number." Potts then proceeded to describe in detail the numerous procedures, including performance of a simulator test, conducted to assure the breathalyzer instrument was properly calibrated.

Finally, Potts related his personal experience in operating the Breathalyzer 900:

> Counsel: And how many times would you say you had used the Breathalyzer by August 21, 1988?
>
> Sergeant Potts: Probably a thousand.

Potts thus testified as to the customary required procedures routinely utilized by himself and other chemical analysts in administering a Breathalyzer 900 test, including performance of a simulator test. Potts' testimony provided competent evidence under G.S. § 8C-1, Rule 406, that the breathalyzer test administered to defendant "was in conformity with the habit or routine practice," *id.*, of Potts and other chemical analysts administering Breathalyzer 900 tests. *See Barber v. Babcock & Wilcox Construction Co.*, 98 N.C. App. 203, 207, 390 S.E.2d 341, 343 (1990), *rev'd on other grounds*, 101 N.C. App. 564, 400 S.E.2d 735 (1991) (corporate defendant's safety specialist competent to testify as to defendant's routine practice for removing asbestos insulation, notwithstanding specialist was not actually present at jobsite where such removal occurred), and *Crawford*, 112 N.C. App. at 332, 435 S.E.2d at 548; *see generally Long v. Harris*, 137 N.C. App. ——, ——, 528 S.E.2d 633, 635 (2000) ("whether . . . proffered evidence is sufficient to establish habit is a question to be decided on a case-by-case basis, and the trial court's rulings thereon will not be disturbed absent an abuse of discretion").

Under the circumstances of the case *sub judice*, Potts' testimony comprised a "proper and acceptable manner" of establishing compli-

ance with requirements of G.S. § 20-139.1(b), *see Powell*, 10 N.C. App. at 728, 179 S.E.2d at 786 (State may prove compliance with G.S. § 20-139.1(b) in "any proper and acceptable manner"), and absent evidence to the contrary, provided the basis for a reasonable inference by the trier of fact that he conducted a valid simulator test prior to administering defendant's test, *see State v. Doggett*, 41 N.C. App. 304, 305-06, 254 S.E.2d 793, 794 (1979) (where officer testified he was a certified Breathalyzer operator, and "testified in detail about simulator test he ran before testing defendant . . . the Breathalyzer test results were admissible notwithstanding fact there was no evidence that officer held such a permit on the day of the offense").

We also note parenthetically recognition by our Supreme Court in *State v. Shuping*, 312 N.C. at 431, 323 S.E.2d at 355-56, that "[c]ourts in several states have reviewed the accuracy and reliability of breath-testing devices, including the Breathalyzer Models 900 and 900A, and have determined them to be reliable scientific instruments." *Id.*; *see State v. Smith*, 312 N.C. 361, 372, 323 S.E.2d 316, 322 (1984) ("the science of breath analysis for alcohol concentration has become increasingly reliable, increasingly less dependent on human skill of operation, and increasingly accepted as a means for measuring blood alcohol concentration").

[3] In his final argument, defendant contends his statutory right to assistance in obtaining a blood test was violated. Defendant asserts he requested a blood test several times, but was not accorded assistance in obtaining one.

N.C.G.S. § 20-16.2(a)(5) (1984, amended 1995), in effect at the time of defendant's arrest, provided that an individual charged with driving while impaired could obtain a

> qualified person of his own choosing to administer a chemical test or tests in addition to any test administered at the direction of the charging officer.

Id. Additionally, any officer with a person in his charge who submitted to a chemical analysis was mandated to

> assist the person in contacting someone to administer the additional testing . . . and [to] allow access to the person for that purpose.

N.C.G.S. § 20-139.1(d) (1984, amended 1997).

In *State v. Bumgarner*, 97 N.C. App. 567, 573, 389 S.E.2d 425, 429, *disc. review denied*, 326 N.C. 599, 393 S.E.2d 873 (1990), this Court further clarified the responsibilities of a law enforcement officer with respect to a blood test as follows:

> officers may not hinder a driver from obtaining an independent sobriety test, but their constitutional duties . . . go no further than allowing a [d]efendant access to a telephone and allowing medical personnel access to a driver held in custody.

During the *voir dire* hearing, defendant testified he requested a blood test several times, but was never given access to a telephone, did not have an opportunity to contact a hospital or doctor, and was told by Spencer that they "have enough evidence, [and] need[ed] no blood test." However, defendant later acknowledged he was afforded an opportunity to telephone both his girlfriend and his attorney in Virginia.

Spencer and Potts related they had no recollection of defendant's having requested a blood test, but, according to Spencer,

> if [defendant] had requested us to—to—for a blood test, we would have given him access to several telephones that were located at the Sheriff's Office within walking distance of the Breathalyzer.

Spencer further indicated that upon receipt of a blood test request, it was Patrol policy to

> give them a telephone book and a telephone to make a phone call and give them directions, telephone numbers, to an appropriate facility.

In its order denying defendant's motion to suppress, the trial court concluded as a matter of law that:

> Defendant was given an opportunity to use the telephone to make certain calls to his girlfriend and attorney, Adderley, and could have called a medical expert or hospital for the purposes of conducting a blood test.

The court, as the sole judge of the credibility of the witnesses, thus chose to accept the testimony of Spencer and Potts to the effect that defendant would have been provided access to a telephone had he requested a blood test, and to reject defendant's conflicting testimony that he was denied the opportunity to secure a blood test

although later permitted to telephone both his girlfriend and his attorney. *See State v. Jean*, 310 N.C. 157, 183, 311 S.E.2d 266, 281 (1984) (trial judge "must assess the credibility of witnesses in rendering his judgment as to the admissibility of the evidence which is the subject of the *voir dire*"), and *State v. Bass*, 280 N.C. 435, 448, 186 S.E.2d 384, 393 (1972) (on *voir dire*, "credibility [of witness] was subject to impeachment before the judge in the same manner as it would have been had he taken the stand and testified before the jury"); *see generally Rosales-Lopez v. U.S.*, 451 U.S. 182, 188, 68 L. Ed. 2d 22, 28 (1981) (during *voir dire* trial judges "must reach conclusions as to . . . credibility by relying on their own evaluations of demeanor evidence and of responses to questions," and "an appellate court [cannot] easily second-guess the conclusions of . . . decision maker who heard and observed the witnesses"); *see also State v. Eubanks*, 283 N.C. 556, 563, 196 S.E.2d 706, 711 (1973) ("[d]efendant's testimony that he had consumed only two bottles of beer suggests perjury rather than sobriety").

No error.

Judges McGEE and HUNTER concur.

PHILLIP WHITMAN AND WIFE, EVA WHITMAN, PLAINTIFFS v. WILLIAM "SONNY" KIGER AND WIFE, BEVERLY KIGER, DEFENDANTS

No. COA99-993

(Filed 18 July 2000)

Child Support, Custody, and Visitation— support—minor parents—grandparents' liability

The trial court erred by granting summary judgment for defendants in an action seeking retroactive and prospective child support from grandparents where the unemancipated minor children of plaintiffs and defendants became the biological parents of an infant, the infant resides with plaintiffs and their child, neither defendants nor their child contributed to the support of the infant, and plaintiffs brought this action for support. The plain meaning of N.C.G.S. § 50-13.4, coupled with the legislative intent, imposes primary responsibility for an infant born to unemancipated minors on the minors' parents. Although plaintiffs contend

that they are not liable under subsection (b) of the statute because they are not *in loco parentis* to the infant and have not assumed an obligation to support the infant in writing, that portion of the statute is directed only towards parties who may be subject to secondary liability pursuant to voluntary acts.

Judge WYNN dissenting.

Appeal by plaintiffs from order entered 12 July 1999 by Judge William Graham in Forsyth County District Court. Heard in the Court of Appeals 27 April 2000.

Larry L. Eubanks, Esq. and Jerry D. Jordan, Esq., for plaintiff-appellants.

Morrow, Alexander, Tash, Long and Kurtz, by John F. Morrow, for defendant-appellees.

SMITH, Judge.

Plaintiffs appeal the trial court's grant of summary judgment for defendants. We reverse.

Pertinent facts and procedural history include the following: Plaintiffs are the parents of Beth Whitman (Whitman), an unemancipated minor born 25 March 1982, and defendants are the parents of Chad Elliott Kiger (Kiger), an unemancipated minor born 22 August 1982. Whitman and Kiger are the biological parents of an infant (the infant) born 27 March 1998. The infant resides with Whitman and plaintiffs, and Whitman works to support the infant. Neither Kiger nor defendants have contributed to the support of the infant.

On 23 April 1999, plaintiffs instituted this action pursuant to N.C.G.S. § 50-13.4 (1995), seeking retroactive and prospective child support from Kiger and defendants. On 5 May 1999, defendants filed a Motion to Dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) (1999) (Rule 12(b)(6)), alleging plaintiffs had failed to state a claim upon which relief might be granted. Defendants also filed an Answer denying any responsibility for the infant's support, alleging they "never stood *in loco parentis* of [the infant] . . . [and] never assumed the obligation [to] support said child in writing or otherwise." Following a 7 July 1999 stipulation that defendants' Rule 12(b)(6) motion be heard as a Motion for Summary Judgment, the trial court entered an order 12 July 1999 granting summary judgment for defendants. Plaintiffs appeal.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1999). The movants can meet this burden in one of two ways:

> (1) by showing that an essential element of the opposing party's claim is nonexistent; or (2) demonstrating that the opposing party cannot produce evidence sufficient to support an essential element of the claim or overcome an affirmative defense which would work to bar his claim.

Wilhelm v. City of Fayetteville, 121 N.C. App. 87, 89, 464 S.E.2d 299, 300 (1995) (citing *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992)). In ruling on a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-movants. *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995).

In the case *sub judice*, the propriety of the trial court's grant of summary judgment in favor of defendants is controlled by this Court's interpretation of G.S. § 50-13.4(b). Construction of this section must be resolved by reference to well settled canons of statutory interpretation.

The principal goal of statutory construction is to give effect to the intent of the legislature. *Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 720, 723, 475 S.E.2d 247, 250 (1996), aff'd, 347 N.C. 342, 493 S.E.2d 416 (1997). "The will of the legislature 'must be found from the [plain] language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.' " *State v. Oliver*, 343 N.C. 202, 212, 470 S.E.2d 16, 22 (1996) (quoting *State ex rel. N.C. Milk Comm'n v. National Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)). "If the language of the statute is clear, this Court must implement the statute according to the plain meaning of its terms." *Roberts v. Young*, 120 N.C. App. 720, 724, 464 S.E.2d 78, 82 (1995).

Section 50-13.4, allowing actions for the support of a child, provides in pertinent part:

(a) Any parent, or any person, agency, organization or institution having custody of a minor child . . . may institute an action for the support of such child as hereinafter provided.

(b) In the absence of pleading and proof that the circumstances otherwise warrant, *the father and mother shall be primarily liable for the support of a minor child.* In the absence of pleading and proof that the circumstances otherwise warrant, *parents of a minor, unemancipated child who is the custodial or non-custodial parent of a child shall share this primary liability for their grandchild's support with the minor parent, the court determining the proper share, until the minor parent reaches the age of 18 or becomes emancipated. If both the parents of the child requiring support were unemancipated minors at the time of the child's conception, the parents of both minor parents share primary liability for their grandchild's support until both minor parents reach the age of 18 or become emancipated.* If only one parent of the child requiring support was an unemancipated minor at the time of the child's conception, the parents of both parents are liable for any arrearages in child support owed by the adult or emancipated parent until the other parent reaches the age of 18 or becomes emancipated. In the absence of pleading and proof that the circumstances otherwise warrant, any other person, agency, organization or institution standing *in loco parentis* shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support. However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing *in loco parentis* absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing. The preceding sentence shall not be construed to prevent any court from ordering the support of a child by an agency of the State or county which agency may be responsible under law for such support.

G.S. § 50-13.4(a)&(b) (emphasis added).

Plaintiffs argue the defendants are primarily responsible for their infant grandchild because Kiger, their unemancipated minor child, is unable or unwilling to accept primary liability for the support of the infant. We agree.

The plain meaning of the above statutory language, coupled with the legislative intent, imposes primary responsibility for an infant born to unemancipated minors on the minors' parents (the infant's grandparents). A different construction would be contrary to the context and purpose of the statute.

G.S. § 50-13.4(b) reiterates the well established principle that parents carry primary responsibility for their minor children, regardless of whether they stand in *loco parentis* or decide not to accept a parental role in the child's life. *See* G.S. § 50-13.4(b) ("the father and mother shall be primarily liable for the support of a minor child"), and *Plott v. Plott*, 65 N.C. App. 657, 659-60, 310 S.E.2d 51, 53 (1983) ("both parents have equal support duties" under G.S. § 50-13.4), rev'd in part on other grounds, 313 N.C. 63, 326 S.E.2d 863 (1985).

G.S. § 50-13.4(b) further provides that the "parents of a minor, unemancipated child who is the custodial or noncustodial parent of a child *shall share* this primary liability for their grandchild's support *with* the minor parent . . . until the minor parent reaches the age of 18 or becomes emancipated." G.S. § 50-13.4(b) (emphasis added). This sharing of primary responsibility between the unemancipated minor and that minor's parents, reflects the general principle that an unemancipated minor continues to be the responsibility of his or her own parents until emancipated or reaching the age of majority. *See generally Alamance County Hosp., Inc. v. Neighbors*, 315 N.C. 362, 365, 338 S.E.2d 87, 89 (1986) ("a father has a duty to support his unemancipated minor children"), and N.C.G.S. § 35A-1201(a)(6) (1999) ("[m]inors, because they are legally incompetent to . . . give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their [unemancipated] minor children"). *See also In re Jurga*, 123 N.C. App. 91, 94, 472 S.E.2d 223, 225 (1996). Accordingly, "[i]f both the parents of the child requiring support were unemancipated minors at the time of the child's conception, the parents of *both* minor parents *share primary liability* for their grandchild's support until both minor parents reach the age of 18 or become emancipated." G.S. § 50-13.4(b) (emphasis added).

Additionally, while "the title of an act, although some evidence of legislative intent where the meaning of a statute is in doubt, cannot override, or otherwise limit, unambiguous language," *Bethania Town Lot Committee v. City of Winston-Salem*, 126 N.C. App. 783, 787, 486 S.E.2d 729, 732-33 (1997), aff'd, 348 N.C. 664, 502 S.E.2d 360 (1998), we hold the title given to G.S. § 50-13.4(b), "An Act To Require The Parents Of A Dependent Child Who Is The Parent Of A Dependent Child To Contribute To The Support Of Their Grandchild," 1995 N.C. Sess. Laws ch. 518, § 1, reflects the plain meaning and overall purpose of the statute.

Notwithstanding the plain meaning of the first portion of subsection (b) establishing primary liability, defendants contend they are not liable because they do not stand in *loco parentis* to the infant and have not assumed an obligation to support the infant in writing. In support of their argument, defendants rely on a final portion of subsection (b) which provides:

> However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in *loco parentis* absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing.

G.S. § 50-13.4(b). We find defendant's argument unpersuasive. Defendants have taken the above portion of subsection (b) out of context to impose a requirement that is not applicable to parents of unemancipated minors who have had a child. Defendants, as the parents of an unemancipated minor who fathered a child, are subject to primary liability for such infant because their unemancipated minor lacks the capacity to support the child.

Following the provisions of G.S. § 50-13.4(b) setting forth circumstances where primary liability for an infant may be imposed, section 50-13.4(b) then provides for the imposition of *secondary* liability under circumstances "other" than those previously addressed (*i.e.* primary liability of the parents or where applicable, the grandparents).

> In the absence of pleading and proof that the *circumstances otherwise warrant*, <u>*any other person*</u>, agency, organization or institution standing *in loco parentis* shall be *secondarily* liable for such support.

G.S. § 50-13.4(b) (emphasis added). Considering section 50-13.4(b) in its entirety, we hold the plain meaning of "any other person," is a reference to any person *other* than those who are primarily liable pursuant to the first portion of the subsection, *i.e.* the infant's parents or grandparents where the parents are unemancipated minors.

The phrase relied upon by defendants which absolves one from any liability if they do not stand in *loco parentis* or have not assumed such responsibility in writing, is directed only towards parties who may be subject to secondary liability, *i.e.* "any other person, agency, organization or institution standing in *loco parentis*," G.S. § 50-13.4(b), pursuant to voluntary acts. *See Shook v. Peavy*, 23 N.C. App. 230, 232, 208 S.E.2d 433, 435 (1974) ("person in *loco parentis*" is "one who has assumed the status and obligations of a parent without a formal adoption"). Thus, the portion of subsection (b) absolving a party from secondary liability is not applicable to defendants because Kiger, defendants' unemancipated minor child, is primarily liable for the infant and because he cannot or will not care for the infant, primary responsibility automatically shifts to defendants until Kiger is emancipated or reaches age eighteen.

If we were to adopt the interpretation of G.S. § 50-13.4 advocated by appellees, no grandparent could be required to contribute to the support of a child of a minor unemancipated child unless the grandparent "voluntarily assumed the obligation of support in writing." G.S. § 50-13.4(b). Obviously the General Assembly did not intend such an absurd result. For if a grandparent wanted to voluntarily assume the obligation, it could be done without the intervention of the courts. Adoption of this interpretation would effectively render the statute meaningless.

Based upon the foregoing analysis of G.S. § 50-13.4(b), we hold the infant *sub judice*, born to unemancipated minors, becomes the primary responsibility of defendants and plaintiffs, the unemancipated minors' parents and the infant's grandparents. Such reasoning is logical and in accordance with the plain meaning and overall objectives and purpose of G.S. § 50-13.4(b).

In his dissent, our esteemed colleague makes several references to grandparents' rights, or lack thereof, under present law. Though we are in basic agreement with his reasoning and believe that grandparents rights, such as visitation, should be dependent in part on obligations such as "support," we also believe these matters of important public policy and possibly constitutional law should be addressed by the General Assembly.

We reverse the trial court's order and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judge HORTON concurs.

Judge WYNN dissents in a separate opinion.

Judge WYNN dissenting.

I agree with Judge Graham's interpretation of N.C. Gen. Stat. § 50-13.4 (1995). Contrary to the majority opinion, I believe that the absurd result would be to hold grandparents primarily liable for grandchild support under N.C. Gen. Stat. § 50-13.4 (1995) because (1) the statute is ambiguous and (2) clearly, the Legislature did not intend for grandparents to be liable for grandchild support when they have no corresponding presumptive rights to visitation and custody of their grandchildren.[1] I dissent.

The terms of N.C. Gen. Stat. § 50-13.4 setting forth grandparents' obligations to support grandchildren conflict. One part of the statute provides that a parent of an unemancipated minor child who is the parent of a child shares primary liability for the grandchild if either of the parents were under 18 at the time of the child's conception until both minor parents reach the age of 18. Yet, another part provides that a judge may not enter an order requiring a person who is not the parent of child to pay support unless there is evidence that the person has voluntarily assumed the obligation of support in writing. Therefore, in a case like this one, where the grandparents have not assumed such written responsibility, it is not clear under the terms of the statute whether they share primary responsibility for the support of the child.

Under the Session Laws of 1995, the General Assembly added the statutory provision relating to a grandparent's primary liability for

1. Under the majority's interpretation, the amount of support to be paid by grandparents found "primarily" liable for grandchild support under *N.C. Gen. Stat. § 50-13.4* would presumably be determined by assessing the grandparents' ability to pay under the Child Support Guidelines. It is reasonable to assume that support payments based on the grandparents' income would almost certainly be higher than payments based on the income of their minor child. And of course, in instances where the grandparents' income exceeds $180,000, the Child Support Guidelines would not apply; instead, the trial judge would be allowed to award an amount in excess of that allowed by the Guidelines.

support of a grandchild when either of the parents are unemancipated minors. Thereafter, in *Pott v. Pott*, 126 N.C. App. 285, 484 S.E.2d 822 (1997), this Court stated:

> [It] is beyond question this jurisdiction will not impose the burden of child support on a non-biological parent who has not voluntarily assumed such an obligation. *See Duffey v. Duffey*, 113 N.C. App. 382, 384-385, 438 S.E.2d 445, 447 (1994); *State v. Ray*, 195 N.C. App. 628, 629, 143 S.E. 216, 216 (1928). Indeed, the General Assembly has expressly recognized "the [trial] judge may not order support to be paid by a person who is not the child's parent . . . absent evidence and a finding that such person . . . has voluntarily assumed the obligation of support in writing." N.C. Gen. Stat. § 50-13.4(b) (1995).

Id. at 290, 484 S.E.2d at 826.

As this Court recognized in *Pott*, the plain language of N.C. Gen. Stat. § 50-13.4 shows that our Legislature intended to establish that in this State, the duty of support of a child can be imposed upon a non-parent only when that person has voluntarily assumed this obligation. Indeed, it would be absurd to hold that grandparents must provide support for grandchildren without any presumptive rights of custody, care and control of the child in their favor.[2] *See Duffey*, 346 N.C. at 83, 484 S.E.2d at 537.

In North Carolina, grandparents have very limited rights to sue for custody or visitation of a grandchild, and they do not start with the presumption that they should be entitled to custody or visitation, as do natural parents. Although our State no longer follows the common law rule that grandparents have *no* custody or visitation rights to their grandchildren, our Legislature has determined that grandparents may seek custody or visitation in only the few limited circumstances provided by N.C. Gen. Stat. §§ 50-13.1(a), 50-13.2A, 50-13.2(b1), and 50-13.5(j). (For a more detailed description of these statutes, *see Montgomery v. Montgomery*, 136 N.C. App. 435, 524 S.E.2d 360 (2000).) In general, grandparents still have no automatic

2. It should be noted that while the loss of custody does not relieve a parent of his or her duty to support a child, N.C. Gen. Stat. § 50-13, all natural parents have a constitutionally protected paramount right to custody, care and control of their child. *See Peterson v. Rogers*, 337 N.C. 397, 445 S.E.2d 901. Only a showing that a parent is unfit or has neglected the child's welfare will result in a loss of these rights. *See id. See also Troxel v. Granville*, — U.S. —, 120 S. Ct. 2054 (2000) (holding that parents have a fundamental right to make decisions concerning the custody, care and control of their children).

right to custody or visitation with grandchildren, and there is no provision for custody or visitation rights even when a grandparent must assume primary financial responsibility for a grandchild.

Further, the consent of grandparents who do not have custody of a grandchild is not required before a parent may give the grandchild up for adoption. Moreover, it would appear that grandparents do not have this right even in a case like the one *sub judice* in which the majority holds that the grandparents are primarily liable for their grandchild's support.

If a grandparent does receive custody of a grandchild, he or she stands in *loco parentis* to the grandchild and has voluntarily assumed the obligation of support. But no right to custody is recognized for grandparents in our State solely on the basis that a parent of the grandchild is a unemancipated minor. Therefore, without the right to custody it would be unreasonable to impose the obligation of support upon a grandparent simply because his or her child is an unemancipated minor who has parented a child. *See Price v. Howard*, 346 N.C. 68, 84, 484 S.E.2d 528, 537 (1997) (holding that the right to custody should accompany the duty of support under N.C. Gen. Stat. § 50-13.4).

Since N.C. Gen. Stat. § 50-13.4 is an ambiguous statute, I would defer to our Legislature to set forth whether grandparents should be liable for grandchild support when they have no corresponding presumptive rights to visitation and custody of their grandchildren.

Accordingly, I dissent.

KIMBERLY McKILLOP, PLAINTIFF v. ONSLOW COUNTY, DEFENDANT

No. COA99-814

(Filed 18 July 2000)

1. Contempt— civil—sufficiency of evidence

Although plaintiff contends there is no evidence that she is the owner, operator, or manager of the adult or sexually-oriented business in question, the trial court did not err by finding plaintiff in civil contempt of an order and injunction upholding a county's ordinance regulating adult or sexually-oriented businesses,

because the evidence revealed that: (1) plaintiff admitted in her original complaint that she previously managed two adult or sexually-oriented businesses that were shut down; (2) plaintiff opened a business adjacent to the site of one of her previous businesses and posted a large sign indicating her business was back; (3) plaintiff exhibited her "specified anatomical areas" to undercover officers at this new establishment, in violation of the ordinance; and (4) plaintiff acknowledged that she was violating the ordinance and the injunction entered against her by reopening her business.

2. **Contempt— civil—county ordinance—adult or sexually-oriented business**

Although plaintiff contends that exhibition of specified anatomical areas in an adult or sexually-oriented business located within 1,000 feet of a residence in itself is not a violation of a county's ordinance, the trial court properly held plaintiff in civil contempt because it is the exhibition of these areas as part of an adult or sexually-oriented business with the intent of sexual stimulation or arousal, and/or sexual fondling or touching within 1,000 feet of the specified places that is the violation of the ordinance.

3. **Contempt— civil—willful failure to comply—plaintiff's invocation of Fifth Amendment right**

The trial court did not err in finding that plaintiff willfully failed to comply with an injunction permanently enjoining plaintiff from operating her two adult or sexually-oriented businesses in violation of a county's ordinance, that plaintiff confirmed she knew she was violating the ordinance and injunction, and that she failed to show cause as to why she should not be held in civil contempt, because: (1) plaintiff admits she chose to invoke her Fifth Amendment right so as to not incriminate herself by testifying at trial, and thereby, she showed no cause why she should not be adjudged in contempt; (2) plaintiff by her refusal to present testimony chose to abandon her claim that she was not in contempt of the trial court's order; and (3) the record is replete with evidence that plaintiff willfully and with stubborn disobedience failed to comply with and knowingly violated the injunction against her.

Appeal by plaintiff from an order entered 21 January 1999 by Judge W. Allen Cobb, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 17 April 2000.

Jeffrey S. Miller for plaintiff-appellant.

Shipman & Associates, L.L.P., by Gary K. Shipman and Carl W. Thurman III, for defendant-appellee.

HUNTER, Judge.

Kimberly McKillop ("plaintiff") appeals the 21 January 1999 Order of Abatement and Judgment of Civil Contempt entered by the trial court finding her in contempt of the Permanent Injunction issued by the same court on 3 July 1996, and ordering her to immediately comply with the 3 July 1996 order and allowing her to purge herself of contempt. We affirm.

The facts of this case are many and convoluted at best; however, we recite below only those pertinent to the appeal at hand. On or about 20 July 1994, agents of defendant-appellee Onslow County ("County") served notice on plaintiff that as of 21 September 1994, the county intended to enforce its "Ordinance to Regulate Adult Businesses and Sexually Oriented Businesses" ("Ordinance") in Onslow County, against plaintiff and her two businesses. Through a number of lawsuits and counter-lawsuits, plaintiff pursued having the Ordinance declared "invalid and unconstitutional" and seeking a preliminary injunction "enjoining and restraining the [County] from enforcing [the Ordinance]," and; the County pursued having the Ordinance declared valid and constitutional and praying the court "permanently enjoin the Plaintiff from operating [her businesses] Amy's Playhouse and Private Pleasures as nonconforming adult businesses and sexually oriented businesses."

On 3 July 1996 the trial court, finding the Ordinance valid, ordered plaintiff's complaint dismissed with prejudice. The trial court further ordered that:

> The Plaintiff, her agents, servants, employees and other persons in active concert therewith, are enjoined and restrained from violating, and are ordered specifically to comply with, the provisions of the Ordinance, . . . and specifically:
>
> a. shall not own and/or operate and/or manage any sexually oriented business, in any building located within one thousand (1,000) feet in any direction from a residence, a house of worship, a public school, or a public playground.

b. shall not exhibit any specified anatomical areas or engage in any specified sexually activities, as defined by the Ordinance, in any business located within one thousand (1,000) feet in any direction from a residence, a house of worship, a public school, or a public playground;

c. shall cease to operate Private Pleasures and Amy's Playhouse in a manner inconsistent with the Ordinance, and specifically, as a sexually oriented business.

However on appeal, the pertinent outcome of this Court's and our Supreme Court's rulings were that the County's Ordinance was "a valid exercise of the general police powers granted to the County by the General Assembly," thus the County had a right to enforce the Ordinance, requiring plaintiff to comply. *Onslow County v. Moore*, 129 N.C. App. 376, 382, 499 S.E.2d 780, 785 (1998). (For more information, *see Onslow County v. Moore*, 127 N.C. App. 546, 491 S.E.2d 670 (1997); *Onslow County v. Moore*, 347 N.C. 672, 500 S.E.2d 88 (1998).)

On 5 October 1998, the County moved for an order to show cause why plaintiff should not be held in civil contempt; which motion was allowed. That show cause hearing resulted in the County presenting affidavits in support of its position, while plaintiff refused to present evidence on the ground that she might incriminate herself in a pending criminal suit. As a result, on 21 January 1999 the trial court concluded that plaintiff was in violation of its 3 July 1996 order, finding in pertinent part that:

4. In September of 1998, the Plaintiff opened a business adjacent to the site of one of her previous businesses and posted a large sign indicating "Amy's Back." On September 24, 1998 . . . a detective with the Onslow County Sheriff's Department [Officer John], entered a business identified on an interior door as Amy's Playhouse. . . . Upon entering . . . he was greeted by a female who introduced herself as "Amy". Officer John recognized the female to be [plaintiff]. . . .

5. . . . [Plaintiff] completely removed her bra. . . . She [further] demonstrated some of the tip enhancements by "talking dirty", and touching her bare breasts and sliding her hand inside her panties and massaging her vaginal area. . . .

6. . . . She began rubbing her body against [Officer John] and ran her hands along his torso, arms, thighs and then started rubbing his genital area. . . .

7. During the session, [plaintiff] exhibited a "Specified Anatomical Area" as defined under the Ordinance . . . , namely her bare breasts.

8. On September 25, 1998, [Officer] John returned to Amy's Playhouse. . . .

9. During the session, [plaintiff] again exhibited a "Specified Anatomical Area" as defined under the Ordinance . . . , namely her bare breasts.

10. [Plaintiff's] violation of the Ordinance and this Court's Order has been both knowing and for personal gain. [Plaintiff] acknowledged to Detective W.L. Condry of the Onslow County Sheriff's Department that she was aware of the Order of this Court and that her actions violated the Ordinance, yet she chose to violate both the Order of this court and the Ordinance. After [plaintiff] was arrested on October 1, 1998, for violating the Ordinance, Detective Condry advised [plaintiff] of her rights and conducted an interview with her.

11. During the interview, [plaintiff] confirmed that she knew she was violating the Ordinance and the injunction entered against her by reopening her business. She further indicated that she saw penalties under the Ordinance as a cost of doing business and "liked paying taxes on $250,000.00 per year." [Plaintiff] also indicated that she intended to continue operating her business because of the money she could make and because she did not believe the Ordinance was constitutional.

. . .

13. [Plaintiff] has and continues to operate a sexually oriented business and adult business as defined under the Ordinance.

14. The Plaintiff knew, based upon her personally engaging in the act of exposing her bare breasts for a fee, that she was exhibiting "specified anatomical areas" in a sexually oriented or adult business located within 1,000 feet of a residence.

15. The Plaintiff has willfully failed to comply with the provisions of the Permanent Injunction, in that the Plaintiff has possessed the means to comply with the Permanent Injunction at all times since the entry of the Order.

16. The Plaintiff has shown *no* cause why she should not be adjudged in contempt of this Court for her willful failure to abide by the provisions of the Permanent Injunction, opting, instead, to invoke the Fifth Amendment privilege against self incrimination.

(Emphasis in original.) Thus the trial court held plaintiff in contempt.

[1] Plaintiff has preserved ten assignments of error. However, due to our disposition of her appeal, we need address only three. We first address plaintiff's assigning error to the trial court's finding that she is in contempt. Plaintiff contends that there was no evidence that she was the owner, operator, or manager of the business in question, specifically, "Amy's Back." We find plaintiff's argument unpersuasive.

We begin by noting that plaintiff, in violation of N.C.R. App. P. 28(b)(5), cites almost no authority upon which she bases her arguments before this Court. That rule clearly states that "[a]ssignments of error not set out in the appellant's brief, *or in support of which no* reason or argument is stated or *authority cited, will be taken as abandoned.* [Furthermore,] [t]he body of the argument *shall contain citations of the authorities upon which the appellant relies. . . .*" N.C.R. App. P. 28(b)(5) (1999) (emphasis added). Nonetheless, we choose to go forward and address plaintiff's appeal on its merits.

It is well established that this Court's

> review of contempt proceedings is confined to whether there is competent evidence to support the [trial court's] findings of fact and whether those findings support the judgment. *McMiller v. McMiller*, 77 N.C. App. 808, 336 S.E.2d 134 (1985); *Cox v. Cox*, 10 N.C. App. 476, 179 S.E.2d 194 (1971). . . .

Koufman v. Koufman, 97 N.C. App. 227, 230, 388 S.E.2d 207, 209 (1990), *reversed on other grounds*, 330 N.C. 93, 408 S.E.2d 729 (1991). Furthermore,

> [t]he statutes governing proceedings for civil contempt . . . cases clearly assign the burden of proof to the party alleged to be [in contempt]. Civil contempt proceedings are initiated by a party interested in enforcing the [trial court's] order by filing a motion

in the cause. . . . The opposing party must then show cause why [s]he should not be found in contempt.

Plott v. Plott, 74 N.C. App. 82, 85, 327 S.E.2d 273, 275 (1985).

The record before us reveals that in her original complaint, plaintiff admitted that she managed the two businesses, specifically, "Amy's Playhouse located at 3054 Wilmington Highway South and Private Pleasures located at 2247 Richlands Highway." In the court order imposing the permanent injunction upon plaintiff, the court specifically found that both of her establishments were in violation of the Ordinance. Plaintiff does not dispute this finding, except to say that the mere "exhibition of 'specified anatomical areas in a sexually oriented or adult business located within 1,000 feet of a residence' in itself is not a violation of the Ordinance" (a contention we will address below). Neither does plaintiff dispute the finding that she "and K. Hope, Inc., a corporation owned and/or controlled by [plaintiff], which corporation purportedly is the actual 'owner' of these businesses, are in privity with one another."

The County's witness, Detective Sergeant W. L. Condry ("Det. Condry"), testified that although plaintiff shut down her two above-named businesses, about a year later she reopened the business under the guise of "Amy's Back." Det. Condry further stated that he had measured the distance between the trailer, in which "Amy's Back" was housed, and the nearest residence and that distance was seventy (70) feet. Detective Todd John ("Det. John") testified that on the two occasions he entered "Amy's Back" (which was in effect "Amy's Playhouse," having a sign inside which displayed the name "Amy's Playhouse"), plaintiff introduced herself as "Amy," welcomed him in, directed him to a price list from which he was to choose the desired service(s) and then took his money from him and proceeded to provide the sexual service he paid for—including displaying her bare breasts to him. Additionally, at trial, the County produced affidavits and testimonies from officers stating that plaintiff had bared her breasts and genitals as part of their "sessions" with her. Thus, we conclude that the record contains competent evidence upon which the trial court could find that plaintiff did in fact own, operate, and/or manage "Amy's Back." Having concluded thusly, we need not address two of plaintiff's assignments of error regarding whether she opened the business or posted the sign, and whether there was evidence that she was continuing to operate a sexually oriented business and adult business as defined. Furthermore, because the record supports the

finding that plaintiff did own, operate and/or manage "Amy's Back," we need address plaintiff's assignment of error regarding the trial court's requiring her to remove items from the business and close "Amy's Back" down, only by saying that we affirm the trial court's order in that regard.

[2] Next, we address plaintiff's contention that "exhibition of 'specified anatomical areas in a sexually oriented or adult business located within 1,000 feet of a residence' in itself is not a violation of the Ordinance"; and therefore, she has not violated the Ordinance. We find this argument completely without merit.

Plaintiff rests her argument on the idea that "[n]othing in the Ordinance addresses enforcement against people who exhibit anatomical areas." However, the Ordinance unambiguously reads:

> (i) A *Sexually Oriented business shall further be defined as any business activity*, club or other establishment, within which the exhibition, showing, rental, or sale of materials distinguished or characterized by an emphasis on material depicting, describing, or *exhibiting specified anatomical areas or relating to specified sexual activities* is permitted. . . .
>
> (ii) No Sexually Oriented Business shall be permitted in any building:
>
> (a) *located within 1000 feet in any direction from a building used as a residence or dwelling.*
>
> (b) located within 1000 feet in any direction from a building in which an adult business or a sexually oriented business is located.
>
> (c) located within 1000 feet in any direction from a building used as a church, synagogue, or other house of worship.
>
> (d) located within 1000 feet in any direction from a building used as a public school or as a state licensed day care center.
>
> (e) located within 1000 feet in any direction from any lot or parcel on which a public playground, public swimming pool, or public park is located.

Ordinance Article V(B)(i), (ii) (emphasis added). Additionally, the Ordinance defines specified anatomical areas as "human genitals, pubic regions, buttocks and female breasts below a point immedi-

ately above the top of the areola" (Ordinance Article IV(i)); and specified sexual activities as:

a. Human genitals in a state of sexual stimulation or arousal;

b. Acts of human masturbation, sexual intercourse, sodomy; or

c. Fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts.

Ordinance Article IV(j)(a), (b), (c).

Thus, plaintiff is correct in that the exhibition of "specified anatomical areas" alone is not the violation, it is the exhibition of these areas *as part of a sexually oriented business or an adult business* with the intent of sexual stimulation or arousal, and/or sexual fondling or touching within 1,000 feet of the specified places that is the violation of the Ordinance. Plaintiff does not argue that the finding of the trial court that she and other women within her business were exhibiting their "specified anatomical areas" was error, neither does she dispute the court's finding that the business was within 1,000 feet of a residence. We further note that this Court upheld the trial court's enjoining plaintiff's businesses ("Amy's Playhouse" and "Private Pleasures") from operating with 1,000 feet of a residence, house of worship, or public school or playground, finding it proper (*Moore*, 129 N.C. App. at 386, 499 S.E.2d at 787); and plaintiff's current business, "Amy's Back" is housed adjacent to where "Private Pleasures" had been housed, displaying an "Amy's Playhouse" sign inside. Therefore, we hold that the record supports the trial court's conclusion of law that plaintiff's businesses were in violation of the Ordinance.

[3] We next address plaintiff's argument that the trial court erred in finding that she willfully failed to comply with the injunction; that she confirmed she knew she was violating the Ordinance and injunction; and, that she failed to show cause as to why she should not be held in contempt.

It is true that intent is a necessary element in a finding of contempt.

> Although the statutes governing civil contempt do not expressly require willful conduct, *see* N.C. Gen. Stat. §§ 5A-21 to 5A-25 (1986), case law has interpreted the statutes to require an element of willfulness. *Smith v. Smith*, 121 N.C. App. 334, 336, 465 S.E.2d 52, 53-54 (1996). In the context of a failure to comply

> with a court order, the evidence must show that the person was guilty of "knowledge and stubborn resistance" in order to support a finding of willful disobedience. *Hancock v. Hancock*, 122 N.C. App. 518, 525, 471 S.E.2d 415, 419 (1996). . . .

Sharpe v. Nobles, 127 N.C. App. 705, 709, 493 S.E.2d 288, 290-91 (1997). Therefore, this Court is

> required to examine the record to determine whether competent evidence is present to support this key finding and the corresponding conclusion of law holding that defendant was in willful contempt of the [3 July 1996] order. Our Court has held that one may not be held in civil contempt for failure to comply with an order of the court *unless* his or her failure is willful. *Powers v. Powers*, 103 N.C. App. 697, 705, 407 S.E.2d 269, 273-74 (1991) (*citing Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981)). Accordingly, we must determine from the evidence presented whether defendant's actions were willful or unintentional.

Blazer v. Blazer, 109 N.C. App. 390, 393, 427 S.E.2d 139, 141 (1993) (emphasis added). Thus, if the record cannot support the trial court's finding that plaintiff *willfully* failed to comply with or knowingly violated the injunction, then her contempt judgment must be reversed.

Ordinarily, the argument plaintiff poses would raise an issue of credibility—that is, whether plaintiff's evidence or the County's evidence is more credible. As such, it would be within "the province of the trial court to resolve this conflict." *Koufman*, 97 N.C. App. at 231, 388 S.E.2d at 209. *See also Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). However, in the case at bar, plaintiff bases her argument on the fact that she refused to testify at trial on the basis that she might incriminate herself in the concurrently running criminal trial against her, and that the County's only witness to confirm that plaintiff knew she was violating the Ordinance and the court's order, Det. Condry, was uncorroborated.

This Court was faced with this same issue in *Cantwell v. Cantwell*, 109 N.C. App. 395, 427 S.E.2d 129 (1993), where the defendant in a divorce action, seeking alimony, invoked her Fifth Amendment privilege when her husband sought to prove she had been unfaithful to him. The Court stated:

> The constitutional privilege against self-incrimination assures all individuals that they will not be compelled to give tes-

timony which will tend to incriminate them or which will tend to subject them to fines, penalties or forfeiture. *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964). . . . Therefore [where there is the threat of prosecution,] the defendant could properly invoke the privilege in the course of her deposition testimony. *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (1990) (in a civil action parties may obtain discovery regarding relevant matters except those that are privileged).

While we recognize that the defendant in the present case had the right to invoke her privilege against self-incrimination, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege . . . ." *Brown v. United States*, 356 U.S. 148, 156, 2 L. Ed. 2d 589, 597[,] *reh'g denied*, 356 U.S. 948, 2 L. Ed. 2d 822 (1958) (a party witness in a criminal case cannot present testimony on direct examination and then invoke the privilege on cross-examination); *see also Pulawski v. Pulawski*, 463 A.2d 151, 157 (R.I. 1983) (as between private litigants, the privilege against self-incrimination must be weighed against the right of the other party to due process and a fair trial). The privilege against self-incrimination is intended to be a shield and not a sword. *Pulawski*, 463 A.2d at 157; *Christenson v. Christenson*, 162 N.W.2d 194, 200 (Minn. 1968). Therefore, "if a plaintiff seeks affirmative relief or a defendant pleads an affirmative defense[,] he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or the defense." *Christenson*, 162 N.W.2d at 200 (citation omitted).

Id. at 397, 427 S.E.2d at 130-31. Finding *Christenson* persuasive and instructive, this Court held "a party has a right to seek affirmative relief in the courts, but if in the course of her action she is faced with the prospect of answering questions which might tend to incriminate her, she must either answer those questions or abandon her claim." *Id.* at 398, 427 S.E.2d at 131.

Furthermore, it is well established that North Carolina law allows the trier of fact to infer guilt on a civil defendant who, having the opportunity to refute damaging evidence against her, chooses not to. The finder of fact in a civil cause may use a witness' invocation of his Fifth Amendment privilege against self-incrimination to infer that his

truthful testimony would have been unfavorable to him. *Fedoronko v. American Defender Life Ins. Co.*, 69 N.C. App. 655, 657-58, 318 S.E.2d 244, 246 (1984).

This scenario has often come to bar in cases of alienation of affection, criminal conversation and adultery. In one such case, the plaintiff and the private detective he hired followed his wife and the defendant to a condominium. Having observed the lights inside the condominium go out and neither his wife's nor the defendant's cars move from their parking spaces, plaintiff filed for divorce citing adultery as the reason. At trial, when the defendant refused to answer questions on the grounds that he might incriminate himself, this Court opined:

> "Plaintiff's charge against defendant was adultery; if the evidence of so serious a charge was not true, the defendant had the opportunity to refute it. Whether the charge was true or not, the falsity of it was peculiarly within defendant's knowledge. The fact that [he] did not refute the damaging charge made by plaintiff, it may be that this was a silent admission of the charge made against [him]."

Gray v. Hoover, 94 N.C. App. 724, 729, 381 S.E.2d 472, 475, *disc. review denied*, 325 N.C. 545, 385 S.E.2d 498 (1989) (*quoting Walker v. Walker*, 201 N.C. 183, 184, 159 S.E. 363, 364 (1931)).

In the case at bar, we find both *Cantwell* and *Gray* dispositive. The County produced evidence that plaintiff had, on several occasions after the injunction, shown her breasts and pubic areas to undercover police officers as well as masturbated and fondled those officers and other women as part of her business—for money—in a building less than 1,000 feet from a residence. The County further presented evidence, by way of Det. Condry's testimony and affidavit, that plaintiff had made statements that she had reopened her business, even though she knew she was in violation of the injunction, because she "liked paying taxes on $250,000.00 per year." Therefore, because "[plaintiff] never refuted the serious allegation[s] . . . lodged against her . . . her refusal to testify about the nature of her [business] and her failure to refute the charge[s] [against her] logically give rise to an inference of [guilt]." *In Re Estate of Trogdon*, 330 N.C. 143, 152, 409 S.E.2d 897, 902 (1991). Additionally, plaintiff herself admits, she chose to invoke her Fifth Amendment right so as to not incriminate herself by testifying at trial; and thereby, she "show[ed] no cause why she should not be adjudged in contempt." Therefore, under *Cantwell*,

supra, we hold that plaintiff must choose between her right not to incriminate herself in a pending criminal trial and her claim that she cannot be held in civil contempt.

The record is replete with evidence that plaintiff willfully and with stubborn disobedience failed to comply with and knowingly violated the injunction against her. *Sharpe v. Nobles*, 127 N.C. App. at 709-10, 493 S.E.2d at 290-91. Thus, our review of the record reveals that there was competent evidence to support the trial court's holding plaintiff in contempt, and we hold that plaintiff, by her refusal to present testimony, chose to abandon her claim that she was not in contempt of the trial court's order.

We need not address any more of plaintiff's assignments of error since the order from which plaintiff appeals is solely for contempt and abatement.

Having found competent evidence in the record to support the trial court's determination that plaintiff was in contempt of the permanent injunction issued by that court, its judgment is

Affirmed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. ARTHUR EDWARD BALDWIN, JR.

No. COA99-767

(Filed 18 July 2000)

1. Sentencing— second-degree murder—aggravating factor—creating a great risk of death to more than one person

The trial court did not err in a second-degree murder case by finding as an aggravating factor that defendant created a great risk of death to more than one person because: (1) defendant used a sawed-off shotgun during this crime, and a shotgun has the destructive capabilities to be a qualifying weapon under this aggravating factor; (2) defendant deliberately pointed the sawed-off shotgun at both the victim and another individual sitting on

the same bed in a small hotel room; and (3) evidence that the shooting was accidental suggests that a discharge could have occurred when the gun was pointed near other persons.

2. **Sentencing— second-degree murder—aggravating factor—murder committed in course of robbery—motivated by pecuniary gain**

The trial court did not err by finding as an aggravating factor that the murder was committed in the course of a robbery and was motivated by pecuniary gain, even though defendant contends that robbery was an essential element of this felony murder case, because defendant pled guilty and was sentenced for second-degree murder, which does not require robbery as an element.

3. **Sentencing— second-degree murder—aggravating factor—failing to render aid to victim—essence of the crime**

The trial court erred in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant failed to render aid to the victim, and the case must be remanded for a new sentencing hearing, because: (1) an aggravating factor cannot be based on circumstances which are part of the very essence of a crime; and (2) not helping to save a victim is withing the essence of malice, and therefore, is inherent in the malice crime of second-degree murder.

Appeal by defendant from judgment entered 10 December 1998 by Judge Thomas W. Ross in Forsyth County Superior Court. Heard in the Court of Appeals 25 April 2000.

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

J. Clark Fischer for defendant.

McGEE, Judge.

Arthur Edward Baldwin, Jr. (defendant) was charged with first degree murder of Debbie Dawn Burnette (Burnette) in a juvenile petition filed 11 July 1994 and was indicted for her murder by a grand jury on 30 January 1995. Defendant was tried during the 30 October 1995 session of Forsyth County Superior Court when the jury was unable to agree upon a unanimous verdict, whereupon the trial court granted defendant's motion for mistrial. During defendant's second trial at the

14 December 1995 session, the State presented eyewitness testimony from Craig Woods (Woods) of the 28 June 1994 murder of Burnette. Woods testified that he had been a friend of Burnette's for approximately nine months before Burnette was killed. At around 8:00 p.m. on the evening before the murder, Burnette and a mutual friend, Todd Culler (Culler), stopped at Woods's house in Winston-Salem to pick him up. Culler drove Burnette and Woods to a sports bar and shortly thereafter to a BP station, where Culler purchased a six-pack of beer. They drove to the Knights Inn, arriving shortly after 9:00 p.m., and spent the night in a room on the second floor. Woods testified that he, Culler, and Burnette drank beer and used cocaine. Burnette and Culler left the room at around 2:00 a.m. for approximately ten minutes to purchase cigarettes, and Culler left for home at around 2:30 a.m. Woods and Burnette remained in the room watching television with the lights off and the front door ajar. Woods sat in a chair in the far right corner of the room and Burnette sat on the bed with her back against the headboard. They heard voices outside at around 3:30 a.m., and Woods went to the door. He saw two black men in the parking lot, one of whom asked Woods "for a light." Woods tossed his lighter to the person, who lit his cigarette and tossed the lighter back up to Woods. Woods then returned to his chair, and the door to the room was "all the way open."

Again Woods and Burnette heard voices, and Woods again went to the door. He saw one of the same men from the parking lot on the breezeway which connected the two buildings of the Knights Inn at the top of the steps. After Woods returned to his chair in the room, the person he had seen on the breezeway tapped on the door and asked to use the phone. Woods testified that "it was [Burnette's] room," so he asked her if this person could use the telephone, and she gave permission. Woods said this person, who was wearing a ball cap, dialed some numbers and then said, "Give me the police."

Woods then saw the other man from the parking lot walking up the steps arguing with the person wearing the ball cap inside the room. This second man also entered the room, told the person on the telephone to hang it up and hand over his valuables, and revealed "a sawed-off shotgun with a pistol grip" that was "[a]round two and a half feet" in length. The person wearing the ball cap "reache[d] from in his pocket and hand[ed] him something" that Woods could not identify, and told the gunman, "Man, somebody is going to see you[.]" The gunman went to the door, pushed it shut, and pointed the gun at Woods and demanded his valuables. Woods was sitting in

a chair with his hands up and replied that he had nothing. The person wearing the ball cap at first had his hands up but at this time was sitting on the edge of the bed closest to Woods. Burnette, who was still sitting with her back against the headboard of the bed, now had her hands up.

The gunman told Woods he was lying about not having anything to give, and then pointed the shotgun at Burnette, repeating his demands and adding, "[g]ive me anything you got." When Burnette was silent, the gunman pointed the shotgun back at Woods, and Burnette "got up and started down the side of the bed [to about the end of the wall]." Using profanity, the gunman forcefully told her to sit back down. Burnette returned to her previous position on the bed when the gunman pointed the shotgun at her, and the weapon discharged.

Woods testified that when the shotgun fired, the gunman was approximately four feet away from Burnette. The gunman then "went to the door, looked out, walked back over toward the bed and then took off out the door." The person wearing the ball cap exclaimed a profanity, went to the door and shouted to the gunman that he knew who he was, and then "took off" while Woods dialed 911.

Defendant was convicted of first degree felony murder on 19 December 1995 and was sentenced to a mandatory sentence of life imprisonment. On appeal to our Court in 1996, defendant argued the trial court erred in not allowing him to cross-examine a police detective and in excluding certain expert psychiatric testimony. We agreed with defendant as to his first argument, and thus reversed and remanded for a new trial in *State v. Baldwin*, 125 N.C. App. 530, 482 S.E.2d 1 (1997). Our Supreme Court allowed the State's petition for discretionary review but later determined it had been improvidently allowed. *State v. Baldwin*, 347 N.C. 348, 492 S.E.2d 354 (1997).

Prior to what would have been his third trial, defendant pled guilty to second degree murder on 10 December 1998. The same day the trial court found by a preponderance of the evidence three aggravating factors and four mitigating factors. The aggravating factors were that defendant (1) knowingly created a great risk of death to more than one person by means of a weapon or device which would normally endanger several persons at once; (2) committed murder during a planned robbery with a motive for pecuniary gain; and (3) failed to render any assistance to the victim and thus showed no

mercy. The mitigating factors were that defendant (1) had no record of criminal convictions; (2) demonstrated an immaturity at the time of the murder that significantly reduced his culpability; (3) gave a statement to law enforcement officers; and (4) was induced to participate in the crime by a co-defendant who provided him with the shotgun. The transcript of the sentencing hearing shows the trial court determined the aggravating factors outweighed the mitigating factors. Therefore, in its judgment and commitment dated 15 December 1998, the trial court sentenced defendant in excess of the fifteen-year presumptive term for second degree murder to forty years' imprisonment, with a credit of 1,626 days already served. *See State v. Melton*, 307 N.C. 370, 373, 298 S.E.2d 673, 676 (1983). Defendant appeals.

Defendant argues the trial court erred in sentencing by finding aggravating factors that "were either not supported by the evidence or were not proper factors in aggravation." The Fair Sentencing Act (FSA), which has since been repealed and replaced by structured sentencing, applies to this case as the crime occurred prior to 1 October 1994. *See* N.C. Gen. Stat. § 15A-1340.10 (1999) (structured sentencing applies to certain criminal offenses that occur on or after 1 October 1994). Under the FSA, the trial court "must impose the statutorily set presumptive sentence unless [it] properly makes written findings of aggravating or mitigating factors and then finds that one set of factors outweighs the other." *State v. Teague*, 60 N.C. App. 755, 757, 300 S.E.2d 7, 8 (1983). This is true even where defendant has pled guilty to the crime for which he is sentenced. "The mere fact that a guilty plea has been accepted pursuant to a plea bargain does not preclude the sentencing court from reviewing all of the circumstances surrounding the admitted offense in determining the presence of aggravating or mitigating factors." *Melton*, 307 N.C. at 377, 298 S.E.2d at 678.

Our Court has examined in detail the procedure for a trial court to find aggravating and mitigating factors under the FSA:

> As long as they are not essential to the establishment of elements of the offense, all circumstances that are both transactionally related to the offense and reasonably related to the purposes of sentencing *must* be considered by the sentencing judge. The trial judge *may* consider aggravating and mitigating factors supported by evidence not used to prove an essential element as long as those factors are reasonably related to the purposes of sentenc-

> ing. The factors found must be supported by a preponderance of the evidence. The balancing of the properly found factors in aggravation and mitigation is left to the sound discretion of the trial judge.

Teague, 60 N.C. App. 757-58, 300 S.E.2d at 8-9 (citations omitted) (emphasis in original); *see also State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E.2d 658, 660-61, *disc. review denied*, 306 N.C. 745, 295 S.E.2d 482 (1982) (discussing the discretionary task of weighing mitigating and aggravating factors).

[1] Defendant first contends "[t]he trial court's finding that defendant created a great risk of death to more than one person is not supported by the evidence." In *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984), our Supreme Court stated that this statutory aggravating factor "addresses essentially two considerations: a great risk of death knowingly created and the weapon by which it is created." *Id.* at 497, 313 S.E.2d at 517. The *Moose* Court "h[e]ld that a shotgun falls within the category of weapon envisioned [by the statute]," *id.* at 498, 313 S.E.2d at 518, primarily for the reason that "it is capable of firing more than one, and in fact, many projectiles in a pattern over a wide impact area rather than a specifically aimed single projectile such as from a rifle or pistol," *id.* at 497, 313 S.E.2d at 517. *But see State v. Bethea*, 71 N.C. App. 125, 129-30, 321 S.E.2d 520, 522 (1984) ("While we do not minimize the danger that a loaded rifle presents to the public, especially in a setting such as a metropolitan area courthouse square, we do not feel that a .30-.30 lever action rifle was a weapon contemplated by [the statute]."). Defendant in this case used a sawed-off shotgun during the crime, and a shotgun has the "destructive capabilities" to be a qualifying weapon under this aggravating factor. *Moose*, 310 N.C. at 497-98, 313 S.E.2d at 517-18.

The remaining question concerns "the risk element," requiring that the defendant "knowingly created a great risk of death to more than one person" in using the weapon. *Id.* at 496-97, 313 S.E.2d at 516. In *Moose*, the Court found there was a great risk of death knowingly created where the shotgun was fired into a vehicle occupied by two persons. *Id.* at 497, 313 S.E.2d at 517. Similarly in *State v. Rose*, 327 N.C. 599, 398 S.E.2d 314 (1990), our Supreme Court made the same finding where the defendant fired a shotgun at a victim who was sitting on a couch with two other people. *Id.* at 606, 398 S.E.2d at 318.

Although the facts in this case are even closer than in *Moose* and *Rose*, the risk element is satisfied where defendant brandished a

sawed-off shotgun and deliberately pointed it at both Woods and Burnette in a hotel that, according to the testimony of a city police identification technician, had dimensions of approximately 12-½ by 13-½ feet. Furthermore, according to Woods's testimony, the man wearing the ball cap was sitting on the same bed as Burnette when she was shot. We note that the proximity of all persons in the room was questioned in great detail by the trial court during sentencing. Also, a forensic pathologist testified the approximate distance between defendant and Burnette at only "five to six feet" when she was shot and Woods thought the distance was around four feet. The shotgun had a pistol grip and the barrel was sawed off. Finally, evidence introduced to the effect that the shooting was accidental suggests that a discharge could have occurred when the gun was pointed near other persons. For these reasons, we hold that defendant "knowingly created a great risk of death to more than one person" with the shotgun, and the trial court did not abuse its discretion in finding this aggravating factor.

[2] Defendant next argues the trial court erroneously found the aggravating factor that the murder was committed in the course of a robbery and was motivated by pecuniary gain, for defendant contends "robbery was an essential element of this felony murder case" and evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. This argument is without merit for the reason that defendant pled guilty to and was sentenced for second degree murder, which does not require robbery as an element. *See Melton*, 307 N.C. at 375, 298 S.E.2d at 677 (to prove second degree murder, "the state must prove beyond a reasonable doubt only that the defendant unlawfully killed the deceased with malice"). The facts of this case support second degree murder wholly independent of any attempted robbery or other felony. *See, e.g., State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984) ("The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice."); *State v. Hodges*, 296 N.C. 66, 72, 249 S.E.2d 371, 374 (1978) (evidence showing defendant intentionally inflicted a wound with a deadly weapon which caused death "raises inferences of an unlawful killing with malice which are sufficient [to establish] murder in the second degree").

[3] Finally, defendant argues the trial court erred in finding a non-statutory aggravating factor in "failing to render aid to the victim, as this is not a factor properly used to distinguish defendant from others convicted of second degree murder [and it improperly uses evidence

to prove the offense]." The trial court made the following finding of this factor in aggravation:

> The court would find that after discharging the weapon into the female victim as far as it being the same transaction was suspended without mercy and left the victim who at that time was bleeding profusely. He did so without rendering any assistance to her. The court would note for the record that even though others were present that the gravity of the aggravating factor which the court finds is not that the victim did not later receive assistance promptly, but instead by leaving, that the defendant showed no mercy. He left, himself, without rendering aid.

Under the FSA, the trial court was permitted to increase a presumptive sentence in accordance with its written findings of non-statutory aggravating factors, provided the factors were (1) supported by a preponderance of the evidence, *see Davis*, 58 N.C. App. at 334, 293 S.E.2d at 661; (2) "not essential to the establishment of elements of the offense," *see Teague*, 60 N.C. App. at 757, 300 S.E.2d at 8; (3) "reasonably related to the purposes of sentencing," *see id.* at 758, 300 S.E.2d at 8; and (4) not based upon the failure to perform a statutory mitigating factor, *see State v. Coleman*, 80 N.C. App. 271, 276, 341 S.E.2d 750, 753, *disc. review denied*, 318 N.C. 285, 347 S.E.2d 466 (1986) ("[I]t is improper to aggravate a defendant's sentence for his failure to perform an act when the doing of the act would support the finding of a factor in mitigation."); *State v. Church*, 99 N.C. App. 647, 657, 394 S.E.2d 468, 474 (1990) (limiting this rule to only statutory mitigating factors). Defendant contends the trial court's finding cannot be an aggravating factor.

Defendant maintains that the trial court's finding relies upon evidence necessary to prove second degree murder because malice necessarily denotes an absence of mercy and an unwillingness to render aid. In *State v. Reeb*, 331 N.C. 159, 415 S.E.2d 362 (1992), two defendants were convicted of assault with a deadly weapon with intent to kill inflicting serious injury and were sentenced to the maximum of twenty years rather than the presumptive six-year term based upon an aggravating factor that they "mercilessly left the victim who was then bleeding and in great pain, without rendering any type of assistance to her." *Id.* at 180, 415 S.E.2d at 374. The *Reeb* Court allowed the aggravating factor in that it "was not necessary to prove an element of the assault charge." *Id.* at 181, 415 S.E.2d at 374. *See also State v. Applewhite*, 127 N.C. App. 677, 683, 493 S.E.2d 297, 300 (1997) (rely-

ing on *Reeb* to uphold the same aggravating factor in sentences for the non-malice crimes of attempted armed robbery and assault with a deadly weapon inflicting serious injury). According to the Court in *Reeb*, "refusing to help a victim after the crime of assault is complete is not an inherent part of the crime," but "makes the assault more reprehensible" and "may be some evidence of intent to kill." *Reeb*, 331 N.C. at 181, 415 S.E.2d at 374. Defendant distinguishes *Reeb* on the basis that the crime in that case did not require malice.

In *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985), the victim stabbed the defendant in the back during an argument, after which the defendant beat, stabbed, and shot the victim, causing his death. The defendant, who was found on someone's front porch with serious injuries, pled guilty to voluntary manslaughter. The trial court found among three aggravating factors, which outweighed the mitigating factors, that "[t]he defendant left the victim dying in a field and did not seek to have help sent to him." *Bates*, 76 N.C. App. at 678, 334 S.E.2d at 74. Our Court stated "[i]t is error for an aggravating factor to be based on circumstances which are part of 'the very essence' of a crime because 'it can be presumed that the Legislature was guided by this unfortunate fact when it established [the FSA].' " *Id.* (quoting *State v. Higson*, 310 N.C. 418, 424, 312 S.E.2d 437, 441 (1984)). We continued that "[t]he exceptional nature of a defendant['s] 'attempting to secure immediate medical attention for [his victim]' has been noted by the Supreme Court." *Id.* (quoting *State v. Bondurant*, 309 N.C. 674, 694, 309 S.E.2d 170, 183 (1983)). Our Court in *Bates* concluded the trial court had erred in finding as an aggravating factor the defendant's failure to aid his victim. *Id.*; *State v. Irby*, 113 N.C. App. 427, 439, 439 S.E.2d 226, 234 (1994) (applying rule in *Bates* to second degree murder without discussion). By contrast, the *Reeb* decision, which allowed the aggravating factor, distinguished *Bates* on the basis that the defendant in *Reeb* was not severely injured at the time he could have rendered aid to the victim. *See Reeb*, 331 N.C. at 181, 415 S.E.2d at 375.

In this case, defendant was sentenced for second degree murder, and our question is whether failing to aid the victim is "part of 'the very essence' of [second degree murder,]" *Bates*, 76 N.C. App. at 678, 334 S.E.2d at 74, or simply makes the crime "more reprehensible," *Reeb*, 331 N.C. at 181, 415 S.E.2d at 374. As previously stated, second degree murder is the unlawful killing of a human being with malice, and North Carolina recognizes three kinds of malice. First is where the defendant exhibits "a positive concept of express hatred, ill-will

or spite." *State v. McBride*, 109 N.C. App. 64, 67-68, 425 S.E.2d 731, 733 (1993). Second is when an act committed by defendant is "inherently dangerous to human life [and] 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." *Id.* The third kind is where the defendant possesses a "condition of mind which prompts a person to take the life of another intentionally [and] without just cause, excuse, or justification." *Id.*

Looking to the three definitions of malice, it is clearly unlikely that a person evincing the first kind, one who hates or has ill-will or spite for the victim, would offer assistance after inflicting a fatal injury. Next, by definition it is impossible that a person could demonstrate the second kind of malice and also render assistance to the victim, for such aid necessarily shows some "regard for human life and social duty." Finally, as to the third kind of malice, we believe it to be inconsistent with human nature that a person would intentionally take the life of another without just cause, excuse, or justification, and then immediately conjure the opposite intent, being to intentionally save that same life. *See State v. Bondurant*, 309 N.C. 674, 694, 309 S.E.2d 170, 182-83 (1983) ("In no other capital case among those in our proportionality pool did the defendant express concern for the victim's life or remorse for his action by attempting to secure immediate medical attention for the deceased."). Accordingly, we agree with defendant that not helping to save a victim is within the essence of malice, and therefore is inherent in this malice crime of second degree murder. *Cf. State v. Lewis*, 2000 Tenn. Crim. App. LEXIS 253 (failure to render aid to victim tends to show premeditation); *Stephenson v. State*, 205 Ind. 141, 179 N.E. 633 (1932) (failure to render aid included among facts supporting murder conviction).

Furthermore, we cannot say the act of leaving without providing aid to a victim makes murder "more reprehensible," *compare Reeb*, 331 N.C. at 181, 415 S.E.2d at 374, for murder is a violent crime involving the endangerment, not the preservation, of life. *See State v. Higson*, 310 N.C. 418, 424, 312 S.E.2d 437, 441 (1984) ("Inherent in most crimes is an unprovoked, uninvited and unwarranted attack on an unprepared, innocent victim[;] [s]uch is the very essence of violent crime[.]"); *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983) (the focus for aggravating a crime under the FSA is whether the facts of the case disclose "excessive" wickedness "not normally present in that offense").

We therefore hold the trial court's finding as an aggravating factor that defendant left without rendering aid and showed no mercy violates the proscription against aggravating a sentence with evidence "used to prove an essential element" of the crime, namely malice. *Cf. State v. McKinney*, 88 N.C. App. 659, 663, 364 S.E.2d 743, 746 (1988) (although strictly speaking "the use of a deadly weapon is not an essential element of voluntary manslaughter . . . our Supreme Court gave a broader meaning to the term 'element of the offense[.]' "); *State v. Evangelista*, 319 N.C. 152, 165, 353 S.E.2d 375, 384 (1987) (conviction of involuntary manslaughter required finding that defendant was armed with and discharged a firearm, which in effect became an element of the offense, and the same evidence could not be considered as an aggravating factor for sentencing); *State v. Swann*, 115 N.C. App. 92, 97, 443 S.E.2d 740, 743 (1994) (evidence that defendant took a deadly weapon to victim's neighborhood was so closely connected to the evidence implying malice, it was error to consider the use of the pistol again in sentencing); *Blackwelder*, 309 N.C. at 417, 306 S.E.2d at 788 (when evidence of use of deadly weapon is deemed necessary to prove malice, trial court is precluded from using it as aggravating factor at sentencing). We do not reach the questions of whether the trial court's finding was based upon the failure to perform a statutory mitigating factor or was reasonably related to the purposes of sentencing.

"When the trial judge errs in finding an aggravating factor and imposes a sentence in excess of the presumptive term, the case must be remanded for a new sentencing hearing." *State v. Wilson*, 338 N.C. 244, 259, 449 S.E.2d 391, 400 (1994). Resentencing is mandatory even if a single factor in aggravation is improperly applied. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983). We therefore remand this case for resentencing by the trial court.

Remanded for resentencing.

Judges GREENE and EDMUNDS concur.

GEORGE C. YANCEY, ADMINISTRATOR FOR THE ESTATE OF LUCY W. YANCEY, PLAINTIFF v. ARTIE SYLVESTER LEA AND HUSS, INCORPORATED, DEFENDANTS

No. COA99-533

(Filed 18 July 2000)

1. Motor Vehicles— collision with passing truck—gross negligence

The trial court did not err by refusing to instruct the jury on the issue of defendant Lea's gross negligence in an accident which occurred when Lea's tractor trailer collided with decedent's automobile as defendant attempted to pass decedent while decedent was making a left turn. The evidence tended to show that decedent had slowed her vehicle and activated her left turn signal prior to the collision, Lea conceded being aware that decedent was slowing, and Lea testified that he did not see decedent's turn signal or brake lights. Although negligence on the part of Lea was essentially undisputed, there was no evidence that he was either intoxicated or traveling at an excessive speed, nor was there substantial evidence of other conduct that lies somewhere between ordinary negligence and intentional conduct. Moreover, North Carolina courts have never held that singular acts of simple negligence, considered cumulatively or in combination, may comprise wilful and wanton negligence.

2. Negligence— comparative—not adopted in North Carolina

The trial court did not err by failing to instruct the jury on the doctrine of comparative negligence; neither the North Carolina Supreme Court nor the General Assembly has adopted comparative negligence as the law of the state.

Judge HUNTER dissenting.

Appeal by plaintiff from judgment entered 7 December 1998 by Judge W. Osmond Smith, III, in Granville County Superior Court. Heard in the Court of Appeals 27 January 2000.

Glenn, Mills & Fisher, P.A., by William S. Mills, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio, for defendant-appellees.

JOHN, Judge.

Plaintiff George C. Yancey, administrator of the estate of Lucy W. Yancey (decedent), appeals judgment entered upon a jury verdict finding defendant Artie Sylvester Lea (Lea) negligent and decedent contributorily negligent in the automobile collision which caused decedent's death. Plaintiff asserts the trial court erred by failing to instruct the jury as to the alleged gross negligence of Lea and on the doctrine of comparative negligence. We conclude the trial court did not err.

Relevant background information includes the following: Decedent was killed in a collision between her automobile and a tractor-trailer truck operated by Lea and owned by defendant Huss, Incorporated. At approximately 9:00 p.m. on 6 September 1996, decedent and Lea were proceeding in a northerly direction on Highway 15 in Granville County, decedent's vehicle preceding that of Lea. As decedent turned left from the northbound lane into her sister's driveway, Lea was attempting to pass on decedent's left and collided with her automobile in the southbound lane.

Evidence at trial further indicated Highway 15 at the point of the accident is a two-lane, straight highway with unobstructed visibility for a substantial distance in either direction, and that Lea attempted to pass decedent in a valid passing zone. Decedent's grandson, Bobby Elliott (Elliott), a passenger in her automobile, testified that the turn signals on his grandmother's vehicle made a loud noise when activated and that he specifically remembered decedent had activated her left turn signal just prior to the collision. Elliott also stated to the investigating officer that Lea failed to sound his horn prior to passing decedent's automobile. Two other non-passenger witnesses reported decedent's left turn signal was flashing following the collision.

In his testimony, Lea stated he never saw a turn signal activated on decedent's vehicle. Lea observed decedent slow down and acknowledged he could have stopped behind her vehicle without striking it. However, he attempted to pass and flashed his high beam headlights to signal he was doing so. Lea related he had chosen Highway 15 because it had less traffic and would likely require less travel time in consequence of the recent passage of Hurricane Fran than an alternative route on Interstate Highway 85. Another truck driver testified that as he was traveling in his 1965 Chevrolet pickup at 50 to 53 miles per hour in a 55 mile per hour zone on Highway 15

approximately one mile before the collision site, Lea passed him traveling at a speed of 55 to 65 miles per hour.

Plaintiff subsequently filed the instant wrongful death action, alleging Lea's negligence proximately caused decedent's death. Defendants answered denying negligence on the part of Lea and asserting decedent's contributory negligence in bar of plaintiff's claim. At trial, the jury found Lea negligent and decedent contributorily negligent and judgment was entered in favor of defendants. Plaintiff timely appeals.

[1] Plaintiff first asserts the trial court erred by refusing to instruct the jury on the issue of Lea's gross negligence as a proximate cause of decedent's death. At the outset, we note plaintiff's complaint failed to include an allegation of gross negligence. Ordinarily, when a claim of negligence can be drawn from the evidence but has not been pled, it may not be considered by the jury, as there must be both allegation and proof. *Poultry Co. v. Equipment Co.*, 247 N.C. 570, 572, 101 S.E.2d 458, 460 (1958). However, the trial transcript reveals that plaintiff moved at the charge conference to amend the pleadings to conform to the evidence of Lea's gross negligence. *See* N.C.G.S. § 1A-1, Rule 15(b) (1999) (Rule 15(b)).

> The effect of Rule 15(b) "is to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case, *i.e.*, where he had a fair opportunity to defend his case."

Shore v. Farmer, 133 N.C. App. 350, 354, 515 S.E.2d 495, 498 (quoting *Roberts v. Memorial Park*, 281 N.C. 48, 59, 187 S.E.2d 721, 727 (1972)), *rev'd on other grounds*, 351 N.C. 166, 522 S.E.2d 73 (1999). While the trial court granted plaintiff's motion, it nonetheless denied his request to submit to the jury the issue of Lea's gross negligence.

"The issue of gross negligence should be submitted to the jury if there is substantial evidence of the defendant's wanton and/or wilful conduct." *Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 670, 486 S.E.2d 472, 474 (1997), *rev'd on other grounds*, 348 N.C. 67, 497 S.E.2d 283 (1998).

> Wilful or wanton conduct in the context of the contributory negligence issue has sometimes been referred to as gross negligence, but the use of that term cannot be read to describe conduct less

> negligent than that suggested by the phrase "wilful or wanton conduct." Indeed it is only where the term "gross negligence" is defined to "refer to misconduct which is . . . described as wilful, wanton or reckless . . . [that] the contributory negligence of the plaintiff is not a bar to recovery for an injury caused by such conduct on the part of the defendant."

Id. at 669-70, 486 S.E.2d at 473 (citations omitted) (footnote omitted).

The requisite wilful conduct " 'involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another.' " *Bailey v. R.R.*, 149 N.C. 123, 127, 62 S.E. 912, 914 (1908) (quoting *Thompson on Negligence* § 20 (2d ed.)). Such conduct is distinguishable from a wilful and deliberate purpose to inflict injury, which is an intentional tort. *Siders v. Gibbs*, 39 N.C. App. 183, 187, 249 S.E.2d 858, 860 (1978). Wilful and/or wanton conduct "encompasses conduct which lies somewhere between ordinary negligence and intentional conduct." *Id.* at 186, 249 S.E.2d at 860. "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929).

The evidence viewed in the light most favorable to plaintiff, *see Cockrell v. Transport Co.*, 295 N.C. 444, 449, 245 S.E.2d 497, 500 (1978), tends to show decedent had slowed her vehicle and activated the left turn signal thereon prior to the collision. Lea conceded having been aware decedent was slowing down, but testified he did not see decedent's turn signal in flashing mode. According to Lea, he observed decedent's vehicle while attempting to pass it until the two vehicles were "nose-to-nose," and although decedent's vehicle was reducing its speed, at no time did he see either brake lights or a turn signal.

Under previous decisions of our courts, we conclude the foregoing fails to comprise "substantial evidence," *Cissell*, 126 N.C. App. at 670, 486 S.E.2d at 474, that Lea's conduct, while constituting negligence, was either "deliberate," *Bailey*, 149 N.C. at 127, 62 S.E. at 914, or "reckless[ly] indifferen[t]," *Foster*, 197 N.C. at 91, 148 S.E. at 37-38; *accord Enyeart v. Borgeson*, 374 P.2d 543, 545 (Wash. 1962) (if defendant did not observe plaintiff's left turn signal, attempting to pass turning vehicle "admits to negligence only and not wilful misconduct"); 57A Am. Jur. 2d *Negligence* § 272 (1989) (to constitute wilful and wanton conduct, "the defendant must have been aware of th[e] situation and ignored it").

Indeed, the appellate courts of this State have determined an instruction on wilful and wanton conduct to be proper only in situations where the defendant's underlying negligence was coupled with a clear indication of reckless indifference to the rights of others. For example, in *Boyd v. L.G. DeWitt Trucking Co.*, 103 N.C. App. 396, 405 S.E.2d 914, *disc. review denied*, 330 N.C. 193, 412 S.E.2d 53 (1991), submission of the issue was approved where the negligence of a truck driver whose vehicle struck the rear of a stalled automobile in his lane of travel was compounded by evidence tending to show he

> was intoxicated at the time of the accident, . . . was traveling in excess of the posted speed limit, . . . and . . . no attempt was made to avoid the accident prior to its occurrence.

Id. at 402, 405 S.E.2d at 918; *see also Berrier v. Thrift*, 107 N.C. App. 356, 360, 420 S.E.2d 206, 208 (1992), *disc. review denied*, 333 N.C. 254, 424 S.E.2d 918 (1993) (instruction warranted where defendant, who lost control of vehicle in curve, had blood alcohol content of 0.184 two hours following the accident and had made "deliberate decision" to drive despite being aware of consequences of driving while impaired). Similarly, evidence tending to show the defendant was driving at an excessive rate of speed, *see Baker v. Mauldin*, 82 N.C. App. 404, 408, 346 S.E.2d 240, 242 (1986) (100 miles per hour), or was engaged in a "speed competition" with another vehicle, *see Lewis v. Brunston*, 78 N.C. App. 678, 685, 338 S.E.2d 595, 600 (1986) (75 miles per hour in 45 mile-per-hour zone), may suffice to take the issue of wilful and wanton conduct to a jury.

By contrast, our courts have determined facts tending to show a defendant's failure to drive in the right lane of an interstate highway while cognizant of the potential of running out of fuel, combined with failing to remove her stopped automobile out of the left travel lane after running out of gas and her failure to warn other motorists of the stopped automobile, did not justify an instruction on wilful and wanton conduct. *Dixon v. Weaver*, 41 N.C. App. 524, 527, 255 S.E.2d 322, 324 (1979). Further, a defendant's failure to warn oncoming traffic of a truck and trailer parked in the right travel lane on a wide, straight highway on a sunny morning likewise did not constitute wilful and wanton conduct. *Cissell v. Glover Landscape Supply, Inc.*, 348 N.C. 67, 497 S.E.2d 283 (1998) (adopting dissenting opinion of John, J., *Cissell*, 126 N.C. App. at 671-72, 486 S.E.2d at 474-75).

While cognizant of the points raised by the dissent in the case *sub judice*, we believe the circumstances herein fall into the category of

cases, such as *Dixon* and *Cissell*, in which an instruction on wilful and wanton conduct was not warranted. Although negligence on the part of Lea was essentially undisputed, there was no evidence he was either intoxicated or traveling at an excessive speed. Further, in our view, neither plaintiff nor the dissent has identified "substantial evidence," *Cissell*, 126 N.C. App. at 670, 486 S.E.2d at 474, of other conduct on the part of Lea that "lies somewhere between ordinary negligence and intentional conduct," *Siders*, 39 N.C. App. at 186, 249 S.E.2d at 860. In light of the precedent cited above, therefore, we hold the trial court properly denied plaintiff's request to submit to the jury the issue of Lea's wilful and wanton negligence.

Notwithstanding, the dissent asserts the combination of several factors operated to constitute substantial evidence of wilful and wanton negligence: the weight of defendant's truck, his choice to travel a secondary road, as well as evidence he may have exceeded the speed limit, failed to sound his horn, and was in a hurry to get home. However, our courts have never held that singular acts of simple negligence, considered cumulatively or in combination, may comprise wilful and wanton negligence and we decline to so hold herein.

[2] Finally, plaintiff raises the question of the trial court's failure to instruct the jury on the doctrine of comparative negligence. As this Court has previously observed:

> The common law doctrine of contributory negligence has been the law in this State since *Morrison v. Cornelius*, 63 N.C. 346 (1869) . . . . Although forty-six states have abandoned the doctrine of contributory negligence in favor of comparative negligence, contributory negligence continues to be the law of this State until our Supreme Court overrules it or the General Assembly adopts comparative negligence.

Jones v. Rochelle, 125 N.C. App. 82, 89, 479 S.E.2d 231, 235 (citation omitted), *disc. review denied*, 346 N.C. 178, 486 S.E.2d 205 (1997). At the present time, neither the North Carolina Supreme Court nor the North Carolina General Assembly has adopted comparative negligence as the law of this state. Further, as conceded by plaintiff in his appellate brief, this Court lacks authority to do so in the absence of action by one of those bodies. Accordingly, whatever may be the private views of the individual members of this panel, plaintiff's second assignment of error is unavailing.

No error.

Judge McGEE concurs.

Judge HUNTER dissents in separate opinion.

Judge HUNTER dissenting.

I respectfully dissent on the first issue in the majority opinion, as I believe there was substantial evidence warranting a jury instruction on gross negligence.

Beyond the facts recounted in the majority opinion, the evidence in the case *sub judice* shows that Lea was driving an 80,000 pound truck when he struck the decedent's 1989 Buick. The highway patrolman who investigated at the scene reported that when he arrived, he observed no skid marks from Lea's vehicle before the point of collision. Decedent's vehicle was pushed 170 feet before it came to a stop. The patrolman also stated that there were no driveways to the right at the collision point that decedent could have been turning into as she slowed down prior to the accident. Lea testified that he had been driving since 9:00 p.m. the night before the accident for a total of fifteen and a half hours driving time within a twenty-four hour period. At the time of the collision, he had been driving continuously for five and a half hours, covering a distance of 467 miles. Lea admitted he had taken Highway 15 because it had less traffic and he thought it would be quicker than an alternative route on Interstate Highway 85. He also admitted he observed decedent's vehicle slow down and could have stopped without striking it.

Willful and/or wanton conduct "encompasses conduct which lies somewhere between ordinary negligence and intentional conduct." *Siders v. Gibbs*, 39 N.C. App. 183, 186, 249 S.E.2d 858, 860 (1978). " 'An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. . . .' " *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971) (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929)). Therefore, willful and wanton conduct is neither always intentional, nor always done with wicked purpose, but always is indicative of careless and reckless disregard for the rights of others.

I have reviewed several cases where the courts of this state have addressed what actions constitute gross negligence, and none of them are similar to the factual circumstances in the present case. In

Boyd v. L. G. DeWitt Trucking Co., 103 N.C. App. 396, 405 S.E.2d 914, *disc. review denied*, 330 N.C. 193, 412 S.E.2d 53 (1991), this Court held that there was sufficient evidence to support the jury's findings that a truck driver had been recklessly indifferent to the rights of others when plaintiff's evidence tended to show that the driver at issue was intoxicated, was speeding while carrying a fully-loaded rig and an unauthorized female passenger, and made no attempt to avoid the accident prior to its occurrence. In another case, this Court held that the issue of gross negligence should have been submitted to the jury when the defendant (1) had been driving a vehicle and his blood alcohol content was 0.184, (2) had approximately ten beers within several hours before the accident but did not tell his passengers, and (3) defendant was aware that his driving after drinking alcohol was a risk because it impaired his reaction time. *Berrier v. Thrift*, 107 N.C. App. 356, 420 S.E.2d 206 (1992), *disc. review denied*, 333 N.C. 254, 424 S.E.2d 918 (1993). Also, when there is some evidence that defendant was not driving as though intoxicated, but there is also evidence that immediately prior to the accident he was driving 100 miles per hour, the issue of defendant's gross negligence should be left to the jury. *Baker v. Mauldin*, 82 N.C. App. 404, 346 S.E.2d 240 (1986). The facts in the foregoing cases are not identical to the facts in the present case; however, the cases where our courts have held that a gross negligence instruction was not proper are also dissimilar to the present case.

This Court held that the jury should not be charged on gross negligence of a defendant when he failed to drive in the right lane of an interstate highway while knowing of the possibility of running out of gas, failed to push a stopped automobile out of the left lane after running out of gas, and failed to warn other motorists of the stopped automobile. *Dixon v. Weaver*, 41 N.C. App. 524, 255 S.E.2d 322 (1979). In *Cissell v. Glover Landscape Supply, Inc.*, 348 N.C. 67, 497 S.E.2d 283 (1998), our Supreme Court agreed with Judge John's dissent in *Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 486 S.E.2d 472 (1997), that willful and wanton conduct is not constituted by a driver who did not warn oncoming traffic, on a sunny morning, that he left his eight-foot wide truck and trailer on the right-hand paved portion of a thirty-six foot wide, straight and level highway, which had no obstructions to hinder approaching motorists' view. Contrary to the cases where gross negligence was evident, the drivers in these cases did not drive at high speeds, nor while their faculties were impaired—they simply failed to push their stopped vehicles off the roadway and then warn oncoming drivers.

If a party argues that an opponent's acts or omissions constitute a particular claim for relief,

> the trial court must submit the issue with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim . . . .

Cockrell v. Transport Co., 295 N.C. 444, 449, 245 S.E.2d 497, 500 (1978). "If the facts are such that *reasonable men could differ* upon whether the negligence amounted to willful and wanton conduct, the question is generally *preserved for the jury to resolve.*" *Siders*, 39 N.C. App. at 186, 249 S.E.2d at 860 (emphasis added). Viewing the evidence in the present case *in the light most favorable to plaintiff*, it indicates that Lea was speeding in a forty-five mile per hour speed limit zone while driving a loaded eighteen-wheel truck and trailer rig weighing 80,000 pounds, on a dark night, on a two-lane rural highway which was not familiar to him. He did not notice the lead car's left turn signal, and attempted to pass it without blowing his horn, as required by statute. Driving an 80,000 pound load, Lea would have been aware that any collision between his vehicle and a much smaller vehicle would be very dangerous. Lea admitted he was in a hurry to get home, and the evidence supports an inference that Lea's hurried attitude and demanding driving schedule had detrimental impact on his driving ability. Logic would demand that a driver in a hurry take an interstate highway, which is meant for higher speeds of travel and has more traffic access lanes. Defendant, either consciously or unconsciously, failed to see decedent's signal, disregarded the speed limit, and failed to keep a proper lookout as to decedent's turning vehicle. Our Supreme Court has stated that it is the duty of a driver to

> keep a proper lookout ahead in the direction he [is] travelling, to watch out for signals from the driver of any vehicle ahead to turn, stop or start, to give due regard to them, and in the exercise of ordinary care be prepared to avoid danger in case of any movement of the vehicle ahead which is properly signaled. The driver of the automobile behind in failing to observe plain turning or stopping signals given by the motorist ahead may be guilty of contributory negligence in the event of a collision and injury to himself.

Weavil v. Trading Post, 245 N.C. 106, 113, 95 S.E.2d 533, 539 (1956) (citations omitted). In that case, the Court also stated:

> [W]here the driver of the stopped [vehicle] has given no clear signal of his intention to make a left turn, but the [vehicle] standing on the right of the highway merely has on the left rear and left fender a red light flashing on and off, it would seem that the driver of an automobile approaching at night from the rear, in the exercise of ordinary care, is bound to approach with his automobile under control, so as to reduce his speed or stop, if necessary, to avoid injury.

Id. at 114, 95 S.E.2d at 540. The evidence indicates that Lea disregarded his duty, in the exercise of ordinary care, to approach the decedent's vehicle under control by reducing his speed or stopping in order to avoid injury. All of the these factors, *in toto*, support an inference that Lea's conduct was at least as careless, reckless, and dangerous as a driver who travels at an extremely high rate of speed. See *Baker v. Mauldin*, 82 N.C. App. 404, 346 S.E.2d 240.

It is not our duty to review whether or not the evidence is sufficient to prove that Lea was grossly negligent. We must only review it to determine if there is sufficient evidence such that reasonable men could differ as to whether or not Lea was grossly negligent on the night in question. I believe reasonable men could differ on this issue. Accordingly, I believe that the alleged gross negligence of Lea should have been submitted to the jury, and thus would remand to the trial court for a new trial.

KENNETH WAYNE HARTER AND JOHN ROBERT PAYNE, PLAINTIFFS v. C. D. VERNON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF ROCKINGHAM COUNTY; AND U.S. FIDELITY AND GUARANTY COMPANY, DEFENDANTS

No. COA99-992

(Filed 18 July 2000)

1. Statute of Limitations— federal claim dismissed—supplemental state claims

The trial court did not err in an action arising from a Sheriff firing employees after an election by granting summary judgment for defendants based upon the failure to timely file in state court where there was no dispute that the statute of limitations began to run when plaintiffs were terminated on 15 July 1994 and that the statute of limitations would have ordinarily expired on 15 July

1997; the action was originally filed in federal court; the state claims were dismissed without prejudice; plaintiffs appealed that dismissal, that appeal was subsequently dismissed pursuant to the parties' stipulated voluntary dismissal; and plaintiffs filed in state court on 20 March 1998. Plaintiffs' dismissal did not fall under N.C.G.S. § 1A-1, Rule 41(a), so that there is no state law available tolling the limitations period, and the limitations period was tolled for only 30 days from federal dismissal under 28 U.S.C.A. § 1367(d) because the federal court gained jurisdiction supplementally and not under diversity.

2. Statute of Limitations— summary judgment—statute of limitations defense—not specified in motion

A statute of limitations defense was properly before the court, even though not specified in the motion for summary judgment, because defendants had pled the affirmative defense in their answer. No other notice was necessary. The argument that defendants waived the defense by failing to allege it in their motion is clearly incorrect under *Miller v. Talton*, 112 N.C. App 484.

3. Civil Procedure— summary judgment—grounds other than that specified in judgment

Defendants could argue a statute of limitations defense in support of a summary judgment even though the court granted the motion "for the reasons stated in defendants' brief" and the statute of limitations was not mentioned in that brief. The court may consider pleadings on a motion for summary judgment and defendants had included the statute of limitations in their answer. Moreover, a correct summary judgment will not be disturbed on appeal even though the trial court may not have assigned the correct reason for the judgment.

Appeal by plaintiffs from orders entered 30 March 1999 by Judge Jerry Cash Martin in Rockingham County Superior Court. Heard in the Court of Appeals 6 June 2000.

Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by James R. Morgan, Jr., for defendant-appellees.

Moore & Van Allen, PLLC, by Jonathan D. Sasser; J. Michael McGuinness and Deborah K. Ross, for The North Carolina

Police Benevolent Association, The Southern States Police Benevolent Association and The American Civil Liberties Union of North Carolina Legal Foundation, amici curiae.

Hafer, McNamara, Caldwell, Cutler & Curtner, P.A., by Edmond W. Caldwell, Jr. and David P. Ferrell, for the North Carolina Sheriffs' Association, amicus curiae.

HUNTER, Judge.

Plaintiff-appellants Kenneth Wayne Harter and John Robert Payne (collectively "plaintiffs") appeal the trial court's grant of defendant-appellees' C. D. Vernon and U.S. Fidelity and Guaranty Company (collectively "defendants") motion for summary judgment under N.C.R. Civ. P. 56. Although the trial court delineated its grant of that motion only by stating that "the motion should be granted for the reasons stated in defendants' brief," we agree with defendants that plaintiffs failed to timely file their action in state court, and thus the statute of limitations has run on plaintiffs' claims. Therefore, we hold that summary judgment for defendants was proper.

Due to our disposition of this case, we need relate very little of the factual history. Plaintiffs Harter and Payne worked as a dispatcher and a patrol deputy (respectively) for the Rockingham County Sheriff's Department under defendant Sheriff C. D. Vernon ("Sheriff Vernon"). In 1994 Sheriff Vernon was up for re-election in the democratic primary campaign and was (himself and through other employees) actively soliciting and recruiting support throughout the sheriff's department. Several members of the sheriff's department, including plaintiffs, did not actively participate in any campaign nor outwardly exhibit which candidate they were supporting. Nonetheless, Sheriff Vernon won the election and immediately thereafter, began an investigation of employees who "had not been loyal to him." On 15 July 1994, two months after the primary election, Sheriff Vernon fired seven of his employees including plaintiffs. Other officers within the department made statements that Sheriff "Vernon was firing the people on 'the list.' " Although both plaintiffs had recent performance appraisals, neither appraisals gave notice that either plaintiff was performing unsatisfactorily or was in danger of losing his job.

As to the procedural history, we take it directly from plaintiffs' brief to this Court. Originally, plaintiffs filed suit in federal district court on 31 January 1995 asserting claims under 42 U.S.C. § 1983 for

violation of their federal First Amendment and Due Process rights, wrongful discharge in violation of public policy, and violation of the North Carolina Constitution. On 22 March 1996, the United States District Court denied defendants' motion for summary judgment concluding that genuine issues of material fact existed regarding Sheriff Vernon's motive for firing plaintiffs and rejecting defendants' Eleventh Amendment immunity defense. In *Harter v. Vernon*, 953 F. Supp. 685 (M.D.N.C. 1996), defendants made an interlocutory appeal of the Eleventh Amendment decision; however, the United States Fourth Circuit Court of Appeals affirmed. Nevertheless, on remand the United States District Court concluded that the intervening Fourth Circuit decision in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1996), *cert. denied*, 522 U.S. 1090, 139 L. Ed. 2d 869 (1998) required dismissal of plaintiffs' 42 U.S.C. § 1983 claims. *See Harter v. Vernon*, 980 F. Supp. 162, 165 (M.D.N.C. 1997). The federal court declined to retain the supplemental jurisdiction it had obtained over plaintiffs' state constitutional and wrongful discharge claims. Thus on 5 November 1997, the court dismissed plaintiffs' state claims without prejudice. Plaintiffs initially appealed to the Fourth Circuit Court the federal court's involuntary dismissal of their state claims. However, on 23 February 1998, the parties stipulated to a dismissal of that appeal and the Fourth Circuit dismissed pursuant to the parties' stipulation on 24 February 1998. Consequently on 20 July 1998, plaintiffs filed this action in state court alleging that they had been wrongfully discharged by defendants and that defendants had violated their right to freedom of speech and to participate freely in the political process under the Constitution of North Carolina.

In their answer, defendants alleged eight affirmative defenses, including the statute of limitations. On 11 March 1999, defendants filed a motion for summary judgment in which they did *not* specifically state the statute of limitations as grounds. However, on 6 April 1999, the trial court allowed defendant's motion "for the reasons stated in defendants' brief." Plaintiffs now appeal to this Court the trial court's grant of summary judgment to the defendants for several reasons. However, because we agree with defendants that plaintiffs' state action was untimely filed, we do not reach plaintiffs' arguments.

Recently this Court visited this very issue that is now before us: whether, after plaintiffs have filed their action in federal court and had their state claims dismissed without prejudice, plaintiffs can then file their actions in state court after the statute of limitations has run

on the original claim. In the alternative, the question becomes does the federal action toll the statute of limitations or do plaintiffs automatically gain the advantage of N.C.R. Civ. P. 41(a) which allows plaintiffs one year from their voluntary dismissal in which to file.

[1] We begin by noting that although plaintiffs argue they took a voluntary dismissal in federal court (thus N.C.R. Civ. P. 41(a) should apply giving plaintiffs one year to refile in state court), plaintiffs unambiguously admit that the federal district court "dismissed the[] [state claims] without prejudice" first. Such a dismissal, if under North Carolina law, would be an *involuntary dismissal* pursuant to N.C.R. Civ. P. 41(b) instead of 41(a), this Court having held that:

> "[I]f the [federal] court specifies that the dismissal of an action . . . is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal." [Thus,] [i]f plaintiff was to take advantage of the savings provision, *it was his responsibility to convince the federal courts to include* in the order or opinion a statement specifying *that plaintiff had an additional year to refile*. . . .

Clark v. Velsicol Chemical Corp., 110 N.C. App. 803, 809, 431 S.E.2d 227, 230 (1993) (emphasis added) (quoting N.C.R. Civ. P. 41(b)). Thus, under the present circumstances and pursuant to well established case law, plaintiffs would not be entitled to the additional year to refile provided in N.C. Gen. Stat. § 41(a) since the order did not so specify. Nevertheless, we choose to address plaintiffs' argument from the standpoint that they, in fact, did take a voluntary dismissal of their state claims in federal court.

The plaintiff in *Huang v. Ziko*, 132 N.C. App. 358, 511 S.E.2d 305 (1999), like the present plaintiff, initially filed his complaint in federal court and then attempted to file in state court after the federal court dismissed his action without prejudice. In his attempt to convince this Court that the trial court had erred in dismissing his action, that plaintiff argued:

> [O]nce the federal action was no longer pending, the time for filing his complaint in state court should have been extended for the portion of the three-year limitations period that had not been used when he filed the federal action. Since less than a year and a half had passed when plaintiff filed his federal action, he would

have had more than a year and a half after 7 December 1995 to file his complaint in state court.

Id. at 361, 511 S.E.2d at 307-08. However, this Court found the plaintiff's contention unpersuasive, opining:

> The rule which plaintiff would have this Court adopt is contrary to the policy in favor of prompt prosecution of legal claims. Furthermore, such a rule is contrary to the general rule that "[i]n the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him[.]" 51 Am. Jur. 2d *Limitation of Actions* § 311 (1970). In this case, no statute or rule provides for the exclusion of the time during which the federal action was pending from the limitations period.
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> We believe the question presented by this appeal is controlled by 28 U.S.C.A. § 1367 (1993). That federal statute provides that *when a federal district court has* original jurisdiction over a civil action it may also exercise "pendent" or "*supplemental jurisdiction* over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy[.]" 28 U.S.C.A. § 1367(a). A federal district court may decline to exercise *supplemental jurisdiction* over a claim if it "has dismissed all claims over which it has original jurisdiction[.]" 28 U.S.C.A. § 1367(c)(3). The statute further provides that *the period of limitations for any supplemental claim* "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C.A. § 1367(d). *Since the claims now asserted by plaintiff were supplemental claims* dismissed by the United States District Court, he was entitled to thirty additional days to file his complaint in state court after the United States Court of Appeals reached its decision, unless some state statute provided for a longer period of time.
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> . . .
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> Because North Carolina has no applicable "grace period" longer than the thirty-day period set out in 28 U.S.C.A. § 1367, the statute of limitations was tolled while the federal action was pending and for thirty days thereafter. Plaintiff could have filed

> his complaint in state court at any time during the pendency of the federal action and up to thirty days after the United States Court of Appeals reached its decision . . . .

Id. at 361-62, 511 S.E.2d 308 (emphasis added) (citations omitted).

In the case at bar, there is no dispute that the statute of limitations began to run when plaintiffs were terminated on 15 July 1994 and ordinarily would expire on 15 July 1997. Like the plaintiff in *Huang, supra*, the plaintiffs at bar first filed in federal court on 31 January 1995 (6 months after the limitations period had begun to run), and the federal district court dismissed without prejudice plaintiffs' state claims on 5 November 1997. Plaintiffs appealed to the United States Fourth Circuit Court which later dismissed plaintiffs' appeal on 24 February 1998 pursuant to the parties' stipulated voluntary dismissal. Subsequently on 20 July 1998, plaintiffs filed their state claims action in state court. We find the facts in *Huang* sufficiently analogous and hold that plaintiffs had thirty days from 24 February 1998 to refile their state claims in state court, not one year.

> Under [28 U.S.C. § 1367(d)], the state period of limitations for a plaintiff's pendent state claims is tolled for a period of thirty days after the federal district court has dismissed the plaintiff's claims. . . . If, however, a plaintiff appeals the federal district court's dismissal of his claims, the plaintiff's pendent state claims are tolled for a period of thirty days following the date of the decision of the federal court of appeals.

Estate of Fennell v. Stephenson, 137 N.C. App. 430, 435, 528 S.E.2d 911, 914 (2000).

However, plaintiffs argue that because *Huang, supra*, was decided seven months *after* the instant action was filed in state court, *Huang* cannot be applied retroactively. We recognize that plaintiffs' argument is essentially that *Huang* created an *ex post facto* effect with regard to whether the statute of limitations is tolled by the federal action and how much time a plaintiff, under the present circumstances, has to refile her complaint in state court after the federal court has dismissed it. Plaintiff's argument is meritless.

Under U.S. Const. art. I, § 10, cl. 1, and N.C. Const. art. I, § 16, the law is well established that there are two critical elements which *must* be present for a law to be considered "*ex post facto*": (1) the case law or statute must apply to events occurring before its enactment, and (2) the case law or statute as applied must disadvantage

the offender affected by it. *See State v. Jones*, 133 N.C. App. 448, 516 S.E.2d 405 (1999), and *In Re Hayes*, 111 N.C. App. 384, 432 S.E.2d 862 (1993). Thus, in order for plaintiffs' objection to be sustained, this Court must find that *Huang* was *both* decided after plaintiffs' firing *and* that applying *Huang* to plaintiffs' case will disadvantage them.

First, we agree with plaintiffs that *Huang* was decided *after* plaintiffs filed their action. However, we find it unnecessary to rely solely on *Huang* since earlier cases bring us to the same conclusion. The key to whether a plaintiff in the present situation gains the additional year provided under N.C.R. Civ. P. 41(a) is governed by *how* the federal court gained jurisdiction over the state issues.

> Ordinarily, a voluntary dismissal in federal court under *Federal Rule 41* "leaves the situation as if the action had never been filed." Wright & Miller, *Federal Practice and Procedure*: Civil § 2367 (1971). "*The statute of limitations is not tolled* by bringing an action that is later voluntarily dismissed." *Id.* Federal courts ordinarily need not consider the applicability of a savings provision, as the federal rule contains no such provision. *This applies to cases in federal court in which jurisdiction is not based on diversity of citizenship* and in which there is no occasion for the federal court to apply state substantive law.
>
> For example, in *Humphreys v. United States*, 272 F.2d 411 (9th Cir. 1959), a plaintiff sued the United States government under the Federal Tort Claims Act. Plaintiff's first suit in federal court was brought within the statute of limitations, but plaintiff voluntarily dismissed in order to sue in another federal court more convenient to the parties and witnesses. Plaintiff refiled in the other federal court outside the statute. The court upheld the denial of plaintiff's motion to set aside the order of dismissal and reinstate her first suit. It noted that the statute had expired when the motion was made because plaintiff's dismissal under the federal rules did not toll the statute and left "the situation the same as if the suit had never been brought in the first place." *Id.* at 412. Similar treatment of federal voluntary dismissals in *nondiversity cases* is seen in patent claims—*see A.B. Dick Co. v. Marr*, 197 F.2d 498 (2d Cir. 1952), *cert. denied*, 344 U.S. 878, 97 L. Ed. 680, *reh'g denied*, 344 U.S. 905, 97 L. Ed. 699 (1952)—***and cases involving § 1983 claims*** *[with state claims attached], see Cabrera v. Municipality of Bayamon*, 622 F.2d 4 (1st Cir. 1980).

> *Thus, a voluntary dismissal* under the Federal Rules *in a non-diversity case in federal court does not toll the statute of limitations or invoke a savings provision.*

Bockweg v. Anderson, 328 N.C. 436, 438-39, 402 S.E.2d 627, 628-29 (1991) (emphasis added). Furthermore,

> In *Haislip v. Riggs*, 534 F. Supp. 95 (W.D.N.C. 1981), plaintiff *filed in federal court a medical malpractice claim* [a state claim] *which was voluntarily dismissed, by stipulation of the parties, without prejudice.* Plaintiff sought to file the same action in a North Carolina state court within a year of the dismissal, but outside the statute of limitations, and suffered summary judgment on statute of limitations grounds because *High v. Broadnax* precluded application of the savings provision where the original suit was brought in a federal court . . . . Plaintiff then sought to refile his suit in federal court, whereupon defendant again moved to dismiss. The court in *Haislip* stated:
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> "This Court is of the opinion North Carolina Rule 41(a) is a tolling provision legislatively adopted and falls within the first category of the analysis [requiring application of state substantive law]. . . . The tolling of a state statute of limitations *in a diversity case* is strictly a substantive matter of state law which *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945) command that this Court follow absent substantial countervailing federal interests. *Id.* . . ."
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> [*Haislip*, 435 F. Supp.] at 98 (emphasis added) (citation omitted). . . .
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> . . .
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> *The effect of a voluntary dismissal in federal court, pursuant to the Federal Rules, thus depends on whether the federal court's jurisdiction is based on the existence of a federal question or on diversity of citizenship.* . . . [T]he effect of a voluntary dismissal taken under the Federal Rules by a plaintiff in a federal court sitting in diversity applying North Carolina law is to allow the plaintiff up to one year to refile in federal court.

Id. at 440-41, 402 S.E.2d at 630 (emphasis added). Therefore, it is apparent that where the federal court gains jurisdiction over state issues strictly because the action is a *diversity action* (which is *not*

the case here), the federal court must apply state substantive law *in all respects* of the case, including in its dismissal of the claims with or without prejudice. However where, as in the case at bar, the federal court gains jurisdiction over state claims *supplementally*, pursuant to 28 U.S.C.A. § 1367(a), because the action was first brought based on federal or constitutional law, the court is not bound to state substantive law only. Thus because, in the case before us, the federal court gained *supplemental* jurisdiction over plaintiffs' state law claims *not* due to diversity, 28 U.S.C.A. § 1367(d) applies and the limitations period for plaintiffs' *supplemental claims* was tolled for 30 days after the action was dismissed because "a voluntary dismissal under the Federal Rules in a nondiversity case in federal court does not toll the statute of limitations or invoke a savings provision." *Bockweg*, 328 N.C. at 439, 402 S.E.2d at 629. "The United States Code provides that when a state claim is brought in federal district court pursuant to 28 U.S.C. § 1367(a), the state period of limitations for the claim 'shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.' " *Fennell*, 137 N.C. App. at 435, 538 S.E.2d at 914 (quoting 28 U.S.C. § 1367(d) (1994)). In the case at bar, with plaintiffs' dismissal not falling under N.C.R. Civ. P. 41(a), there is no state law available to them that tolls the limitations period.

[2] Plaintiffs further contend that "[d]efendants' statute of limitations defense is not properly before the court" because defendants did not "specify in its motion an intent to argue the statue of limitations . . . ." Again, we are unpersuaded. Although plaintiffs cite *Miller v. Talton*, 112 N.C. App. 484, 435 S.E.2d 793 (1993) in support of their position, we find it inapposite to their position and, in fact, find it dispositive in defendants' favor.

In *Miller*, the plaintiffs argued that because the defendants failed to formally amend their answer to affirmatively plead the statute of limitations, defendants' failure constituted a waiver of that defense. *Id.* at 487, 435 S.E.2d at 796. Finding that plaintiffs had either expressly or impliedly consented to defendants' raising the defense, this Court stated:

> The affirmative defense relied upon *should be* referred to in the motion for summary judgment; *however, in the absence of an expressed reference, if the affirmative defense was clearly before the trial court, the failure to expressly mention the defense in the motion will not bar the trial court from granting*

> *the motion on that ground.* This is especially true where the party opposing the motion has not been surprised and has had full opportunity to argue and present evidence. "Thus, although it is better practice to require a formal amendment to the pleadings, unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment." *Ridings v. Ridings*, 55 N.C. App. 630, 632, 286 S.E.2d 614, 615-16, *disc. review denied*, 305 N.C. 586, 292 S.E.2d 571 (1982).

Id. at 487, 435 S.E.2d at 796-97 (citations omitted).

In the case at bar, we find it disingenuous for plaintiffs to argue that they did not have proper notice of defendants' intent to plead the statute of limitations as a defense. From the very beginning, defendants pled the affirmative defense in their answer. Thus no other notice was necessary. Additionally, plaintiffs' argument that because defendants failed to allege the defense in their motion for summary judgment they waived the defense is clearly incorrect under *Miller*, *supra*.

[3] Finally, plaintiffs argue that because the trial court granted defendants' summary judgment motion " 'for the reasons stated in defendants' brief,' " defendants cannot now argue the statute of limitations defense because it could not have been the basis upon which the trial court granted summary judgment since it was not mentioned in defendants' brief to that court. Again, we are unpersuaded by plaintiffs' argument.

It has long been the law in North Carolina that in granting or denying a motion for summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56, the trial court may consider "the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits . . ." which are before the court. *Johnson v. Insurance Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). Therefore, it was proper in this case for the trial court to consider defendants' answer (which included their affirmative defense of the statute of limitations) in granting their motion for summary judgment. Furthermore, our Supreme Court has long established that:

> If the granting of summary judgment can be sustained on *any* grounds, it should be affirmed on appeal. *If the correct result has been reached, the judgment will not be disturbed even though the trial court may* ***not*** *have assigned the correct reason for the judgment entered. . . .*

Shore v. Brown, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (emphasis added).

Therefore, the judgment of the trial court is

Affirmed.

Judges GREENE and HORTON concur.

STATE OF NORTH CAROLINA v. GLENN EDWARD PIKE

No. COA99-675

(Filed 18 July 2000)

Search and Seizure— motor vessel—reasonable articulable suspicion

The trial court erred by finding that the stop of defendant's motor vessel violated the Fourth Amendment, requiring the evidence obtained from that stop to be suppressed and the charges of operating a motor vessel while impaired in violation of N.C.G.S. § 75A-10(b1)(2) to be dismissed, because a Wildlife Resource Commission officer could stop the motor vessel pursuant to N.C.G.S. § 75A-17(a) in order to conduct a safety inspection on the waters of North Carolina without having any reasonable articulable suspicion of criminal activity to justify the stop based on the facts that: (1) it is necessary to stop vessels in order to do safety checks to insure compliance with statutory safety regulations; (2) defendant did not contend he lived on his boat in order to raise his expectation of privacy, nor did the officers ever board defendant's boat; (3) evidence of defendant's intoxication obtained by the officers was within plain view; and (4) the government's interest in maintaining water safety on its lakes and rivers substantially outweighed defendant's expectation of privacy in his boat.

Appeal by the State from an order and memorandum of decision entered 23 October 1998 by Judge Sanford L. Steelman, Jr. in Stanly County Superior Court. Heard in the Court of Appeals 17 April 2000.

Attorney General Michael F. Easley, by Assistant Attorney General C. Norman Young, Jr., for the State.

Tucker, Slaughter & Singletary, P.A., by Robert L. Slaughter, for defendant-appellee.

HUNTER, Judge.

This case presents a question of first impression for North Carolina, that is, whether a Wildlife Resources Commission officer may stop to conduct a safety inspection of a motor vessel on the waters of North Carolina without having any reasonable, articulable suspicion of criminal activity to justify the stop. Although we refuse to expand the ruling in this case to other factual situations, we hold that under these circumstances the stop was reasonable and therefore did not violate defendant's Fourth Amendment rights. Therefore, we reverse and remand.

The facts in this case are undisputed. On 23 May 1998, North Carolina Wildlife Resources Commission Officer James Pope ("Officer Pope") and Sergeant Howell were patrolling Badin Lake in Stanly County. Officer Pope testified that he and Sergeant Howell were checking every vessel within that vicinity on that night. At about 11:45 p.m., the two men observed a pontoon boat in the area, being operated by Glenn Edward Pike ("defendant"). Neither officer observed any illegal activity at the time of the stop, nor did they observe any activity which would violate any rules or regulations of the Wildlife Resources Commission. Nevertheless, as they neared the pontoon vessel, Officer Pope activated a blue strobe light—signaling the pontoon operator to stop, which defendant did immediately. Officer Pope then switched on a "bright white light, which is a take down light which illuminates the whole interior of a vessel." The purpose of activating the "take down light" is so the officer can see anything, everything and everybody on the vessel. The officers announced their presence, informed defendant that they were going to conduct a safety check of the vessel, and then did so. The officers never boarded the vessel. However, after the safety inspection, defendant was arrested and charged with the criminal offense of operating a motor vessel while impaired (OWI) in violation of N.C. Gen. Stat. § 75A-10(b1)(2).

At trial, defendant entered a plea of not guilty, was tried and found guilty. Upon giving notice of appeal to the superior court, defendant "filed a written Motion to Suppress seeking to suppress

evidence of the stop of his pontoon boat and attached thereto his Affidavit dated the same date." Following the 16 September 1998 hearing on defendant's motion, the trial court concluded that the stop of defendant's vessel was not based upon any reasonable suspicion of illegal activity and thus, violated defendant's Fourth Amendment right to freedom from unreasonable search and seizure. Therefore, the trial court suppressed the evidence of the stop which resulted in the dismissal of the charges against defendant. The State appeals.

The State brings forward only one question for this Court's review: whether the trial court committed prejudicial error by finding that the stop of defendant's vessel violated the Fourth Amendment to the United States Constitution, thus requiring the evidence obtained from that stop to be suppressed and the charges against defendant dismissed.

It is well established that the Fourth Amendment to the Constitution of the United States provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

U.S. Const. amendment IV. Our courts therefore, have ruled that "[w]hether a [stop,] search or seizure is reasonable is to be determined on the facts of each individual case." *State v. Boone*, 293 N.C. 702, 709, 239 S.E.2d 459, 463 (1977). Furthermore, although not specifically listed in the Amendment, the United States Supreme Court has held that there can be some expectancy of privacy with regard to motor vehicles and vessels; however, "under the overarching principle of 'reasonableness' embodied in the Fourth Amendment, . . . the important factual differences between vessels *located in waters offering ready access to the open sea* and automobiles on principal thoroughfares . . . are sufficient to require a different result . . . ." *United States v. Villamonte-Marquez*, 462 U.S. 579, 588, 77 L. Ed. 2d 22, 31 (1983) (emphasis added). Nevertheless, whether the facts involve the stop of a vessel or that of a motor vehicle, to be allowable under the Fourth Amendment the stop must be reasonable, and reasonableness is a matter of balance. *See Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660 (1979). "Though slightly dif-

ferent tests have been applied, all suspicionless [stop,] search and seizure cases balance governmental interest against individual intrusion in some fashion." *Schenekl v. State*, 996 S.W.2d 305, 309, n.3 (Tex. Ct. App. 1999).

> [T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field." *Camara v. Municipal Court*, 387 U.S.[] at 532, 18 L. Ed. 2d 930, 87 S. Ct. 1727. . . .

Prouse, 440 U.S. at 654-55, 59 L. Ed. 2d 667-68 (footnotes omitted).

The State's interest in the case at bar is the same as articulated in *Klutz v. Beam*, 374 F. Supp. 1129 (W.D.N.C. 1973), to ensure boating and waterway safety for all North Carolinians. Likewise, the State relies on the Boating Safety Act, N.C. Gen. Stat. § 75A *et seq.*, to grant it the authority exercised by Officer Pope and Sergeant Howell. The pertinent section reads:

> Every wildlife protector and every other law-enforcement officer of this State and its subdivisions shall have the authority to enforce the provisions of this Chapter and in the exercise thereof *shall have authority to stop any vessel subject to this Chapter; and*, after having identified himself in his official capacity, *shall have authority to board and inspect any vessel* subject to this Chapter.

N.C. Gen. Stat. § 75A-17(a) (1999) (emphasis added). Furthermore,

> (a) Inspectors and protectors are granted the powers of peace officers anywhere in this State, and beyond its boundaries to the extent provided by law, in enforcing all matters within their respective subject-matter jurisdiction . . . .
>
> . . .

(c) The jurisdiction of protectors extends to all matters within the jurisdiction of the Wildlife Resources Commission, *whether set out in this Chapter, Chapter 75A,* Chapter 143, Chapter 143B, or elsewhere. *The Wildlife Resources Commission is specifically granted jurisdiction over all aspects of*:

(1) *Boating and water safety*;

. . .

(d)(1) *In addition* to law enforcement authority granted elsewhere, a protector has the authority to enforce criminal laws under the following circumstances:

(1) When the protector *has probable cause to believe that a person committed a criminal offense* in his presence and at the time of the violation the protector is engaged in the enforcement of laws otherwise within his jurisdiction . . . .

N.C. Gen. Stat. § 113-136(a), (c), (d)(1) (1999) (emphasis added).

By reason of the foregoing statutory authority, it is undisputed that Officer Pope and Sergeant Howell, *at some point*, would have had the authority to inspect vessels on Badin Lake, where defendant was boating. Furthermore, our statute clearly *requires no articulable suspicion or probable cause to stop a vessel for a safety check.* N.C. Gen. Stat. § 75A-17(a). However, because it is also undisputed that the wildlife officers had no articulable suspicion or probable cause, we must then determine what "other safeguards are [to be] relied upon to assure that the [defendant's] reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' " *Prouse*, 440 U.S. at 655, 59 L. Ed. 2d at 668 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 532, 18 L. Ed. 2d 930, 937 (1967)). Since this case is one of first impression for North Carolina, we look to other jurisdictions for guidance.

Just recently, the State of Texas dealt with the very issue at hand. We briefly recite the facts. At about midnight, a Texas game warden was patrolling Lake Lewisville in his marked patrol boat when he noticed the defendant's boat pulling out of the marina. Soon thereafter, by authority of Texas' Parks and Wildlife Code, the warden, without reasonable suspicion or probable cause, stopped and boarded defendant's boat for a water safety check. Finding defendant "having trouble answering [the warden's] questions, . . . fumbling with

his fingers, and . . . smell[ing] of alcohol," the warden "performed a horizontal gaze nystagmus test on [defendant] and detected positive indications of intoxication." *Schenekl v. State*, 996 S.W.2d at 308. Consequently, the warden arrested defendant for boating while intoxicated. *Id.*

At trial, defendant filed a motion to suppress the evidence of intoxication resulting from the stop, arguing that his Fourth Amendment right to be free from unreasonable search and seizure had been violated. The trial court denied the motion. Upholding the trial court's denial of defendant's motion to suppress, the Texas Court of Appeals opined that:

> The Fourth Amendment does not prohibit all searches and seizures, only those that are deemed unreasonable. . . . However, under certain limited circumstances, searches and seizures conducted without individualized suspicion may be reasonable under the Fourth Amendment. . . .

Id. at 309 (citations omitted).

> [Furthermore,] [i]n weighing the level of intrusion, we consider the individual's expectation of privacy, the length and scope of the detention, the alternative means available in light of the statute's contribution to the state interest, and the discretion given law enforcement officials.

Id. at 310. The Court's analysis began with whether defendant had any expectation of privacy in his boat, granted by the Fourth Amendment. The Court decided that defendant, having a possessory interest and being legitimately in the boat, having control of the boat and having the right to exclude all others, "had an expectation of privacy in his boat. . . . [However, in comparison to a home] it is a diminished one." *Id. See Carroll v. United States*, 267 U.S. 132, 69 L. Ed. 543 (1924) (Fourth Amendment must recognize the difference between a search of a store, house or other structure and a search of a ship, motor boat, wagon, or automobile); *United States v. Albers*, 136 F.3d 670, 673 (9th Cir. 1998) (government's traditional power to board a vessel is far greater than its power to enter a motor-home or car); *United States v. Cadena*, 588 F.2d 100, 101 (5th Cir. 1979) (there is a greater expectation of privacy aboard a vessel [when] "[t]he ship is the sailor's home"); also recognized in *Klutz v. Beam*, 374 F. Supp. 1129.

> The scope and length of the detention here were not intrusive. The enforcement provision authorizes detention only for the

> purpose of ensuring compliance with the registration and safety requirements. The intrusion is minimal in scope because the search may only be directed at the safety items listed in the statute. Further, while the boat must carry several safety and registration items, only a brief visual inspection is necessary to determine compliance. . . .

Schenekl, 996 S.W.2d at 310 (citation omitted).

The Court then compared the alternative mechanisms available to the State in enforcing its safety statutes to those mechanisms available in *Prouse*, and found that policemen engaged in highway or roadway safety enforcement have many more options to stopping a motor vehicle than do boat patrolmen. For example, in checking safety registration items,

> [s]ome of the required safety equipment [of a boat] is not capable of outward observation. For example, life jackets and fire extinguishers may be secreted and are also readily detachable. It may well be impossible to observe from a distance that a boater is not carrying the proper number of life jackets or a fire extinguisher. Additionally, though required numbering on the boat is evidence of proper registration, there is no safety inspection on which registration is contingent. Thus, unlike license plates [and inspection tags] on a car, the numbers on a boat do not indicate compliance with safety requirements.
>
> Further, fixed checkpoints [available to highway patrolmen] are not a viable alternative. As the Supreme Court noted in *Villamonte-Marquez*, "vessels can move in any direction at any time and need not follow established 'avenues' as automobiles must do." 462 U.S. at 589, 103 S. Ct. at 2580. Boats are thus not susceptible to fixed checkpoints on the water. Also, because safety items such as life jackets and fire extinguishers are readily detachable, a checkpoint at a dock or boat ramp would be ineffective in determining whether a boater complied with safety requirements *while actually on the water*. [Thus,] [t]here appear to be no other means as effective as the seizures authorized by the Act [the state's statutes].

Id. at 311 (emphasis added). The Texas court went on to consider the issue of whether there were sufficient safeguards in place to ensure that defendant's expectation of privacy was not " 'subject [solely] to the discretion of the official in the field.' " *Prouse*, 440 U.S. at 655, 59

L. Ed. 2d at 668 (quoting *Camara v. Municipal Court*, 387 U.S. at 532, 18 L. Ed. 2d at 937).

> Finally, we consider the discretion given law enforcement. The Act's enforcement provision applies to "all vessels on public water," and a stop may be made at any time. Tex. Parks & Wild. Code Ann. § 31.004 (Vernon Supp. 1999). Under the statute, there are no restrictions on a law enforcement officer's discretion. This unfettered discretion conflicts with the Supreme Court's repeated insistence, when construing the Fourth Amendment, that "the discretion of the official in the field be circumscribed, at least to some extent." *See Prouse*, 440 U.S. at 661, 99 S. Ct. at 1400 (and cases cited therein). Thus, the level of intrusion, otherwise minimal, is heightened by the lack of restraint on a law enforcement officer's discretion.
>
> This does not, however, render the intrusion unreasonable under the Fourth Amendment. Although the level of intrusion is escalated by the lack of restraint on the discretion of individual law enforcement officials, it does not rise to an unreasonable level. The reduced expectation of privacy in a boat, the brevity of the encounter, and the lack of alternative means render the level of intrusion reasonable under the circumstances.
>
> Balancing the State's substantial interest in recreational water safety against the intrusion involved, the enforcement provision of the Act does not authorize searches and seizures that violate the Fourth Amendment. . . .

Schenekl, 996 S.W.2d at 311.

Although *Schenekl* is not mandatory authority upon this Court, we find that Court's reasoning there extremely persuasive. We first agree that it is impractical as well as perhaps, impossible to check that a vessel is complying with statutory safety regulations if the State is unable to verify that the requirements are being met *while the vessel is at sea*. Thus, we find it necessary that vessels be stopped in order to do safety checks (for fire extinguishers, life jackets and the like). In comparing *Schenekl* to the facts of the case at bar, the officers here never boarded defendant's vessel to inspect it. Thus, their interference with defendant's right to privacy was even less intrusive than in *Schenekl*. The question then becomes whether, in conducting their inspection of defendant's vessel, the officers impermissibly detained defendant. We think not.

Our Supreme Court has held that the

> "capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. . . ." *Mancusi v. DeForte*, 392 U.S. 364, 20 L. Ed. 2d 1154, 88 S. Ct. 2120 (1968). Thus, what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection, but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967).

State v. Boone, 293 N.C. at 708, 239 S.E.2d at 463. As owner and operator of the vessel, defendant had to have been aware of the safety regulations which mandatorily are to be followed; and defendant knew or should have known that with regulations also come inspections. Furthermore, defendant does not contend that he lived on his boat or that the officers exceeded their scope of authority by intruding into the boat's private bedrooms as did the officers in *Klutz*, 374 F. Supp. 1129. (In fact the officers never even boarded the present defendant's boat.) Therefore, although defendant had some expectation of privacy, we hold that "it [was] a diminished one," *Schenekl*, 996 S.W.2d at 310, noting that evidence of defendant's intoxication was obtained by the officers because it was "in plain view," as it were, the defendant having "knowingly expose[d] [it] to the public." *Boone*, 293 N.C. at 708, 239 S.E.2d at 463.

Furthermore we, like the *Schenekl* Court, recognize that boats do not display the same safety stickers and licenses as do motor vehicles, neither are all the regulated safety requirements readily able to be seen by an officer while the boat is moving. Additionally, we note that Badin Lake is *not* a manmade lake, landlocked from any other source of water; but in fact, Badin Lake sits on the Yadkin River which runs through more than four counties of this state. Thus, it cannot be said as in *Prouse* that "[q]uestioning of all oncoming traffic at roadblock-type stops is [a] possible alternative." *Prouse*, 440 U.S. at 663, 59 L. Ed. 2d at 674. We conclude the officers' interference of defendant's movement was minimal and their detention of him, necessary.

We hold then, that pursuant to N.C. Gen. Stat. § 75A-17(a), the officers' stopping defendant without probable cause—for the pur-

pose of inspecting defendant's vessel—was reasonable. We note that defendant's vessel passed its inspection. However, it was defendant himself who did not pass inspection—and the officers needed not even board defendant's vessel to know this. Therefore, we further hold that once the officers stopped defendant for inspection purposes, they had the right to arrest him pursuant to N.C. Gen. Stat. § 113-136, having (at that time) reasonable cause to believe defendant was operating the vessel while impaired. Again, we find the "plain view" doctrine applicable.

> In *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, *reh'g denied*, 404 U.S. 874, 30 L. Ed. 2d 120 (1971) the U.S. Supreme Court held that the police may seize without a warrant the instrumentalities or evidence of a crime which is within "plain view" if three requirements are met. First, the initial intrusion which leads to the plain view discovery of the evidence must be lawful. Additionally, the discovery of the evidence must be inadvertent. Third, it must be immediately apparent upon discovery that the items constitute evidence of a crime. *Id. See also State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986). . . .

State v. Sapatch, 108 N.C. App. 321, 325, 423 S.E.2d 510, 513 (1992).

We take great pains, however, to note that facts different from this case may have resulted in a different outcome. However, under these facts, having found that the government's interest in maintaining, for its citizens, water safety on its lakes and rivers substantially outweighed this defendant's expectation of privacy in his boat, the trial court's order suppressing evidence of the stop and dismissing the charges against defendant is hereby reversed. Thus this case is

Reversed and remanded for trial.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. ROBERT ANTHONY MOSS

No. COA99-680

(Filed 18 July 2000)

1. Evidence— expert—opinion—extent of injuries—inconsistency with medical history

The trial court did not err in a second-degree murder case by allowing an expert witness to testify that he felt the severity and the extent of the minor child's injuries were not consistent with the history obtained from the medic and from defendant-father, because: (1) the expert was in a better position to form an opinion about the child's injuries than the jury; (2) the expert did not testify as to what in fact caused the injuries, nor did he express an opinion about the culpability of defendant; and (3) the expert did not improperly discuss defendant's character.

2. Evidence— expert—extent of injuries—time and causation

The trial court did not err in a second-degree murder case by allowing an expert witness to testify that from a single fall of 18 inches it is virtually impossible to produce the extent of injuries the minor victim had, because: (1) the statements were not used as character evidence to impeach defendant's credibility; and (2) the testimony was used to explain how external bruising may reveal both the time and cause of injury, which was probative of the ultimate issue in the case.

3. Homicide— second-degree murder—requested instruction—accident

The trial court did not err in a second-degree murder case by denying defendant's request for a jury instruction on the defense of an accident, because defendant failed to show how he was prejudiced by the refusal to submit the requested instruction that the minor victim sustained injuries when he fell from a bed possibly after being shoved by the family's dog, based on the facts that: (1) the jury was instructed on second-degree murder and involuntary manslaughter, and chose to convict defendant of second-degree murder; and (2) the conviction for an intentional killing as opposed to an involuntary killing precludes the possibility that the same jury would have accepted defendant's claim that the victim accidentally fell from the bed even if it had been given the requested instruction.

STATE v. MOSS

[139 N.C. App. 106 (2000)]

Appeal by defendant from judgment entered 14 January 1999 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 April 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Francis J. Di Pasquantonio, for the State.

Goodman, Carr, Nixon, Laughrun & Levine, P.A., by George V. Laughrun, II, for defendant.

McGEE, Judge.

Defendant Robert Anthony Moss was convicted on 14 January 1999 of second degree murder of his infant son. Defendant was sentenced to 130 to 165 months' imprisonment. The evidence at trial tended to show that Robert Anthony Moss, Jr. was born on 22 August 1997 to defendant and Pamela Moss (Pamela), who nicknamed him "T.J." (T.J.). On the night of 9 December 1997, defendant dialed 911 to obtain emergency assistance for T.J. Defendant reported on the telephone that T.J. had been injured in a fall. Defendant next telephoned Pamela, who was working at a Harris Teeter grocery store that night, to inform her that T.J. "fell and [was] crying."

June Stillwell (Stillwell), an emergency medical technician and a captain in the Charlotte Fire Department who first arrived at defendant's apartment, testified T.J. was "very, very pale" or "very, very ashen" and was making a "humming or a moaning or a whimpering noise" that signaled "some serious problems with the child." Stillwell said T.J. was not responsive and his eyes were very tightly closed. When his eyes were forced open, Stillwell said T.J.'s eyes were "looking up to the left" and "rolled back into his head."

Stillwell testified that when she asked defendant what happened to T.J., defendant responded that he believed T.J. had fallen from a bed but that he did not see T.J. fall. When the ambulance arrived, the paramedics transported T.J. to the hospital immediately and defendant rode in the passenger seat "with tears on his face." Defendant watched the paramedics treat T.J. through a glass window behind his seat in the ambulance, and at the hospital defendant was allowed to hold T.J., whose noises had ceased and whose color had improved. Stillwell told defendant that T.J. seemed "comfortable" and "content" in the arms of defendant, but defendant said that was unusual because T.J. never relaxed with him, only with Pamela.

Cynthia Willis-Mecimore (Willis-Mecimore), an emergency medical technician who was in the ambulance that arrived at defendant's residence soon after the fire department officers, testified that when she saw T.J. his "eyes [were] deviated and fixed back, which is very unusual." She also stated that T.J. was "making a very low . . . humming sound," and had a "small red spot" on his forehead, but was breathing normally. T.J. did not respond when Willis-Mecimore touched his hands and legs, but rather trembled slightly in "seizure like activity." His hands were "very tight, almost claw like," and when Willis-Mecimore asked defendant what had happened, he told her T.J. "fell from a bed." When Willis-Mecimore looked at the bed, she saw three pillows placed around the edge acting as a "wall" to keep T.J. from rolling off the side, and a carpeted floor approximately two feet beneath. Willis-Mecimore stated to defendant at the hospital that T.J.'s beginning to cry was "a good thing," to which defendant replied that "[T.J.] cries a lot when he's with me and I'm not able to make him stop."

Valencia Kay Rivera (Rivera), an investigator with the Family Services Bureau of the Charlotte Police Department, interviewed defendant in a hospital waiting room. Defendant told her he fed T.J. between 8:00 and 8:30 p.m. and laid him down in a crib at about 9:30 p.m. T.J. was crying, so defendant lifted him and placed him onto his bed in the bedroom. Defendant said he positioned three pillows around T.J. to keep him from falling off the bed, one at the end and one at each side of T.J.'s body. He then went to sleep next to T.J., woke up during the night from T.J.'s crying, and found T.J. was lying face-up on the floor with his head against the night stand and a pillow on top of him. Defendant surmised that "the dog must have jumped up on the bed and pushed the baby off." Defendant said the dog was a 120-pound mixed breed. Rivera testified that defendant was "very nervous" during the interview. Later Rivera inspected defendant's bedroom, with consent from defendant and Pamela. Rivera said the bedroom had "typical apartment carpeting" and, commenting on the height of the bed, said it "came to [the middle of her] knees," or about eighteen inches high. She stated that the dog did not appear to be aggressive and that it weighed approximately sixty pounds. The following day the dog was weighed and determined to be fifty-six pounds. Rivera had another conversation with defendant at approximately 8:00 a.m. in the pediatric ward of the hospital, while T.J. was in surgery. Defendant stated that he "didn't want to talk anymore." About one hour later, Rivera received a telephone call informing her that T.J. had died in surgery.

Three doctors testified for the State at trial. Dr. Steven Robert Munson (Dr. Munson), an emergency physician at the hospital, first treated T.J. Dr. Munson found that T.J. had a small bruise on his forehead and swelling on the back of the head where it joined the neck. He sedated T.J. to minimize his movement and ordered a "CT scan" that revealed multiple skull fractures, a shift of the midline of the brain indicating increased pressure on the brain, and a subdural hematoma which is a collection of blood between the skull and brain from ruptured veins associated with trauma. Dr. Munson determined that T.J.'s "level of consciousness was decreased far more than [he] thought it should be" and T.J.'s left eye was not functioning properly. In an effort to decrease T.J.'s internal cranial pressure, Dr. Munson moved him to the intensive care unit under chemical paralysis. T.J. was breathing through a plastic tube inserted into his trachea and was receiving medication through an intravenous line inserted into his chest cavity. Dr. Munson testified that the injuries to T.J., being so severe, were not consistent with the history provided to Dr. Munson, and thus he notified the police department for an investigation.

Dr. Craig Andrew Vanderveer (Dr. Vanderveer), a board certified neurological surgeon and chief of neurosurgery at the hospital who performed the emergency surgery on T.J., testified that approximately forty percent of his case load involved cerebrovascular surgery, and twenty percent trauma surgery. Upon review of the CT scan results, Dr. Vanderveer found that T.J.'s brain "was largely disrupted" by more than trivial trauma. The brain had both "old" and "fresh" blood clotted onto it, which evidenced "two violent traumas," and Dr. Vanderveer "wiggled out a big pancake of clot." Dr. Vanderveer said that normally that would mark the successful end of the procedure, but in this case T.J.'s brain suddenly began to erupt out of the hole they had cut in his skull, causing death. Dr. Vanderveer said an "extremely violent" or "tremendous" angular force was applied to T.J., such as a "very large punch" or "swinging" his body against something solid. He testified that not even falling down a flight of stairs could have caused the injury. Moreover, the bleeding was "virtually circumferential all the way around the head," which demonstrates multiple points of impact as opposed to just one impact from a fall.

Dr. Michael Sullivan (Dr. Sullivan), a forensic pathologist and medical examiner for Mecklenburg County who performed an autopsy of T.J., testified that by studying fractures and hematomas in T.J., he identified a "[m]inimum of three" blows to the head, the least

serious one to the forehead and the more serious ones to the left and right sides. When asked about the claim that T.J. fell from a bed, Dr. Sullivan stated that the injuries T.J. sustained "are not consistent with that history." He felt that the injuries were from "blows to the head" that had occurred "in the short time frame prior to when 911 was called, at which time the child became symptomatic." Dr. Sullivan clarified that "short time frame" meant "minutes" or "less than an hour."

Defendant testified at trial that T.J. fell from the bed and that he did not inflict injuries on his son. He stated that he did not push, hit or slap his son, or hit him with a blunt object, or "hit him on the bed." He also presented testimony from his wife, who said "I know that [defendant] did not do this." Dr. Fred Culpepper, T.J.'s pediatrician, testified that "there were no bruises found" on T.J. during any of his five office visits. Other witnesses testified as to defendant's reputation for truthfulness.

Defendant was convicted of second degree murder on 14 January 1999. Upon finding that an aggravating factor that the victim was very young outweighed mitigating factors that defendant has been a person of good character, supported his family, had support in the community and was gainfully employed, the trial court sentenced defendant to 130 to 165 months' imprisonment. Defendant appeals.

Defendant argues the trial court erred in: (1) allowing Drs. Munson and Sullivan to testify as to their opinion of the cause of T.J.'s injuries, (2) allowing Dr. Vanderveer's testimony as to how the injuries "may have occurred," and (3) failing to instruct the jury on the defense of accident.

[1] Defendant offers several arguments why Dr. Munson should not have been allowed, over defendant's objection, to testify he "felt the severity and the extent of the injuries were not consistent with the history that [he] obtained from the medic and from the Defendant." Defendant contends that such testimony violated the criteria for allowing expert medical testimony, which are enumerated in *State v. Brown*, 300 N.C. 731, 268 S.E.2d 201 (1980):

> (1) the witness because of his expertise is in a better position to have an opinion on the subject than the trier of fact,
>
> (2) the witness testifies only that an event *could* or *might* have caused an injury but does not testify to the conclusion that

> the event did in fact cause the injury, unless his expertise leads him to an unmistakable conclusion and
>
> (3) the witness does not express an opinion as to the defendant's guilt or innocence.

Brown, 300 N.C. at 733, 268 S.E.2d at 203. According to defendant, the first criterion is not satisfied; it is not clear which of the other two he also rejects. Regardless, we believe all three conditions are satisfied such that the trial court did not err in allowing Dr. Munson's testimony as to his observation that T.J.'s injuries did not match the history with which he was provided. Dr. Munson taught emergency medicine in the United States Navy for four years after his medical training, became board certified in 1987 and re-certified in 1997, and has had specific training in the recognition, treatment and stabilization of head trauma. As for the three criteria in *Brown*, Dr. Munson was in a better position to form an opinion about T.J.'s injuries than the jury, did not testify as to what in fact caused the injuries, and did not express an opinion about the culpability of defendant.

Defendant also construes Dr. Munson's opinion as a presentation of evidence by the State to show bad character on the part of defendant. In his brief, defendant argues

> [t]he jury was basically presented with a scenario that the Appellant gave a version of the events and the expert Dr. Munson was allowed, over objection, to testify that in his opinion the injuries could not have been inflicted in that manner. Thus, the bottom line was the expert commented and gave expert testimony on the Appellant's credibility. . . . The general proposition is that the State is prohibited from offering testimony as to an accused's character in a criminal trial unless it is relevant for some purpose other than showing character.

We are aware that "[w]here a defendant has neither testified as a witness nor introduced evidence of his good character, the State may not present evidence of his bad character for any purpose." *State v. Sanders*, 295 N.C. 361, 373, 245 S.E.2d 674, 683 (1978), *cert. denied*, 454 U.S. 973, 70 L. Ed. 2d 392 (1981); N.C. Gen. Stat. § 8C-1, Rule 404(a) (1999) (evidence of a person's character is not admissible to prove he acted in conformity therewith on a particular occasion). However, Dr. Munson did not discuss the character of defendant, and thus Rule 404(a) has no application. Using Dr. Munson as an expert witness, the State merely presented its own theory of the case, which

invariably undermines most or all proponents of the defense theory, and vice versa.

[2] As for Dr. Vanderveer, defendant specifically opposes the inclusion of testimony, over defendant's objection at trial, that "from a single fall of 18 inches, it is virtually impossible to produce a picture like this." Defendant also argues against the inclusion of Dr. Vanderveer's statement that "in the far reaches of probability, it's possible that a fall of 18 inches could produce a portion of perhaps one of these" injuries. Defendant's argument against admitting this testimony "reiterate[s] the argument made with regard to Dr. Munson's testimony."

First, defendant argues that Dr. Vanderveer made these statements to attack the credibility of defendant when the issue of his credibility had not been presented to the jury, and second, defendant admits Dr. Vanderveer "is a schooled expert in neurological surgery procedures" but contends that "his opinion did absolutely nothing to assist the factfinder in deciding the ultimate issue[.]" Dr. Vanderveer saw T.J.'s internal injuries during surgery and, being an expert, he offered important information which would assist a jury. The statements by Dr. Vanderveer were properly admitted, and they are not character evidence used to impeach the credibility of defendant, as we discussed in rejecting defendant's same argument against the admission of specified statements by Dr. Munson.

Defendant also challenges other testimony by Dr. Vanderveer, namely that an impact with a soft surface such as a mattress might not leave external bruising, on the ground that its probative value was substantially outweighed by the danger of unfair prejudice. Defendant then argues the statements were altogether irrelevant. We reject both contentions. This testimony explained how external bruising may reveal both the time and cause of injury, and thus was highly probative as to the ultimate issue in the case. The trial court properly admitted such testimony.

Defendant also raises the same arguments as they relate to the testimony by Dr. Sullivan that his findings of injury were not consistent with T.J.'s reported history. These arguments fail for the same reasons stated above.

[3] In his last argument defendant argues the trial court erred in refusing to grant his request for a jury instruction on the defense of accident. "Pursuant to N.C.G.S. 1A-1, Rule 51 (1990), the trial court is

'required to instruct a jury on the law arising from the evidence presented[.]' " *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 527 S.E.2d 712 (2000) (quoting *Lusk v. Case*, 94 N.C. App. 215, 216, 379 S.E.2d 651, 652 (1989)). "The defense of accident 'is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another.' " *State v. Turner*, 330 N.C. 249, 262, 410 S.E.2d 847, 854 (1991) (quoting *State v. Lytton*, 319 N.C. 422, 425-26, 355 S.E.2d 485, 487 (1987)); *see also State v. Faust*, 254 N.C. 101, 112, 118 S.E.2d 769, 776, *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961) (a killing will be excused as an accident when it is unintentional and when the perpetrator, in doing the homicidal act, did so without wrongful purpose or criminal negligence while engaged in a lawful enterprise). Where the defendant was not engaged in lawful conduct when the killing occurred, the evidence does not raise the defense of accident. *Faust*, 254 N.C. at 113, 118 S.E.2d at 776-77.

Here defendant presented evidence that T.J. sustained the injuries for which he was hospitalized on 9 December 1997 when he fell from a bed, possibly after being shoved by their dog. Defendant argues he simply placed T.J. onto a bed and then went to sleep next to him, which was not unlawful conduct. Thus, under such circumstances T.J.'s death would be adjudged an accident, and accordingly the defense of accident should have been instructed as an alternative verdict for the jury if it accepted defendant's testimony as true.

However, defendant has failed to show he was prejudiced by the trial court's refusal to submit the requested instruction, and therefore the error was harmless. *See State v. Riddick*, 340 N.C. 338, 343-44, 457 S.E.2d 728, 732 (1995). In *Riddick*, our Supreme Court held the trial court did not err in denying an instruction on accident. However, the *Riddick* Court said even if denying the instruction had been error, it was harmless for the reason that defendant, who was convicted of first degree murder rather than involuntary manslaughter, failed to show prejudice. The Court explained:

> The jury in the present case was instructed that it could not return a verdict finding the defendant guilty of first-degree murder unless it found beyond a reasonable doubt that the defendant specifically intended to kill the victim. In reaching its verdict convicting the defendant of first-degree murder, the jury found that the defendant had the specific intent to kill [the victim] and, necessarily, rejected the possibility that the killing was unintentional. Therefore, the jury verdict finding the defendant guilty of first-

degree murder, and not the unintentional act of involuntary manslaughter, precludes the possibility that the same jury would have accepted the defendant's claim that the shooting was accidental even if it had been given the requested instruction.

Id. at 344, 457 S.E.2d at 732. In the case before us, the jury was instructed on second degree murder as well as involuntary manslaughter. The jury convicted defendant of second degree murder, which required a finding of intent on the part of defendant. The conviction for an intentional killing as opposed to an involuntary killing "precludes the possibility that the same jury would have accepted the defendant's claim that [T.J. accidentally fell from the bed] even if it had been given the requested instruction." *Id.*

We find no prejudicial error by the trial court.

No error.

Judges GREENE and EDMUNDS concur.

IN THE MATTER OF: MICHAEL CHARLES HAYES

No. COA99-537

(Filed 18 July 2000)

1. Mental Illness— criminal defendant found insane—recommitment—definition of mentally ill

In a recommitment hearing for a respondent found not guilty by reason of insanity of multiple counts of murder and assault, the definition of "mentally ill" applied by the trial court was not unconstitutionally vague. N.C.G.S. § 122C-3(21).

2. Mental Illness— criminal defendant found insane—recommitment—personality disorder

In a recommitment proceeding for a respondent who had been found not guilty of multiple murders and assaults by reason of insanity, the trial court did not err by concluding as a matter of law that respondent had failed to meet his burden of proof and again ordering his return to confinement at the Dorothea Dix state mental health facility. Although respondent argued that he can no longer be classified as mentally ill under *Foucha v.*

Louisiana, 504 U.S. 71, that case did not define mental illness and respondent did not challenge N.C.G.S. § 122C-3(21)'s definition of mental illness, which included personality disorders, or the evidentiary basis for the court's finding that he suffers from a personality disorder.

3. Mental Illness— criminal defendant found insane—recommitment—dangerousness to others—age of crimes

In a recommitment proceeding for a respondent who had been found not guilty of multiple murders and assaults by reason of insanity, the trial court did not err by finding respondent dangerous to others under N.C.G.S. § 122C-276.1 and N.C.G.S. § 122C-3(11)b. The probative value of evidence of respondent's "extremely violent homicidal" crimes far outweighed any potential prejudice due to the crimes' age; furthermore, it is clear that the court's findings were also rooted in additional evidence unrelated to respondent's prior crimes.

Respondent appeals from order entered 27 October 1998 by Judge William Z. Wood in Forsyth County Superior Court. Heard in the Court of Appeals 27 March 2000.

In 1988, Respondent-Appellant Hayes was indicted and tried on 4 counts of first degree murder, 5 counts of felonious assault with a deadly weapon and 2 counts of assault on a law officer. Hayes was found not guilty of all charges by reason of insanity in 1989 and was committed to the Dorothea Dix state mental health facility in Raleigh pursuant to G.S. § 122C-261, *et seq.* This case involves Hayes' appeal of a 1998 order, issued after an annual re-commitment hearing pursuant to G.S. § 122C-276.1, continuing Hayes' confinement at Dix for another year in order "to ensure the safety of others and . . . to alleviate or cure [Hayes'] mental illness."

At Hayes' hearing, Drs. Seymour Halleck and James Bellard, both forensic psychiatrists, and Mr. Edwin Mundt, a Dix psychologist, testified that Hayes was not "actively" mentally ill. In support of their diagnosis, Hayes' three experts testified that (1) Hayes exhibited no symptoms of "current, active" psychoses for ten years, or personality disorders for two years, prior to the 1998 re-hearing; (2) Hayes' prior drug and alcohol dependence (which his expert witnesses say was the sole cause of Hayes' psychosis in 1988) had been successfully treated in the uncontrolled setting at Dix, where they testified alcohol and drugs were still obtainable; (3) Hayes was "statistically unlikely"

to relapse into post-release drug and alcohol abuse; (4) Hayes was committed to post-release psychotherapy and attendance at Narcotics Anonymous and Alcoholics Anonymous meetings; and (5) Hayes' progress at Dix was attributable to his natural maturation though aging. In addition, several non-physician staff members at Dix testified as to Hayes' recent good behavior on his ward, normal interaction with other Dix patients, stable work history, and progress in various treatment programs.

Drs. Halleck, Bellard and Mundt discounted evidence of recent hostile behavior by Hayes—the 1997 "the slaw incident"—in which Hayes "got upset and became angry" with his job supervisor over his co-worker's premature disposal of coleslaw from the hospital grill where Hayes is employed. This incident resulted in the revocation of staff's recommendation that Hayes be given increased privileges, including "off-campus" job privileges. Hayes' three experts attributed Hayes' aggressive behavior to his perfectionism and the stress of "being a sane man in a mental hospital," and considered the incident to be an isolated event which was not symptomatic of continuing mental illness.

On cross examination, Drs. Halleck and Bellard stated that Hayes had a psychotic disorder in July of 1988 and for at least three months thereafter. In July 1988, Hayes killed four people and wounded several others. Drs. Bellard and Halleck also testified on cross-examination that through 1996, Hayes suffered from a personality disorder which, prior to July 1988, manifested itself in Hayes' prolonged use of marijuana to "calm himself down" and several instances of cruelty to animals. Dr. Halleck conceded that Hayes' success in controlling his drug and alcohol problems at Dix occurred in an environment where there were at least "some controls" and agreed that North Carolina has no formal means of supervising insanity parolees after their release. Dr. Bellard testified that without post-release treatment to help Hayes adjust to the outside world, Hayes "has a risk of returning to drug abuse because he has a history of it." Mr. Mundt confirmed that early 1990's testing showed that Hayes posed a serious risk of returning to the "biker lifestyle" if released.

Drs. Halleck, Bellard and Mundt testified that while Hayes' violent acts in 1988 were "relevant" to determining his potential for post-release dangerousness, his recent progress was a better predictor of the danger Hayes might pose. While he was unaware of a 1992 report that Hayes had expressed a need to arm himself upon his release for

his own protection, Dr. Bellard believed that Hayes no longer felt that way. Based on Hayes' recent progress, Hayes' experts concluded that he was no longer dangerous.

Dr. Margery Sved, the director of adult psychiatry at Dix since 1989, Dr. Jonathan Weiner, a forensic psychiatry expert appointed to assist the trial court in the Hayes' case, and Dr. Jarrett Barnnhill, Hayes' attending psychiatrist, all testified that Hayes' was still mentally ill and dangerous to others.

When called *by Hayes,* Dr. Barnhill testified that in Dix's "structured setting," Hayes was "highly functional" and currently free of symptoms of psychosis. However, Dr. Barnhill stated that Hayes (1) posed a risk of relapse into drug addiction, which Dr. Barnhill believed to be the sole cause of Hayes' 1988 psychosis, and (2) continued to display some elements of a personality disorder, including perfectionism, a low tolerance for frustration and inadequate impulse control, which left Hayes "vulnerable" to stressors present in the outside world.

Drs. Weiner and Sved, called by the State, diagnosed Hayes with a "long-standing," albeit "markedly diminished," personality disorder with antisocial and narcissistic traits. Dr. Barnhill concurred in this diagnosis. Drs. Weiner and Sved reported a sixty percent likelihood that Hayes would relapse into substance abuse/addiction in an uncontrolled setting. Drs. Weiner and Sved also testified to the existence of additional elements of personality disorder in Hayes, including his "suspicio[ns] of others' motives," "limited" ability to empathize with other people, "perceptions that others will act against him of [sic] in some way out to get him," and a "defensive, irritable and sarcastic" attitude when receiving "therapeutic feedback." Drs. Sved and Weiner also emphasized the continued existence of "stressors" which they believed had in part triggered Hayes' initial psychosis and increased the likelihood of its recurrence. The primary stressor was Hayes' limited physical, emotional and financial ability to care for three children (two of whom were born during Hayes' confinement) and his girlfriend, who also has "psychological difficulties."

Drs. Barnhill, Sved and Weiner stated that Hayes' history of violence was the best indicator of whether Hayes posed a danger to others, and that there was a reasonable probability that Hayes would be a danger to others if released. Dr. Barnhill stated that in light of Hayes' violent history and high risk of relapse into substance abuse in an uncontrolled setting, he "would probably *never* feel comfortable

saying that [Hayes] is over his addiction[s], over his risk of future aggression, no matter how well he's doing now."

After Hayes' two-day hearing, the trial court re-committed Hayes to Dix for another year based on the following findings:

> No. 3. [A]t the time of the killings and of the felonious assaults . . . on July 17 1988, Mr. Hayes suffered from an acute psychotic episode which lasted approximately 4 months in duration from the week before the killings on July 17, 1988, up to and including the time period in which he was being treated and observed at Dorothea Dix Hospital in October 1988; that this psychotic episode evidences a schizophreniform disorder and that this is an Axis I (DSM-IV) mental illness; that although the psychotic phase of this illness has apparently not recurred since his admission . . . in 1989, it is unclear whether this particular mental illness will recur . . . should the respondent be released from his current controlled environment at Dorothea Dix Hospital; that Michael Hayes is currently given a diagnosis of and meets criteria in the Diagnostic and Statistical manual, edition four, of the American Psychiatric Association (DSM-IV) of: Axis I, History of Schizophreniform Disorder; or History of Psychotic Disorder NOS [not otherwise specified, DSM Code 298.90]; Axis I, Cannabis Abuse (abstinent) in a controlled environment; Axis I, Alcohol Dependence (abstinent) in a controlled environment; as described in testimony of expert witnesses at this hearing;
>
> No. 4. That Michael Hayes also presently suffers from . . . an Axis II (DSM-IV) mental illness designated as a Personality Disorder NOS (not otherwise specified) with anti-social and narcissistic traits; and that this Axis II mental illness is currently being treated, has not been cured, and that it is likely to continue in the future;
>
> No. 5. That these . . . mental conditions either existed or are related to the mental conditions that existed at the time of the commitment of the homicides by Michael Hayes in 1988, and were probably causative factors in those homicides, and . . . constitute mental illnesses as defined by G.S. 122C-3(21).
>
> No. 6. That the best predictor of future behavior is past behavior, especially when such behavior was in the relevant past; that the extremely violent homicidal behavior exhibited on July 17th, 1988, by Michael Hayes was conduct within the relevant past

which provides the Court with very important information in assessing Mr. Hayes' probable likelihood for future violent behavior and for present and future dangerousness to others.

No. 7. [T]hat the four homicides and seven felonious assaults committed by Michael Hayes on July 17th, 1988, are episodes of dangerousness to others in the relevant past which in combination with his past and present mental condition, his multiple mental illnesses, and his conduct since July 17, 1988, lead the Court to find there is a reasonable probability that Michael Hayes' seriously violent conduct will be repeated and that he will be dangerous to others in the future . . . . There is a reasonable probability that if Michael Hayes were released today that it is likely that he may relapse into his previous pattern of multi-substance abuse and dependance, and relapse into a situation repeating his exposure to the same ordinary life stressors which were present in 1988 at the time of the killings, and that it is likely that should these kinds of relapses occur that Michael Hayes will run the risk of future violent behavior;

No. 8. The Court specifically finds that Michael Hayes is presently dangerous to others as defined by G.S. 122C-3(11)b . . . .

Hayes appeals.

Attorney General Michael F. Easley, by Assistant Attorney General John G. Barnwell, for the State.

Karl E. Knudsen for respondent-appellant.

EAGLES, Chief Judge.

To be released, Hayes must have shown by a preponderance of the evidence either that he is no longer mentally ill, G.S. § 122C-3(21), or that he is no longer dangerous to others, G.S. § 122C-3(11)b. *See* G.S. § 122C-276.1. We note that we denied Hayes' 1992 request to be released in *In re Hayes*, 111 N.C. App. 384, 432 S.E.2d 862, *appeal dismissed,* 335 N.C. 173, 436 S.E.2d 376 (1993), hereinafter "*Hayes I.*"

[1] In his brief, Hayes argues that the statutory definition of "mentally ill" applied here is unconstitutionally vague. *See* G.S. § 122C-3(21). The record reveals that Hayes did not argue this issue below, and therefore failed to preserve it for argument on appeal. N.C. R. App. P. 10(b)(1); *Peace River Elec. Co-op, Inc. v. Ward Transformer Co., Inc.*, 116 N.C. App. 493, 506-507, 449 S.E.2d 202, 212

(1994), *disc. rev. denied*, 339 N.C. 739, 454 S.E.2d 655 (1995) ("we will not decide at the appellate level a constitutional issue or question which was not raised or considered in the trial court"). Assuming, *arguendo*, that the issue is properly before us, we would overrule this assignment of error under our prior holding that a nearly identical definition of mental illness under the prior statute was not unconstitutionally vague. *In re Salem*, 31 N.C. App. 57, 60-61, 228 S.E.2d 649, 651-52 (1976) (analyzing former G.S. §§ 122-36(d) and 58.1).

[2] Hayes also argues that he can no longer be classified as "mentally ill" under *Foucha v. Louisiana*, 504 U.S. 71, 118 L.Ed.2d 437 (1992), and that the trial court violated his due process rights by (1) concluding as a matter of law that he failed to meet his burden of proof and (2) again ordering his return to confinement at Dix. We disagree.

In *Foucha*, the United States Supreme Court invalidated a Louisiana statute under the due process clause because it permitted the re-commitment of an insanity acquittee, Foucha, to a mental institution on evidence that Foucha was "dangerous to others" and had an "antisocial" personality, but was not insane. Here, Hayes argues that *Foucha* "established . . . [that] a personality disorder alone does not qualify as a mental illness which justifies involuntary confinement." Hayes further argues that because (1) he has recovered, like Foucha, from the schizophreniform mental illness or drug-induced psychosis which led him to commit his crimes and (2) he has abstained from drugs and alcohol for at least six years, he is no longer mentally ill and must be released pursuant to *Foucha*. We disagree.

Foucha is distinguishable because there, the State of Louisiana *conceded* that Foucha's "antisocial" personality did not constitute mental illness under Louisiana state law. *Id.* at 80, 118 L.Ed.2d at 447. The *Foucha* Court therefore never reached the issue of whether "antisocial" behavior or other types of personality disorders are mental illnesses. As noted by the Virginia Supreme Court in a case similar to the one at bar,

> [t]he government in *Foucha* did not argue that Foucha's [Anti Social Personality Disorder, or] APD was a mental illness; rather, it relied on the trial court's finding that the APD made Foucha a danger "to himself or others." *Id.* at 78, 112 S.Ct. 1780. *Thus, the Supreme Court did not decide in Foucha whether APD is a mental illness*, but simply affirmed the principle that a state cannot confine an individual with a mental illness absent a showing by

> clear and convincing evidence "that the individual is mentally ill and dangerous." *Id.* at 80, 112 S.Ct. 1780 (quoting *Jones v. United States*, 463 U.S. 354, 362, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983)).

Mercer v. Commonwealth, 523 S.E.2d 213, 215 (Va. 2000) (emphasis added). We agree with *Mercer* that *Foucha* did not define "mental illness."

Thus, assuming *arguendo* that Hayes is neither psychotic nor drug or alcohol dependent, he may still be found "mentally ill" by virtue of having been diagnosed with a personality disorder. Hayes does not otherwise challenge either (1) G.S. § 122C-3(21)'s definition of mental illness, which includes personality disorders, or (2) the evidentiary basis for the court's finding that Hayes suffers from a personality disorder with antisocial and narcissistic traits. Accordingly, we defer to the trial court's finding, supported by competent expert testimony, that Hayes is mentally ill. *See In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980) (Court of Appeals' only function on appeal from commitment order is to determine if the trial court's ultimate findings on the issues of acquittee's mental illness and dangerousness were supported by competent evidence set out in the order).

[3] Finally, we decide whether the trial court erred in finding Hayes "dangerous to others" under G.S. § 122C-276.1 and 122C-3(11)b. In *Hayes I*, we held in part that it did not violate due process to require Hayes to bear the burden of proof under G.S. 122C-276.1 that he is no longer "dangerous to others." *Hayes* at 389-91, 432 S.E.2d at 866-67. G.S. § 122C-3(11)b provides that:

> "Dangerous to others" means that *within the relevant past*, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another or has acted in such a way as to create substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent and convincing evidence that an individual has committed a homicide *in the relevant past* is prima facie evidence of dangerousness to others. (emphasis added).

In *Davis v. N.C. Dept. of Human Resources*, 121 N.C. App. 105, 465 S.E.2d 2 (1995), *disc. rev. denied*, 343 N.C. 750, 473 S.E.2d 612 (1996), we held that although the issue is to be decided by trial courts on a case-by-case basis, prior "violent acts" may be found to have occurred in the "relevant past" when they "occurred close enough in time to the . . . hearing to have probative value on the ultimate question . . . of whether there was a 'reasonable probability that such [violent] conduct [would] be repeated.' " *Id.* at 114-15, 465 S.E.2d at 8 (citing G.S. § 1A-1, Rule 401).

Hayes asserts that *Davis'* definition of "relevant past" is "ambiguous" and that the current statutory scheme denies him due process of law. Specifically, he contends that a court could arbitrarily and capriciously continue his confinement by "operation of law" by finding his crimes to be in the ambiguously-defined "relevant past," despite "proof" that Hayes had not exhibited dangerous behavior since 1988 and was no longer "mentally ill." Instead, Hayes argues by analogy to N.C. R. Ev. 404(b) and 609 that the trial court should have considered his ten-year-old crimes' temporal "remoteness" from the hearing in deciding their admissibility for purposes of determining "dangerousness." We are not persuaded.

As noted above, Hayes failed to meet his burden of proof that he is no longer mentally ill. Furthermore, uncontested evidence of the "slaw incident" demonstrated that Hayes has engaged in dangerous conduct since 1988. The real issue is therefore whether the court denied Hayes due process in applying the relevant statutes.

By *Davis'* references to timing, it is clear that in determining whether acquittees' prior crimes fall into the "relevant past," trial courts *may* consider the crimes' temporal proximity to the hearing date in evaluating their prejudicial effect. This analysis is similar to that required by Rules 403, 404(b) and 609. Undercutting Hayes' argument, however, is the rule that prior crimes' temporal remoteness has more to do with the crimes' evidentiary weight than their admissibility. *See, e.g., State v. Blackwell*, 133 N.C. App. 31, 514 S.E.2d 116, 120, *cert. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999) (citing *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991)) ("remoteness in time generally affects only the weight to be given [Rule 404(b)] evidence, not its admissibility"). In addition, *Davis'* reference to Rule 401 emphasizes that trial courts enjoy great discretion in deciding the probative value of acquittee's prior crimes. *See* G.S. § 122C-3(11)b ("[p]revious episodes of dangerousness to others, *when applicable, may be considered* when determining reasonable probability of

future dangerous conduct"). We conclude that in the context of this case, (1) courts are not constrained by the timing considerations in Rules 404 and 609, as Hayes contends, and (2) lapse of time is only one factor in the court's analysis under Rules 401 and 403.

In this case, it appears that from both evidentiary and medical perspectives, the nature of Hayes' crimes was more important than their timing. In other words, on the issue of the likelihood of Hayes' future dangerousness to others, the probative value of evidence of Hayes' "extremely violent homicidal" crimes far outweighed any potential prejudice due to the crimes' age. Furthermore, it is clear from the order that the court's findings on Hayes' dangerousness were also rooted in *additional* evidence unrelated to Hayes' prior crimes, including (1) Hayes' past and present mental illness, (2) Hayes' behavior since 17 July 1988 (including the "slaw incident"), and (3) Hayes high likelihood of post-release relapse into multi-substance abuse, which all experts agreed was a trigger for his 1988 psychosis. Accordingly, we hold that the trial court did not violate Hayes' right to due process.

Affirmed.

Judges TIMMONS-GOODSON and HUNTER concur.

BOBBY LEE BOND, EMPLOYEE, PLAINTIFF v. FOSTER MASONRY, INC., EMPLOYER; SELF-INSURED, (KEY RISK MANAGEMENT SERVICES), DEFENDANTS

No. COA99-696

(Filed 18 July 2000)

1. Workers' Compensation— average weekly wage—calculation

In a workers' compensation action involving a bricklayer who was a full-time employee even though he was not always required to work due to weather and demand, the Industrial Commission correctly chose the second rather than the fifth method of calculating his average weekly wage under N.C.G.S. § 97-2(5), but did not correctly use the second method in the calculation. The case was remanded for the Commission to determine the number of weeks plaintiff did not work and then to divide plaintiff's yearly earnings by the number of weeks remaining.

2. Workers' Compensation— earning capacity—wages from current employment

The Industrial Commission's findings as to earning capacity in a workers' compensation action were affirmed where competent evidence showed that plaintiff met his burden of showing that he was unable to earn the same wages as before the injury by showing his earnings from his current employment. Defendant presented no evidence that plaintiff could obtain employment earning more than this amount.

Appeal by defendants from an opinion and award entered 5 February 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 March 2000.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Clayton M. Custer and Lawrence B. Somers, for defendant-appellants.

HUNTER, Judge.

Foster Masonry, Inc. and Key Risk Management Services ("defendants"), appeals from an opinion and award of the North Carolina Industrial Commission ("Industrial Commission") wherein it awarded Bobby Lee Bond ("plaintiff"), workers' compensation benefits and calculated plaintiff's average weekly wage under the second method identified in N.C. Gen. Stat. § 97-2(5). We affirm in part and remand in order for the Full Industrial Commission ("Full Commission") to re-calculate plaintiff's "average weekly wage" under the second method in N.C. Gen. Stat. § 97-2(5).

The evidence indicates that plaintiff had been working for defendant as a brick mason for approximately three years when he was injured at work on 9 August 1996 due to the sudden giving away of his right arm. Plaintiff went to Kernersville Immediate Care on the day of his injury. He did not return to masonry work due to continued problems related to the injury; however, plaintiff began working at Direct Transport, Inc., on 3 February 1997, where his duties consisted of driving automobiles from various locations to Greensboro, North Carolina. Plaintiff was ultimately diagnosed with a right rotator cuff strain with brachial plexus strain on 10 March 1997. It was determined that plaintiff had reached maximum medical improvement on 28 April 1997, and he was assigned a permanent partial disability rating of twenty percent (20%) to the right upper extremity, with restric-

tions of no lifting over twenty-five pounds, no overhead work, and no repetitive use of the right arm.

Plaintiff filed a claim with the Industrial Commission, which defendant contested on the basis that plaintiff's injury was not an injury by accident, and therefore was not compensable under the North Carolina Workers' Compensation Act ("Act"). After a hearing on the matter, Deputy Commissioner William C. Bost entered an opinion and award on 16 February 1998, concluding as a matter of law that plaintiff's injury was compensable under the Act, and that

> 4. Plaintiff's average weekly wages on August 9, 1996 were $458.99, yielding a compensation rate of $306.01. G.S. 97-2(5); G.S. 97-29.
>
> 5. As a result of his August 9, 1996 injury by accident, plaintiff was totally disabled during the period August 9, 1996 through February 2, 1997. G.S. 97-29.
>
> 6. As a result of his August 9, 1996 injury by accident, plaintiff's earning capacity was permanently diminished from $458.99 per week to $234.15 per week effective February 3, 1997, thus entitling him to $149.01 per week until the end of the 300-week period. G.S. 97-30.

Commissioner Bost made the following award, in pertinent part:

> 1. For his temporary total disability compensation, defendant shall pay plaintiff temporary total disability compensation at the rate of $306.01 per week for the period August 9, 1996 through February 2, 1997. . . .
>
> 2. For his temporary partial and permanent partial disability compensation, defendant shall pay plaintiff temporary partial and permanent partial disability compensation at the rate of $149.91 per week starting February 3, 1997 and continuing until the end of the 300-week period starting August 9, 1996. . . .

Defendants appealed this opinion and award to the Full Commission. In its opinion and award of 5 February 1999, the Full Commission affirmed that plaintiff had suffered a compensable injury under the Act. As to plaintiff's compensation rate, it found:

> 11. Regarding his employment with defendant, plaintiff was a full time employee. Although he did not work when defendant

did not have contract jobs available, plaintiff was not a part time employee and his employment was not seasonal in nature.

12. In the prior Opinion and Award, plaintiff's pre-injury average weekly wage was calculated pursuant to an Industrial Commission Form 22 submitted by defendant. According to this Form 22, plaintiff worked only four (4) days in November 1995. However, as shown by Defendant's Answers to Plaintiff's Interrogatories, plaintiff worked thirty (30) days in November 1995. Therefore, plaintiff's pre-injury average weekly wage was not $458.99, as found in the prior Opinion and Award.

13. During the fifty-two (52) week period prior to plaintiff's 9 August 1996 injury by accident, he missed seven (7) or more consecutive days on more than one occasion. Therefore, the second method under G.S. § 97-2(5) of calculating his average weekly wage should be used.

14. Plaintiff earned $12,262.50 during the fifty-two (52) weeks preceding his injury. Over this period, plaintiff worked two-hundred and thirteen (213) days, yielding a daily wage rate of $57.57. When multiplied by seven (7), this daily rate yields an average weekly wage for plaintiff of $402.99 as of 9 August 1996, which yields a compensation rate of $268.67.

As a result of these findings, the Full Commission awarded plaintiff temporary total disability from 9 August 1996 through 2 February 1997 at the rate of $268.67 per week, and "partial disability compensation at the rate of two-thirds the difference between his average weekly wage of $402.99 and his post injury wage level of $190.00 for the period of 3 February 1997 through the present, subject to the statutory maximum period of three hundred (300) weeks." Defendants appeal.

[1] 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, . . . if supported by competent evidence . . . even though there is evidence which would support a finding to the contrary." *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981). When this Court reviews a decision of the Full Commission, its inquiry is limited to: (1) whether there is competent evidence to support the Industrial Commission's findings of fact; and, (2) whether the findings of fact

support the conclusions of law and decision of the Industrial Commission. *Id.* 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. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

Under our N.C. Gen. Stat. § 97-2(5), average weekly wage is defined in pertinent part as

> [1] earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52; [2] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. [3] Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. [4] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> [5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (1999). In its first assignment of error, defendants contend that the Full Commission erred in calculating plaintiff's average weekly wage under the second method in N.C. Gen. Stat. § 97-2(5), for a total of $402.99. Defendants argue that the appropriate method in this case is the fifth, or "exceptional reasons" method identified in N.C. Gen. Stat. § 97-2(5), whereby defendants urge that as a seasonal worker, plaintiff's yearly earnings should be

divided by 52 for an average weekly wage of $235.82. We note that this calculation is identical to the first method identified in the subject statute, which is used when the employee has worked 52 weeks in the year.

From our review of this statute and the prior holdings of this Court, it is clear that this statute establishes an order of preference for the calculation method to be used, and that the primary method, set forth in the first sentence, is to calculate the total wages of the employee for the fifty-two weeks of the year prior to the date of injury and to divide that sum by fifty-two. *Hensley v. Caswell Action Committee*, 296 N.C. 527, 533, 251 S.E.2d 399, 402 (1979). The final, or fifth method, as set forth in N.C. Gen. Stat. § 97-2(5), may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods. *See Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 331, 181 S.E.2d 237, 239 (1971). In *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986), the North Carolina Supreme Court held that a worker's average weekly wage should be based upon the measure of the injured employee's earning capacity, noting that this must be determined by calculating " 'the amount which the injured employee would be earning were it not for the injury.' " *Id.* at 197, 347 S.E.2d at 817 (quoting N.C. Gen. Stat. § 97-2(5)).

Defendant contends that because plaintiff's work with his employer was sporadic, fairness to the employer requires the consideration of "both peak and slack periods" in calculating an employee's average weekly wage where the employment in question does not provide work in each of the fifty-two weeks in a year. *Joyner v. Oil Co.*, 266 N.C. 519, 522, 146 S.E.2d 447, 450 (1966). Therefore, defendant argues that plaintiff's earnings of $12,262.50 should be divided by fifty-two weeks, instead of the number of weeks he actually worked, to arrive at an average weekly wage of $235.82. We disagree.

In *Joyner v. Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966), the North Carolina Supreme Court considered a workers' compensation case where the employee was a relief truck driver who worked only on an as-needed basis during the fifty-two weeks prior to injury. The Court described the driver's employment as "inherently part-time and intermittent" and held it was "[un]fair[] to the employer . . . [not to] take into consideration both peak and slack periods," *id.* at 522, 146 S.E.2d at 450, in calculating average weekly wage because "it gives plaintiff the advantage of wages earned in . . . 'peak' . . . season with-

out taking into account the slack periods" during which he did not work. *Id.* at 521, 146 S.E.2d at 449. As a result, the Court held that the employee's average weekly wage was to be calculated under the "exceptional reasons," (fifth) method set forth in N.C. Gen. Stat. § 97-2(5) by taking the total wages earned during the twelve month period prior to injury and dividing that amount by fifty-two, representing the number of weeks in a year. *Id.* at 522, 146 S.E.2d at 450. As for the total wage calculation, the court reasoned that without the injury, the employee "would not be earning more than this sum in a normal year." *Id.* In a more recent case, *Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 517 S.E.2d 914 (1999), plaintiff was injured in 1996 while working as a driver for his employer, a provider of long haul transportation services specializing in produce shipment. The Full Commission had found that plaintiff had been continuously employed with employer since 1994, and that his employment was not seasonal. This Court reversed, stating:

> The parties stipulated in a Form 22 Wage Chart to the days and weeks plaintiff worked in 1995 and 1996 and to the earnings she received. Upon review of the Wage Chart, we note plaintiff did not work during 1995 in February, March, August, September or November, and reported working only eleven days in April, six days in July and seven days in December. In consequence of a fluctuating work schedule dependent in the main upon the produce season, plaintiff's job more properly qualified as "seasonal" rather than continuous employment.

Id. at 436, 517 S.E.2d at 921. As in *Joyner*, the court held that the employees weekly wage should be computed under the fifth method stated in N.C. Gen. Stat. § 97-2(5), i.e., by dividing his total earnings by fifty-two. Unlike *Barber* and *Joyner*, plaintiff in the present case was not a "seasonal" worker or a relief worker who filled in when a regular employee could not. Because work with defendant was dependent on demand and weather conditions, sometimes plaintiff was not required to work for days or weeks at a time; however, he was considered a full-time employee, not a seasonal one. A seasonal employee or relief worker does not work full-time every week in the year. To the contrary, it is entirely possible that as a brick mason, plaintiff could be required to work every week, full-time by his employer. Accordingly, we believe that plaintiff's earnings should not be divided by 52 under the fifth method in N.C. Gen. Stat. § 97-2(5), but rather, the second method in this statute is appropriate in the case at bar. However, our review indicates that the Full Commission did

not correctly use the second method in calculating plaintiff's average weekly wage.

The Full Commission computed plaintiff's daily wage rate by dividing plaintiff's total earnings by the number of days worked, then multiplied this "daily wage rate" by seven for an average weekly wage. First, we note that the second method of N.C. Gen. Stat. § 97-2(5) does not authorize using a "daily wage rate" and multiplying it by seven in calculating an average weekly wage. Additionally, no evidence indicates that plaintiff worked seven days a week, which would substantiate multiplying plaintiff's alleged "daily wage rate" by seven. "Under G.S. 97-2(e), 'average weekly wages' of the employee 'in the employment in which he was working at the time of the injury' must be related to *his earnings* rather than to his earning capacity." *Liles v. Electric Co.*, 244 N.C. 653, 657, 94 S.E.2d 790, 794 (1956) (emphasis in original). The computation used by the Full Commission indicates what plaintiff's *earning capacity* would be if he worked seven days a week for thirty-six weeks as a brick mason. This calculation is not provided for in the second method under N.C. Gen. Stat. § 97-2(5), and therefore was error. Accordingly, those portions of the Full Commission's opinion and award based on a calculation of plaintiff's average weekly wage at $402.99 are reversed. This case is remanded in order for the Full Commission to calculate plaintiff's average weekly wage as specified in the second method in N.C. Gen. Stat. § 97-2(5), which states in pertinent part:

> if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.

N.C. Gen. Stat. § 97-2(5). In accordance with this method, the Full Commission shall determine the number of weeks which plaintiff did not work ("time so lost"), and then divide plaintiff's yearly earnings by "the number of weeks remaining after the time so lost has been deducted." *Id.* The Full Commission may make any corresponding changes in the opinion and award based on this re-calculation, in accordance with this opinion.

[2] Last, defendant argues that plaintiff failed to meet his burden as to his present earning capacity which was determined to be $190.00 per week. Defendants urge that plaintiff could possibly earn more than this amount. This Court has held:

An employee injured in the course of his employment is disabled under the Act if the injury results in an "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9) (1991). Accordingly, disability as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement.

The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). Competent evidence indicates that plaintiff at bar met his burden under (4) identified above by showing his earnings through his employment with Direct Transport, Inc. These earnings, likewise, were competent evidence of plaintiff's earning capacity. Defendant presented no evidence that plaintiff could obtain employment earning more than this amount. Therefore, we hold that this argument is meritless.

In summary, we reverse and remand for re-calculation of plaintiff's average weekly wage, and any award based thereon. We affirm the Full Commission's findings as to plaintiff's earning capacity.

Reversed and remanded in part, affirmed in part.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. VERGIL WAYNE HUTCHINSON

No. COA99-242

(Filed 18 July 2000)

1. Evidence— subsequent crime or act—intent and motive

The trial court did not abuse its discretion in a first-degree burglary case by admitting evidence of defendant's subsequent offenses of shoplifting, breaking and entering and larceny, and car theft, and evidence that defendant used the proceeds from these offenses to purchase drugs, because: (1) the admission of subsequent bad acts was proper under N.C.G.S. § 8C-1, Rule 404(b) for a determination of whether defendant possessed the intent and motive for this first-degree burglary charge; (2) the fact that defendant sold a portion of stolen goods from the subsequent larcenies and used the funds to buy drugs shows defendant's intent and motive during the alleged burglary; (3) the time span of one to two months between the burglary and the subsequent larcenies does not render the larcenies too remote in time to show intent and motive; and (4) the probative value was not substantially outweighed by the danger of unfair prejudice to defendant in light of the trial court's limiting instruction, N.C.G.S. § 8C-1, Rule 403.

2. Burglary and Unlawful Breaking or Entering— alternative jury instruction—intent to obtain property by false pretenses

The trial court did not err in a first-degree burglary case by submitting the alternative jury instruction on defendant's intent to obtain property by false pretenses under N.C.G.S. § 14-100 when defendant made statements to the police that his purpose in entering the pertinent residence was to obtain money to buy drugs, because the State presented sufficient evidence to show that: (1) defendant falsely represented to the homeowners that he needed money because his car had broken down and he needed to get his mother to the hospital; (2) defendant intended to deceive the homeowners; (3) the homeowners were in fact deceived; and (4) defendant thereby attempted to obtain money from the homeowners.

3. Criminal Law— instruction—flight—failure to show prejudice

Although defendant contends the trial court erred in a first-degree burglary case by instructing the jury on defendant's flight when the evidence reveals that defendant walked away from the residence but did not attempt to hide or flee, defendant failed to meet his burden of showing how he was prejudiced by the admission of this evidence.

4. Appeal and Error— preservation of issues—failure to cite authority

Although defendant contends the trial court erred by allowing the State to show the effect of the first-degree burglary upon a young child residing in the house as an aggravating factor when the State did not list the child as an occupant of the house in the indictment, defendant has abandoned this argument since he failed to cite any authority in support of his argument as required by N.C. R. App. P. 28(b)(5).

Appeal by defendant from judgment entered 23 January 1998 by Judge Melzer A. Morgan, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 13 January 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Roy A. Giles, Jr., for the State.

Maddrey Wilson & Etringer, by Walter J. Etringer, for defendant-appellant.

McGEE, Judge.

Defendant Vergil Wayne Hutchinson was charged with first degree burglary in an indictment on 21 July 1997. The State's evidence presented at trial tended to show the following. During the early morning hours of 20 March 1997, defendant entered the house of Jeffrey and Wendy Watson at 303 Wentworth Street in Reidsville, North Carolina without their consent. Defendant entered the house through an unlocked screen door at the back of the residence, which led into a laundry room. One of the inner doors in the laundry room opened into the kitchen. After entering the laundry room, defendant started "beating and banging" at the doors. The residence was occupied by the Watsons, their two young sons, and Wendy Watson's grandmother.

Wendy Watson was alerted by her youngest son that someone was trying to get into the house. She awakened her husband and told him

someone was trying to get in the door. Wendy Watson dialed 911 and requested police assistance. Jeffrey Watson went into the kitchen located in the back of the house. When he turned on the kitchen light, he saw defendant standing at the locked inner door between the laundry room and the kitchen. Jeffrey Watson asked defendant, "What are you doing?" Defendant said that he meant no harm, that his car had broken down, and that he needed money to purchase gas to get his mother to Baptist Hospital. Jeffrey Watson told defendant that he did not know him and that he had no money to give him.

Wendy Watson came to the doorway of the kitchen and told her husband that the police were on the way. Jeffrey Watson testified that defendant then "took off." He stated that defendant turned around and walked out of the house. Officer Keith Petty and Sergeant Wendell Neville, Jr. of the Reidsville Police Department arrived at the Watson home in response to the 911 call. Officer Petty testified that he saw defendant coming around the corner of the house. He testified that when he approached defendant, defendant told him that he was trying to get his mother to Baptist Hospital and his car had broken down. Officer Petty said that he was concerned about the welfare of defendant's mother and inquired where defendant's car had broken down. Defendant responded that his car had not broken down and that he was walking.

Sergeant Neville advised defendant of his *Miranda* rights. Defendant made a statement to Sergeant Neville, who put defendant's statement in writing. Defendant objected to certain portions of the written statement and those were omitted from the final written statement. At trial, Sergeant Neville read defendant's written statement into evidence:

> Earlier I had been drinking and smoking crack at someone's house. I walked up to the back porch. I went in the door of the wash room and knocked on the inner door of the wash room. A lady came to the door and said, "Do you want me to get my gun?" I said, "No, I'm just trying to borrow a couple dollars. My mother and I are broke down on Wentworth Street.["] She hollered at her husband, and I told him I was broke down and needed a couple dollars. He said he didn't have any money. I left from the back porch and walked around the front as the police drove up. The only reason I went was to get money for crack. I didn't enter the house or go to the front door because there were no lights on. I knocked on the back door and no one answered. I went to the back porch and knocked on the other door.

Sergeant Neville testified that he drove the length of Wentworth Street and was unable to locate any disabled car. Sergeant Neville further testified that defendant told him a second, different story. Defendant's second version was that he walked over to the residence at 303 Wentworth Street from a crack house and was looking for money to buy crack.

Prior to opening statements and in the absence of the jury, the trial court considered the State's motion to introduce statements defendant made to Detective Ken Hanks of the Reidsville Police Department, pursuant to Rule 404(b) of the North Carolina Rules of Evidence. These statements by defendant discussed three subsequent offenses defendant committed and the State argued they tended to show defendant's intent and motive at the time the alleged burglary was committed. On 20 May and 21 May 1997, defendant told Detective Hanks that he was involved in (1) shoplifting a vacuum cleaner from K-Mart on 25 April 1997, (2) breaking and entering and larceny at Reidsville Glass Company on 12 May 1997, and (3) a car theft on 21 May 1997. In addition, defendant told Detective Hanks that he had used some of the proceeds from the sale of stolen property to buy drugs. The trial court ruled that defendant's apparent drug habit and various larcenies were relevant to the issue of both intent and motive for the unlawful entry into the Watson residence. A jury found defendant guilty of first degree burglary on 23 January 1998, and he was sentenced to a term of imprisonment of 120 to 153 months. Defendant appeals.

I.

[1] Defendant contends that the trial court erred, pursuant to Rule 404(b), in admitting evidence of his offenses committed subsequent to the burglary. Furthermore, defendant argues that the trial court erred in admitting evidence that he had used some of the proceeds from these offenses to purchase drugs. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1992). Nonetheless, the evidence offered can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (1992). The question of what evidence should be excluded under Rule 403 is a matter left to the trial court's sound discretion. *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990).

Initially, we note that defendant's statements to Detective Hanks are admissible as an exception to the hearsay rule for admissions by a party opponent which includes "his own statement, in either his individual or a representative capacity[.]" N.C. Gen. Stat. § 8C-1, Rule 801(d)(A) (1992). More importantly, we believe the trial court properly admitted evidence of defendant's subsequent conduct in determining whether he possessed the intent and motive for the first degree burglary charge. First, our Supreme Court in 1944 expressly stated that evidence of other offenses applies to both subsequent and prior acts of the defendant. *State v. Biggs*, 224 N.C. 722, 726, 32 S.E.2d 354-55 (1944) ("This rule applies equally to evidence of like offenses committed *subsequent to the offense charged* . . . if not too remote in . . . time[.]") (emphasis added). Second, the plain language of Rule 404(b) makes no distinction between subsequent and prior acts of the defendant. N.C.G.S. § 8C-1, Rule 404(b) ("Evidence of *other crimes, wrongs, or acts* . . . may . . . be admissible for other purposes[.]") (emphasis added). Finally, our State's rule is consistent with holdings from other jurisdictions. *See, e.g., State v. May*, 669 P.2d 616, 621 (Ariz. App. 1983) ("[S]ubsequent bad acts may be admitted for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."); *Seagle v. State*, 448 So. 2d 481, 484 (Ala. Crim. App. 1984) (" 'If the accused is charged with a crime that requires a prerequisite intent, then *prior or subsequent* criminal acts are admissible to show that he had the necessary intent when he committed the now charged crime[.]' "); *People v. Bartall*, 456 N.E.2d 59, 68 (Ill. 1983) ("This court has also allowed subsequent-crimes evidence to be offered on the issue of 'intent,'[.]"); *Cantrell v. State*, 731 S.W.2d 84, 90 (Tex. Crim. App. 1987) ("[E]vidence of subsequent crimes may be admitted for the purpose of showing intent.").

The State offered evidence of the subsequent offenses for the purpose of showing the intent and motive for defendant's alleged burglary of the Watson residence. Both intent and motive are proper purposes within the meaning of Rule 404(b). Defendant's admissions of (1) shoplifting of a vacuum cleaner from K-Mart, (2) breaking and

entering and larceny at Reidsville Glass Company, and (3) car theft are relevant to show his intent and motive for unlawfully entering the Watson residence. The fact that defendant sold a portion of stolen goods from the subsequent larcenies and used the funds to buy drugs tends to show defendant's intent and motive during the alleged burglary. In addition, we note that the time span of one to two months between the burglary and the subsequent larcenies does not render the larcenies too remote in time to show intent and motive. *See Biggs*, 224 N.C. at 726, 32 S.E.2d at 354-55 (where subsequent offenses took place almost one month later); *cf. State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) ("[R]emoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility.").

Defendant argues that the probative value of his admissions of subsequent offenses was substantially outweighed by the danger of unfair prejudice to him. N.C.G.S. § 8C-1, Rule 403. However, the record shows the trial court gave the following limiting instruction before Detective Hanks testified concerning defendant's admissions:

> Ladies and gentlemen of the jury, evidence of acts after March 20, 1997, is about to be received. You may consider this evidence on the question of what the defendant's intent or motive was on March 20, 1997. If you believe such evidence, then you may consider such evidence of later acts as to whether on March 20, 1997, the defendant had the intent to commit larceny within the Watson residence and as to what the defendant's motives were on that date. If you believe this evidence, you may consider it, but only for the limited purposes for which it now being received.

Whether evidence should be excluded as unfairly prejudicial is a matter left to the sound discretion of the trial court and will not be disturbed unless it "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 412-13 (1998) (citation omitted). Considering the trial court's limiting instruction, we hold that the trial court did not err in allowing evidence of defendant's admissions of subsequent offenses on the issue of his intent and motive for burglary of the Watson residence.

II.

[2] Defendant next appears to argue that the trial court's alternative jury instruction on intent to obtain property by false pretenses was not supported by the trial court's prior rulings under Rule 404(b) and Rule 403 involving the admissibility of defendant's statements concerning three subsequent offenses.

Defendant's argument is misplaced. The basis for the alternative instruction in this case was not defendant's statements regarding the larcenies committed subsequent to the burglary at issue. Rather, the ground for the jury instruction was statements made by defendant to the police that his purpose in entering the Watson residence was to obtain money to buy drugs.

In *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973), our Supreme Court stated "[a] trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence." Pursuant to N.C. Gen. Stat. § 14-100 (1993), the elements of obtaining property by false pretenses are:

> (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.

State v. Cronin, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). The State presented sufficient evidence to show that: (1) defendant falsely represented to Jeffrey Watson that he needed money because his car had broken down and he needed to get his mother to the hospital; (2) defendant intended to deceive Jeffrey Watson; (3) the Watsons were, in fact, deceived; and (4) defendant thereby attempted to obtain money from the Watsons. Therefore, we hold that the trial court properly instructed the jury based on sufficient evidence of the elements of the offense.

III.

[3] Defendant next argues that the trial court erred in instructing he jury on "flight" of defendant. The trial court instructed the jury as follows:

> The State contends here, and the defendant denies, that the defendant fled from the scene. Evidence of flight, members of the jury, may be considered by you together with all other facts and

> circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt.

The trial court may not instruct a jury on a defendant's flight unless "there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged." *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (citations omitted). "[M]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant *took steps* to avoid apprehension." *State v. Westall*, 116 N.C. App. 534, 549, 449 S.E.2d 24, 33, *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994) (emphasis added). Here, the evidence showed that after defendant entered the house, he made no attempt to leave. Defendant remained on the back porch after Jeffrey Watson confronted him. Even after Wendy Watson informed defendant that she had called the police, defendant walked away but did not attempt to hide or flee. In addition, when the police arrived, defendant did not attempt to avoid the police. *See id.* at 549-50, 449 S.E.2d at 33 (contrasting the time lapse between committing the crime and voluntarily surrendering to police).

However, "[t]he defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983). "Defendant has the burden of showing that he was prejudiced by the admission of the evidence." *State v. Wingard*, 317 N.C. 590, 599-600, 346 S.E.2d 638, 645 (1986). To meet this burden, defendant must show "that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443 (1988). In the present case, defendant argues only that the trial court erred in its jury instructions and never addresses the effect of the error on the jury's verdict. Therefore, we find defendant has failed to show he was prejudiced by the error.

IV.

[4] Finally, defendant argues that if the State intended to show the effect of the crime upon a young child residing in the house as an aggravating factor in the sentencing phase of the trial, the State should have listed the child as an occupant of the house in the indictment. Rule 28(b)(5) of the Rules of Appellate Procedure states that "[t]he body of the argument shall contain citations of the authorities

upon which the appellant relies." Because defendant has failed to cite any authority in support of his argument, we deem this argument abandoned. N.C.R. App. P. 28(b)(5); *see Byrne v. Bordeaux*, 85 N.C. App. 262, 265, 354 S.E.2d 277, 279 (1987).

Defendant received a fair trial free of prejudicial error.

No error.

Judges JOHN and HUNTER concur.

MULTIFAMILY MORTGAGE TRUST 1996-1, PLAINTIFF v. CENTURY OAKS LIMITED, A NORTH CAROLINA LIMITED PARTNERSHIP, DEFENDANT v. RAYMOND W. POSTLETHWAIT, JR., SUBSTITUTE TRUSTEE, ADDITIONAL PLAINTIFF

No. COA99-715

(Filed 18 July 2000)

1. **Mortgages— foreclosure—HUD's refusal to recast debt—not a violation of due process**

The trial court did not err in an action arising from a foreclosure of a mortgage on a multi-family housing project purchased by plaintiff from HUD by concluding that plaintiff was entitled to summary judgment on the issue of whether HUD violated the Due Process Clause by refusing to provide defendant with flexible financing options and in selling the mortgage at a reduced price. Defendant was first in default in 1989 and continued in default until 1994, thereafter failing to make payments pursuant to a workout agreement. HUD's actions in refusing to recast the debt did not rise to the level of being arbitrary, capricious, or an abuse of discretion, and violated no applicable law. Additionally, HUD properly exercised its discretion in selling the loan to plaintiff as part of a package of 158 loans.

2. **Mortgages— foreclosure—HUD multi-family project—no fiduciary duty by HUD**

The trial court did not err by granting summary judgment for plaintiff in a foreclosure of a mortgage on a multi-family housing project where plaintiff had purchased the mortgage from HUD and defendant argued that HUD had breached its fiduciary duty. The allegations relied upon by defendant do not amount to con-

trol, domination and spoilation of defendant's affairs; there was no evidence that would justify the imposition of a fiduciary duty on HUD.

3. Mortgages— foreclosure—workout agreement—default

The trial court did not err by granting summary judgment for plaintiff in an action arising from a foreclosure of a mortgage on a multi-family housing project where defendant contended that it was not in default since it had substantially complied with a workout agreement and that defaults prior to the workout agreement were waived, but provisional workout agreements do not modify or supercede the original mortgages or alter HUD's right to foreclosure, defendant did not appeal a finding subsequent to the agreement that the loan was in default, defendant acknowledged that the annual lump sum payment could not be made, defendant's managing general partner stated that neither the lump sum payment nor the letter of credit requirements of the workout agreement were complied with by defendant, and defendant did not offer evidence to support its position that it had substantially complied with the agreement.

4. Mortgages— foreclosure—earlier consent judgment—requirement that mortgage be current

The trial court did not err by granting summary judgment for plaintiff in an action arising from the foreclosure of a mortgage purchased by plaintiff from HUD where defendant contended that plaintiff had relinquished in an earlier consent judgment the requirement that defendant hold the mortgage current, but defendant did not reference any provision in the consent judgment to support its position and the court did not find language in the judgment to support defendant's position. Defendant's contention that it was entitled to an accounting was not reached on appeal because an accounting was not requested at trial.

Appeal by defendant from judgment entered 4 November 1998 and filed 9 November 1998 by Judge E. Lynn Johnson in Durham County Superior Court. Heard in the Court of Appeals 29 March 2000.

Horack, Talley, Pharr & Lowndes, P.A., by James H. Pulliam, for plaintiff-appellee.

Michaux & Michaux, P.A., by H. M. Michaux, Jr., Eric C. Michaux, and Crystal S. Creech, for defendant-appellant.

WALKER, Judge.

On 10 July 1980, defendant Century Oaks Limited borrowed $5,935,200 from Trust Company Mortgage, evidenced by a non-recourse note and secured by a deed of trust. Defendant also executed a regulatory agreement with the Department of Housing and Urban Development (HUD) for a Multi-Family Housing Project. The loan was part of the Federal Housing Administration's (FHA) Multi-family Mortgage Insurance Program's credit enhancement devices designed to facilitate financing of new or rehabilitated multi-family rentals. Under the program, FHA, as a division of HUD, approves lenders to provide the funds to make mortgage loans, and FHA provides insurance to the lenders for loan defaults. If a mortgagor defaults and fails to cure the default within 30 days, the mortgagee may assign the note to FHA/HUD in consideration for the insurance benefits. Upon such an assignment, FHA/HUD becomes the mortgagor and servicer of the note.

In December 1989, as a result of defendant's default on the note, defendant's mortgagor assigned the note to HUD. In March 1994, defendant and HUD entered into a Provisional Workout Agreement (PWA), whereby defendant "expressly acknowledge[d] that the mortgage (Deed of Trust) and Note secured by the above project is in default." Additionally, defendant agreed to make "annual lump sum payments, to be applied to mortgage delinquencies, of $32,974," along with the submission of letters of credit securing the lump sum payments. The PWA also provided that "failure of [defendant] to meet the terms of this Arrangement will be sufficient cause for the Secretary [of HUD] to terminate this Arrangement at any time with a thirty day written notice and to commence foreclosure action."

On 11 January 1995, HUD requested evidence from defendant that the first lump sum payment had been made. As of 3 May 1995, the first lump sum payment had not been made, and HUD notified defendant that HUD would terminate the PWA on 5 June 1995. Defendant then attempted to re-negotiate with HUD and requested HUD to discount the mortgage or recast the debt over a new payout period. In support of its requests, defendant sent a letter to HUD which stated that the PWA payment requirement "is onerous and can not be paid by the partnership." HUD declined to re-negotiate the mortgage terms and HUD notified defendant of its decision on 2 June 1995. Subsequently, HUD terminated the PWA on 5 June 1995 for failure to comply with its terms and conditions.

In 1994, HUD developed a program to sell many of these loans to private investors. Under this arrangement, the loans would be sold to bidders at auctions pursuant to conditions designed to be fair to bidders while optimizing the return of money owed to HUD. On 26 April 1996, HUD published in the Federal Register its official notice of the sale of 158 different mortgage properties on which it held loans, including the defendant's property. On 27 June 1996, HUD sold the 158 loans to plaintiff. Plaintiff assigned defendant's mortgage a value of $5,315,693.

On 23 July 1996, plaintiff filed this action, seeking the appointment of a receiver to manage the property pending foreclosure, which was granted the same day by Superior Court Judge Orlando Hudson. Plaintiff filed the affidavit of James Weston Moffett, a vice-president of the servicer for the note, in which he averred that neither plaintiff nor HUD had received any monthly installment since April 1996 and that the loan was still in default. On 24 July 1996, defendant filed a motion for appropriate relief, seeking to set aside the 23 July 1996 order, which Judge Hudson granted in part by canceling the appointment of a receiver. On 27 August 1996, the parties entered a consent order appointing defendant's affiliated management company, Union Insurance and Realty Company, Inc. (Union), to manage the property.

On 19 December 1996, the clerk of superior court entered an order authorizing foreclosure on the deed of trust securing the loan. On 12 February 1997, the day before the scheduled foreclosure sale, defendant filed a counterclaim seeking a restraining order and for appropriate relief pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. Judge Hudson granted the temporary restraining order enjoining the foreclosure sale and subsequently issued a preliminary injunction. On 14 April 1997, plaintiff filed an amended reply to defendant's counterclaim.

On 25 August 1997, the trial court, Superior Court Judge Gordon Battle presiding, ordered the appointment of a receiver, finding that "[a]s a result of the [defendant's] failure to pay certain sums when due, the Note and Deed of Trust are in default." Defendant did not appeal this order.

On 5 March 1998, plaintiff filed a motion for summary judgment, which was granted by Superior Court Judge E. Lynn Johnson on 4 November 1998. The trial court's order also dissolved the preliminary injunction and ordered the foreclosure sale to proceed, which defendant appeals.

On 4 March 1999, Judge Hudson granted a stay as to the sale of the property "until a final mandate is issued by the last appellate court having jurisdiction over this matter." Plaintiff presented evidence in support of what it contended should be a significant bond pending the appeal. The trial court set a bond of $5,000.

Defendant argues that the trial court erred in granting plaintiff's motion for summary judgment. Specifically, defendant's defenses to foreclosure against HUD raise material issues of fact which preclude summary judgment for the plaintiff.

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).

[1] Initially, defendant contends HUD "violated guarantees of fairness and equal treatment embodied in the Due Process Clause of the Fifth Amendment" by refusing to provide defendant with flexible financing options and by selling the mortgage to plaintiff at a "substantially reduced price." Defendant concedes that HUD has broad discretion in making foreclosure decisions, but argues that HUD's actions were arbitrary, capricious and not in compliance with applicable law. Specifically, defendant alleges that HUD's refusal to consider defendant's proposal to discount the mortgage or to allow refinancing of the loan and it's subsequent sale of the mortgage to plaintiff at a "substantially reduced price" constituted arbitrary and unequal treatment.

Judicial review of HUD's decisions "should be narrowly limited to the question whether HUD's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *United States v. Winthrop Towers*, 628 F.2d 1028, 1036 (7th Cir. 1980); 5 U.S.C. § 706(2)(A) (1999). Additionally, the *Winthrop Towers* court stated that:

> the decision to foreclose a mortgage is fundamentally of a business and administrative nature, requiring the exercise of HUD's business and administrative judgment. HUD may certainly give major consideration to preservation of the assets of the insurance fund and may weigh other factors relevant to national housing policy and formulating administrative procedures and in deciding whether to foreclose a particular mortgage.

Id. Further, the court observed that based upon HUD's "very broad discretion" in the area of HUD foreclosures, "the mortgagor resisting foreclosure should bear the initial burden of introducing some evidence of HUD's arbitrary or capricious action, abuse of discretion or failure to comply with applicable law." *Id.*

Defendant was first in default on the loan in 1989, which according to plaintiff, continued in default until 1994, when defendant acknowledged in the PWA that the loan was in default. Thereafter, defendant failed to make payments pursuant to the PWA, which was terminated by HUD. Based on our review of the record, defendant's allegation that HUD refused to recast the debt or discount the mortgage does not rise to a level of arbitrary, capricious, or an abuse of discretion, and violates no applicable law. The trial court did not err in concluding that no material issue of fact exists as to this argument and that plaintiff was entitled to judgment as a matter of law.

Additionally, defendant challenges HUD's authority to sell the mortgage at a reduced price. In 1994, Congress authorized HUD to sell mortgage loans in response to the losses the government was suffering in managing defaulting HUD mortgages. *See* 12 U.S.C. § 1701z-11(a) (1999); *Bayvue Apartments Joint Venture v. Ocwen Federal Bank FSB*, 971 F. Supp. 129, 132 (D.D.C. 1997). Under 12 U.S.C. § 1701z-11(k)(4) (1999):

> Notwithstanding any other provision of law, the Secretary [of HUD] may sell mortgages held on projects that are not subsidized or formerly subsidized projects on such terms and conditions as the Secretary may prescribe.

Thus, HUD properly exercised its discretion in selling this loan as part of the package of the 158 loans sold to plaintiff.

[2] Next, defendant argues that HUD breached its fiduciary duty to defendant and that equity requires plaintiff being enjoined "from foreclosure where HUD's undue control caused [defendant's] current dilemma." Defendant contends that pursuant to the regulatory agree-

ment entered between defendant and HUD, periodic inspection of its records, distribution of earnings and profits to the partners, transfer of property and assets, and limits of secondary financing were all controlled by HUD, such that HUD owed a fiduciary duty to defendant. Defendant concedes that no cause of action has been asserted against HUD, which is not a party to this action, but contends "HUD's role must be taken into account in this equitable foreclosure proceeding."

A fiduciary duty, in the context of a financing party to a corporation, arises only when the evidence establishes that the party providing financing to a corporation completely dominates and controls its affairs. *Edwards v. Bank*, 39 N.C. App. 261, 277, 250 S.E.2d 651, 662 (1979); *Pappas v. NCNB Nat. Bank of North Carolina*, 653 F. Supp. 699, 704 (M.D.N.C. 1987). Further, to justify the imposition of a fiduciary obligation on a party financing the affairs of a corporation, it must be shown that the financing party essentially dominated the will of its debtor. *In re Prima Co.*, 98 F.2d 952 (7th Cir. 1938), *cert. denied*, 305 U.S. 658, 83 L. Ed. 426 (1939).

We fail to see any evidence that would justify the imposition of such a fiduciary obligation on the part of HUD. The allegations defendant relies upon in support of this contention do not amount to control, domination and spoilation of its affairs. *See Edwards*, 39 N.C. App. at 277, 250 S.E.2d at 662. Thus, there is no issue of material fact of a fiduciary duty owed by HUD to defendant.

[3] Defendant further contends that when the PWA was executed, all prior defaults were waived and the note is not in default since defendant has "substantially complied" with the PWA.

It is "well established that provisional work-out agreements do not modify or supersede the original mortgages and mortgage notes or alter HUD's rights to foreclosure on default." *United States v. Wennick*, 645 F. Supp. 103, 105 (D. Del. 1986); *see also United States v. Victory Highway Village, Inc.*, 662 F.2d 488, 495 (8th Cir. 1981); *United States v. 1300 Lafayette East*, 455 F. Supp. 988, 991 (E.D. Mich. 1978).

In the 25 August 1997 order appointing the temporary receiver, entered three years after the PWA was executed, the trial court found that the loan was in default, which the defendant did not appeal. The affidavit of Blanch Reeder, an official of HUD and manager of defendant's note, states in part:

> 4. [Defendant] defaulted under the terms of the PWA for its failure to make a lump sum payment due thereunder, its failure to provide a Letter of Credit as required, and commencing in April 1995, its failure to make the monthly payments in the amount required under the PWA. [. . .]
>
> 5. At the time HUD sold and assigned the loan, as represented by the Note and Deed of Trust, the PWA had been terminated and the Note was in default.

Additionally, defendant acknowledged that the annual lump sum payment "can not be paid by the partnership." Further, the managing general partner of defendant stated in his deposition that neither the lump sum payment nor letter of credit requirements of the PWA were complied with by defendant.

The record does not reflect that defendant offered evidence to support its position that it "has substantially complied with the workout agreement" or in support of its contention the PWA waived all prior defaults.

[4] Defendant also contends that plaintiff "relinquished the requirement that [defendant] hold[] its mortgage current" in the 27 August 1996 consent order. The consent order, which appointed Union to manage the property under certain guidelines, provides in part:

> 5. Except as otherwise expressly provided, this order is entered without prejudice to any rights, claims or positions of any party and nothing in this order shall constitute or be construed as a decision on any legal issue or an admission or waiver by either party as to any issue of fact or law or any other right or remedy with respect to any matter.

Defendant does not reference any provision in the consent order to support its position that plaintiff waived the requirement that defendant keep its payment current under the note. We do not find any language in the consent order that would support defendant's contention and this argument is without merit.

Finally, defendant contends it is entitled to a "thorough and complete accounting from [plaintiff] and HUD to determine how payments made to HUD were applied."

Our review of the record reveals that defendant did not request an accounting at the trial court; therefore, we do not reach the issue. *See* N.C.R. App. P., Rule 10(b)(1) (2000).

In conclusion, after a careful review of the record, we conclude the trial court properly determined that there were no issues of material fact and that plaintiff was therefore entitled to summary judgment. Accordingly, the 4 March 1999 order enjoining the foreclosure and sale of the property is vacated.

The order and judgment of 4 November 1998 is affirmed.

The order of 4 March 1999 is vacated.

Judges LEWIS and SMITH concur.

STATE OF NORTH CAROLINA v. REBECCA BAILEY DYE, DEFENDANT

No. COA98-1593

(Filed 18 July 2000)

Constitutional Law— double jeopardy—domestic criminal trespass—criminal contempt

The trial court erred by denying defendant's motion to dismiss the charge of domestic criminal trespass after she was already convicted of criminal contempt because: (1) the double jeopardy clause prohibits subsequent prosecution of a substantive criminal offense following an adjudication of criminal contempt based upon violation of a court order forbidding commission of acts constituting such substantive offense; and (2) the elements of the offense actually deemed to have been violated in the contempt proceeding, defendant's "coming to" the residence of her ex-husband in violation of a court order, met the essential legal elements of domestic criminal trespass under N.C.G.S. § 14-134.3(a).

Appeal by defendant from judgment entered 19 August 1998 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 20 October 1999.

Attorney General Michael F. Easley, by Associate Attorney General Mary Penny Thompson, for the State.

W. Steven Allen, for defendant-appellant.

JOHN, Judge.

Defendant appeals judgment entered upon conviction by a jury of domestic criminal trespass. We vacate the judgment.

The State's evidence at trial tended to show the following: Defendant and Carey James Dye (Mr. Dye) divorced 14 December 1987. The two entered into a 20 February 1995 civil consent order (the Order) providing in pertinent part that "[d]efendant shall not come to the residence of [Mr. Dye]."

On 24 July 1996, defendant knocked on the front door of Mr. Dye's residence. The door was opened by the couple's child, William Dye (William), who was living with Mr. Dye. William testified defendant began screaming and directing profanity against him, his father, and other family members. William related he "repeatedly" told defendant "she wasn't supposed to be there, [and] she needed to go away." When defendant failed to comply, William closed the door and telephoned the police and his father. As a result, on 26 July 1996, Mr. Dye filed a motion seeking that defendant be held in criminal contempt for violation of the Order.

On 10 May 1997, defendant again returned to Mr. Dye's residence, knocked on the door, and began screaming and cursing at William when he opened it. Based upon this occurrence, Mr. Dye filed a second contempt motion 21 May 1997. Both motions were heard 27 May 1997 in Guilford County District Court (the contempt proceeding). On 16 June 1997, the trial court ruled defendant had "violated the . . . Order of February 20, 1995 . . . [and wa]s in criminal contempt . . . for going to the residence of [Mr. Dye]." Defendant was committed to the Guilford County jail for 30 days.

In addition to his 21 May 1997 contempt motions, Mr. Dye also obtained a warrant charging defendant with domestic criminal trespass in connection with the 10 May 1997 incident. Defendant moved to dismiss 18 May 1998, which motion was denied by the trial court 8 July 1998. Defendant was convicted of the charge by a jury on 19 August 1998 and sentenced to 45 days imprisonment. Defendant appeals.

Defendant contends the trial court erred in denying her 18 May 1998 motion to dismiss, asserting prosecution of the criminal charge violated the "Fifth Amendment Double Jeopardy Clause." Based upon this Court's decision in *State v. Gilley*, 135 N.C. App. 519, 530, 522 S.E.2d 111, 118 (1999), we agree.

It is well established that the Fifth Amendment to the United States Constitution (the Double Jeopardy Clause) protects against, *inter alia*, a "second prosecution for the same offense after [a prior] conviction," *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986), including a nonsummary criminal contempt adjudication, *United States v. Dixon*, 509 U.S. 688, 696, 125 L. Ed. 2d 556, 568 (1993), as occurred in the case *sub judice*.

In *Gilley*, this Court held that the Double Jeopardy Clause prohibits subsequent prosecution of a substantive criminal offense following an adjudication of criminal contempt based upon violation of a court order forbidding commission of acts constituting such substantive offense. *Gilley*, 135 N.C. App. at 529, 522 S.E.2d at 118. Guided by the majority opinion in *Dixon*, 509 U.S. at 696, 125 L. Ed. 2d at 568, we stated there must be a comparison of

> "the elements of the offense actually deemed to have been violated in th[e] contempt proceeding against the elements of the substantive criminal offense(s),"

Gilley, 135 N.C. App. at 527, 522 S.E.2d at 116 (quoting *Commonwealth v. Yerby*, 679 A.2d 217, 222 (Pa. 1996)), "rather than comparison of the general literal elements of contempt with elements of the subsequent substantive criminal offense," *id.* If the substantive elements of the offenses are the same, or if one is a lesser included offense of the other, double jeopardy attaches and the subsequent prosecution is barred. *State v. McAllister*, 138 N.C. App. 252, 255, 530 S.E.2d 859, (2000). Such "approach follows the position of at least five justices in *Dixon*, and best ensures protection of 'the core values of the Double Jeopardy Clause.' " *Gilley*, 135 N.C. App. at 527, 522 S.E.2d at 116 (quoting *Gardner*, 315 N.C. at 452, 340 S.E.2d at 707).

At the contempt proceeding, both motions filed by Mr. Dye were considered and the court set out the following pertinent findings of fact in its order:

> 9. On July 24, 1996, Defendant presented herself at the front door of [Mr. Dye's] residence and knocked on the door. The parties' child . . . who . . . lives at the residence with [Mr. Dye], gave evidence in open Court of Defendant screaming and cursing in a hysterical manner at the door of the residence on July 24, 1996.
>
> 10. On May 10, 1997, the minor child . . . also saw Defendant approach the residence where he and [Mr. Dye] live, knock upon

> the door and begin screaming and using profanity against him and other members of his family.

The court thereupon adjudicated defendant as being in criminal contempt for "going to the residence" of Mr. Dye in violation of the Order.

At her subsequent jury trial on 19 August 1998, defendant was convicted of domestic criminal trespass based upon the 10 May 1997 incident. The issue thus becomes whether defendant's previous "conviction" in the criminal contempt proceeding barred her subsequent prosecution in the trial court.

We note initially that the instant record contains no transcript of the contempt proceeding, and the court's resultant 16 June 1997 contempt order recites only the conclusion that "[t]he defendant is in criminal contempt . . . for going to the residence of [Mr. Dye]." This determination followed detailed findings of fact relating to both the 24 July 1996 and the 10 May 1997 trespass, only the latter of which served as the offense date for the criminal trespasses charge.

Nonetheless, any ambiguity surrounding the trespass date serving as basis for the criminal contempt adjudication, in light of "the terseness of the contempt judgment," *Gilley*, 135 N.C. App. at 528, 522 S.E.2d at 117, "must be construed in favor of defendant," *id.; see Dixon*, 509 U.S. at 724, 125 L. Ed. 2d at 586 ("interests of the defendant are of paramount concern"), and *O'Briant v. O'Briant*, 313 N.C. 432, 435, 329 S.E.2d 370, 373 (1985) ("criminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards"), and *see Gardner*, 315 N.C. at 451, 340 S.E.2d at 707 (ambiguous verdict construed in favor of defendant). We therefore must consider defendant to have been adjudicated in contempt based upon the 10 May 1997 incident which resulted in the domestic criminal trespass conviction.

Under N.C.G.S. § 14-134.3 (1993), the essential elements of domestic criminal trespass include:

> enter[ing] after being forbidden to do so or remain[ing] after being ordered to leave by the lawful occupant, upon the premises occupied by a present or former spouse. . . .

G.S. § 14-134.3(a). The Order mandated that defendant "shall not come to" the residence of her former spouse, Mr. Dye.

In interpreting statutory language, "it is presumed the General Assembly intended the words it used to have the meaning they have in ordinary speech," *Nelson v. Battle Forest Friends Meeting*, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993), and when the plain meaning is unambiguous, a court should go no further in interpreting the statute than its ordinary meaning, *id.* Giving the statutory element of "enter[ing] . . . upon" its ordinary meaning, *see id.*, we conclude that the statutory language is equivalent to the phrase "shall not come to" contained in the Consent Order.

We are cognizant of the holding in *Gilley* that:

> as to the offense of domestic criminal trespass, G.S. § 14-134.3, the [protective] order directed defendant to "stay away" from the marital residence, while the statute forbids a person from "enter[ing] . . . the premises occupied by a . . . former spouse."

Unlike the broad and general "stay away from" terminology rejected in *Gilley*, however, the phrase "shall not *come to* the residence" at issue herein, considered in terms of "ordinary speech," *Nelson*, 335 N.C. at 136, 436 S.E.2d at 124, is specifically akin to the statutory prohibition of "enter[ing]" upon forbidden premises.

"Enter" has been defined as:

> to go or come *into a material place*; to make a *physical entrance* or penetration; to pass *into the interior* of; ingress; to cause to be admitted; to come into or upon. . . .

Webster's Third New International Dictionary 756 (1966) (emphasis added). Similarly, "come" has been defined as "to move toward or enter; to approach or reach; to arrive at a particular place," *id.* at 453, "to present oneself," Black's Law Dictionary 242, and the term "to" has been construed as "movement toward; contact; close against," Webster's at 2401. On the other hand, "stay" has been defined as "to halt an advance; remain," *id.* at 2231, and the word "away" as "from this or that place," *id.* at 152.

Prohibitions against "enter[ing]" or "com[ing] to" a residence would therefore effectively be violated upon actual entrance onto or physical contact with designated premises. However, an order containing the directive to "stay away" from a residence might arguably be violated by travel on a public street passing in front of the residence, or entry into the neighborhood or even the town wherein the residence is located. By contrast, the prohibition forbidding one to

"enter[]" or "come to" certain premises does not lend itself to such uncertainties, because the scope is expressly limited to a "physical entrance" upon the actual "material" premises. *See* Webster's at 756.

In short, we hold the phrase "shall not come to the residence" contained in the Order is equivalent to the domestic criminal trespass element of "enter[ing] . . . upon the premises," G.S. § 14-134.3(a), for purposes of double jeopardy. Accordingly, "the elements of the offense actually deemed to have been violated in th[e] contempt proceeding," *Yerby*, 679 A.2d at 222, *i.e.*, defendant's "coming to" the residence of Mr. Dye on 10 May 1997 in violation of the Order, meet the essential legal elements of domestic criminal trespass under G.S. § 14-134.3(a), *i.e.*, entering upon Mr. Dye's premises on 10 May 1997 after having been forbidden to do so. Under the circumstances of the instant case, therefore, the Double Jeopardy Clause constituted a bar to defendant's subsequent prosecution upon the domestic criminal trespass charge, *see Gardner*, 315 N.C. at 452, 340 S.E.2d at 707 (if substantive offenses are the "same . . . double jeopardy attaches and the subsequent prosecution is barred"), and her conviction must be vacated, *see Gilley*, 135 N.C. App. at 526, 522 S.E.2d at 115, and *Yerby*, 679 A.2d at 221.

In light of the foregoing, we decline to address defendant's remaining assignments of error.

Judgment vacated.

Judges LEWIS and McGEE concur.

STATE OF NORTH CAROLINA v. JEROLD ALAN HARRIS

No. COA99-826

(Filed 18 July 2000)

1. Constitutional Law— self-incrimination—codefendant not required to testify—offer of proof not submitted

The trial court did not abuse its discretion in a robbery with a dangerous weapon and first-degree murder case by ruling that the codefendants could not be called to testify based on their invocation of their Fifth Amendment privilege against self-incrim-

ination, because: (1) defendant did not submit an offer of proof of the codefendants' testimony outside the presence of the jury so that the Court of Appeals could rule on the significance of the codefendants' testimony or the significance of their invocation of the privilege; and (2) defendant's testimony on his own behalf indicating his version of the incidents does not qualify as an offer of proof.

2. Evidence— hearsay—unavailable witness—untrustworthy

The trial court did not abuse its discretion in a robbery with a dangerous weapon and first-degree murder case by failing to conduct the six-part inquiry for the admission of hearsay statements as required by N.C.G.S. § 8C-1, Rule 804(b)(5) based on a codefendant's invocation of his Fifth Amendment privilege making him unavailable to testify, because the trial transcript reveals the trial court found the hearsay at issue to be untrustworthy under the third step of the required analysis, meaning failure to conduct further analysis under the other factors was not prejudicial.

Appeal by defendant from judgments entered 31 July 1998 by Judge Carl L. Tilghman in Hertford County Superior Court. Heard in the Court of Appeals 6 June 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General James Peeler Smith, for the State.

Paul Pooley for defendant-appellant.

HUNTER, Judge.

Jerold Alan Harris ("defendant") appeals his convictions for robbery with a dangerous weapon and first degree murder of Jimmy Andreson ("Andreson"). In his brief before this Court, defendant contends that the trial court abused its discretion in ruling that David Foreman ("Foreman") and Tyrone Dukes ("Dukes"), his codefendants, would not be called to testify without conducting the balancing test required by Evidence Rule 403, and in failing to conduct inquiry into hearsay statements which were excluded after the codefendants became unavailable. Defendant argues that these alleged errors require that he be given a new trial. We hold that defendant has failed to show prejudicial error by the trial court.

The State's evidence at trial relevant to the present appeal indicated that this case stems from incidents occurring the night of 20

December 1996. That evening, defendant, his neighbor "Buddy," Pamela Jacobs, Kelvin Futrell, Alicia Eason, Dukes and Foreman were at defendant's home. When Dukes told Foreman that he had seen Andreson "at the store" earlier in the evening, defendant proceeded to ask them if they wanted "to get" Andreson. Later in the evening, Andreson came to defendant's home and asked if Tim Baker lived there. Defendant came to the door and asked what Andreson needed. When Andreson responded that he wanted "crack," defendant invited him in, saying he had what Andreson wanted. Defendant called Dukes and Foreman to the back of the house for a discussion, and then told Andreson to come into defendant's bedroom.

While Andreson was in defendant's bedroom, Dukes took Andreson's car. He drove it down the road and left it. When Dukes returned to the house, Andreson was just coming out of defendant's bedroom. Looking out the front door, Andreson noticed his car was missing and asked where it was. Dukes and defendant told him they did not know about the car. Andreson continued to ask them where his car was located, and defendant then asked Andreson to leave the house. Defendant then struck Andreson in the face and Andreson fell to the floor. Defendant and Dukes searched Andreson's pockets, took his wallet, and then dragged him by his hair out of the house and down the front steps of the house and into the yard. When Andreson was lying in the front yard of the house, defendant, Dukes and Foreman kicked him and struck him with yard ornaments. Kelvin Futrell prevented defendant from beating Andreson with a baseball bat, but defendant did beat Andreson with an iron rod. When defendant's uncle came to the house, someone dragged Andreson to the side of the house. Andreson was moaning, falling against the side of the house, asking for help.

After defendant's uncle left, defendant, Dukes, Foreman and Kelvin Futrell went back outside. Dukes struck Andreson on the head with a broom handle. When Andreson passed out, defendant went into the house, got a five-gallon bucket of hot water, threw the water on Andreson to revive him, and continued to beat him. Later on, after the beating had subsided, Andreson tried to re-enter the house. Pamela Jacobs told Andreson to leave, that his car was down the road. Defendant and Foreman then ran out of the house and knocked Andreson off the steps and onto the ground. While Foreman held Andreson's head, defendant hit Andreson three times with a gin bottle. Defendant, Foreman and Dukes returned inside the house. Defendant went outside a few moments later, and then returned,

reporting that Andreson was dead. The testimony of Pamela Jacobs and Alicia Eason revealed that defendant remarked that he did not like white people, and Alicia Eason testified that defendant decided to kill Andreson for that reason. Both testified that all co-defendants took part in beating and robbing Andreson, but that defendant committed the final blows to Andreson, causing his death.

Contrary to the evidence presented by the State, defendant testified that when Andreson came to his home asking for drugs, defendant told him he could take Andreson to get some, but Andreson said that he had no money. Andreson started to leave, but came back and instigated a fight with defendant after he discovered his car was missing. Defendant further testified that Dukes then entered the house and told Andreson where his car was located, and that Dukes had taken the car and left it two miles from defendant's house, although defendant did not know why Dukes had done so. Andreson would not leave and continued fighting all three defendants. Defendant testified that in total, he hit Andreson once with his fist, twice with a bottle, twice with a long rod, and kicked him several times. However, defendant testified that co-defendant Foreman struck Andreson with a final blow to the head just before he died. A forensic pathologist testified that Andreson died of blunt trauma to the head.

Defendant was tried at the 22 June 1998 Criminal Session of Superior Court in Hertford County. He was convicted of robbery with a dangerous weapon and first degree murder. For the robbery conviction, defendant was sentenced to a term of 95 to 123 months, consecutive to life imprisonment without parole, his sentence for first degree murder. Defendant appeals.

[1] Defendant first contends that the trial court erred and abused its discretion in ruling that the co-defendants would not be called to testify due to the fact that they would invoke their Fifth Amendment privilege, without conducting the balancing inquiry required by Rule 403 of the North Carolina Rules of Evidence. Our Supreme Court has stated:

> [T]here are two difficulties that may arise when a witness is presented and then refuses to testify by asserting his Fifth Amendment privilege. The first is that it permits the party calling the witness to build or support his case out of improper speculation or inferences that the jury may draw from the witness' exercise of the privilege, which cannot be adequately corrected by trial court instruction. The second concern is that it encroaches

> upon the constitutional right to confrontation because the presentation of the exercise of the privilege cannot be tested for relevance or value through cross-examination. As a result of these difficulties, "the trial judge must weigh a number of factors in striking a balance between the competing interests." Such a balancing will be left to the discretion of the trial court in determining whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice in accordance with Rule 403 of the Rules of Evidence.

State v. Pickens, 346 N.C. 628, 639, 488 S.E.2d 162, 168 (1997) (citations omitted) (quoting *United States v. Vandetti*, 623 F.2d 1144, 1149 (6th Cir. 1980)). In *Pickens*, the defendant wanted to call his co-defendant and show that the co-defendant fired the weapon that caused the victim's death. Outside the jury's presence, the co-defendant had exercised his Fifth Amendment privilege against self-incrimination. The Court held that the co-defendant's assertion of his Fifth Amendment privilege before the jury was "immaterial" because the defendant in *Pickens* was not tried for murder, but under a theory of acting in concert. *Id.* at 640, 488 S.E.2d at 168. Defendant argues that he "should at least have been able to compel his co-defendants to take the witness stand and assert their Fifth Amendment privileges in front of the jury." He contends the purpose of doing this would be to attempt to elicit testimony concerning material facts, or, if the witnesses refused to testify, it would avoid prejudice to his case as he offered the co-defendants as witnesses in light of their roles in the incident.

Our Supreme Court has held that "whether an objection be to the admissibility of testimony or to the competency of a witness to give that, or any, testimony, the significance of the excluded evidence must be made to appear in the record if the matter is to be heard on review." *Currence v. Hardin*, 296 N.C. 95, 99, 249 S.E.2d 387, 390 (1978). "An offer of proof under Rule 43(c) [now Rule 103(b)] must be specific and must indicate what testimony the excluded witness would give." *Id.* at 100, 240 S.E.2d at 390. In the present case, both co-defendants had been subpoenaed by the State and by defendant. The court had been advised by their counsel that they would refuse to testify, invoking their Fifth Amendment privilege. However, defendant did *not* submit an offer of proof as to their testimony outside the presence of the jury. Therefore, we cannot rule as to the significance of their testimony, or the significance of their invocation of their Fifth Amendment privilege, without an offer of the testimony defendant

hoped to elicit. While defendant's testimony on his own behalf indicates his version of the incident, it does not qualify as an offer of proof as to his co-defendants' testimony. Accordingly, this assignment of error is overruled.

[2] Next, defendant contends that the trial court erred and abused its discretion in failing to conduct the required inquiry into certain hearsay, and thereby excluding that hearsay which defendant sought to introduce after the co-defendants became "unavailable" by their exercise of their privilege against self-incrimination. The hearsay at issue is that which defendant proposed to introduce through Jacqueline Harris ("Harris") and Gilbert Ivey ("Ivey"). No offer of proof was made as to Harris's testimony; therefore, based on foregoing authority, we will only consider Ivey's testimony in this assignment of error. An offer of proof of Ivey's testimony indicated that he would testify that co-defendant Dukes had said that he, Dukes, took Andreson's car and went joy riding when the car broke down and that when he came back to defendant's house to get some help fixing the car, he found defendant, Foreman and Andreson in a fight, and

> the next thing he know [sic] they were all beating up on [Andreson].
>
> And he said that they were jumping on [Andreson] and stuff and that he kept telling me how they had that broom, big thick broom, not the little skinny ones, but the big ones. He kept telling me how David [Foreman] was hitting [Andreson] with the broom and stuff and making all kinds of sounds and faces.

Defendant argues that the trial court failed to make required findings and conclusions concerning this hearsay testimony.

Defendant in the present case submitted to the trial court and to the State a written notice of his intent to present hearsay substantially in the form required by Evidence Rule 804(b)(5). To admit testimony under this rule, the trial court must first determine that the witness is unavailable. *State v. Triplett*, 316 N.C. 1, 8, 340 S.E.2d 736, 740 (1986). Where a witness is physically present at the trial, but asserts his Fifth Amendment right not to testify, he is considered "unavailable" for the purpose of determining whether his prior recorded testimony may be admitted into evidence. *State v. Graham*, 303 N.C. 521, 523, 279 S.E.2d 588, 590 (1981). After determining that the witness is unavailable, the trial court must undertake the follow-

ing six-step inquiry required for the admission of the testimony: Whether (1) proper notice has been given; (2) the hearsay is not specifically covered elsewhere; (3) the hearsay is trustworthy; (4) the hearsay statement is material; (5) the hearsay statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts; (6) the interests of justice will be served by the admission. *Phillips & Jordan Investment Corp. v. Ashblue Co.*, 86 N.C. App. 186, 190, 357 S.E.2d 1, 3, *disc. review denied*, 320 N.C. 633, 360 S.E.2d 92 (1987). In *Phillips v. Ashblue*, this Court held:

> The six-part inquiry is very useful when an appellate court reviews the admission of hearsay under Rule 804(b)(5) or 803(24). However, *its utility is diminished when an appellate court reviews the exclusion of hearsay.* Common sense dictates that *if proffered evidence fails to meet the requirements of one of the inquiry steps, the trial judge's findings concerning the preceding steps are unnecessary.*
>
> Although we are compelled to hold that the trial court erred by not making specific findings for each step in the six-part inquiry, the error did not prejudice defendant because the evidence would still have been excluded.

Id. at 191, 357 S.E.2d at 3-4 (emphasis added).

The trial transcript shows that the trial court found the hearsay at issue to be untrustworthy under step (3) of the required analysis. Therefore, error in failing to conduct further analysis under the other factors is not prejudicial. *Id.* Defendant does not assign error to the finding that the hearsay in question was untrustworthy. Accordingly, this assignment of error is overruled.

We have reviewed defendant's remaining assignment of error which he has presented in his brief and find it to be without merit. No other assignments of error were argued and are therefore deemed abandoned under N.C.R. App. P. 28, and we will not consider them.

No prejudicial error.

Judges GREENE and HORTON concur.

JAMES LLOYD SUGG, JR., v. MARTHA SUGG FIELD, WILLIAM STEPHENSON, AND KATHERINE BROWN

No. COA99-888

(Filed 18 July 2000)

1. Civil Procedure— consolidation of actions—discovery—judicial notice of similar proceedings

Although plaintiff contends the trial court erred by effectively consolidating this civil action for trespass and invasion of privacy with the caveat action involving the same parties for purposes of discovery and dismissal, there was no consolidation of the two actions since: (1) the trial judge simply took notice of relevant proceedings in the caveat action as they related to similar proceedings in this action; and (2) a court may take judicial notice of its own records in an interrelated proceeding involving the same parties.

2. Discovery— failure to comply—assertion of privilege against self-incrimination

The trial court did not err by striking the pleadings and dismissing all claims for trespass upon plaintiff's property and chattels, conversion, invasion of privacy by intrusion upon seclusion, intentional and/or negligent infliction of emotional distress, and civil conspiracy, because the trial court balanced plaintiff's right to assert his privilege against self-incrimination as opposed to defendants' due process rights to defend against his allegations and determined that defendants' rights were unduly prejudiced without access to the information concerning the location of certain tapes during the pendency of this action which plaintiff refused to divulge during discovery.

Appeal by plaintiff from order entered 27 January 1999 by Judge Wade Barber, Jr., in Wake County Superior Court. Heard in the Court of Appeals 19 April 2000.

Howard, Stallings, From & Hutson, P.A., by E. Cader Howard and Christopher K. Behm, for plaintiff-appellant.

Stam, Fordham & Danchi, P.A., by Henry C. Fordham, Jr., and Theodore S. Danchi, for defendant-appellee Field.

Akins, Hunt & Fearon, P.L.L.C., by Donald G. Hunt, Jr., for defendant-appellee Stephenson.

Massengill & Bricio, P.L.L.C., by Francisco J. Bricio, for defendant-appellee Brown.

MARTIN, Judge.

Plaintiff filed this action on 8 July 1998, asserting claims for trespass upon his property and chattels, conversion, invasion of privacy by intrusion upon seclusion, intentional and/or negligent infliction of emotional distress, and civil conspiracy. Specifically, plaintiff alleged that on two occasions in February 1997 and on another unspecified date, defendants went upon real property which was in his possession and used as his residence, searched the residence, and removed a number of videotapes belonging to plaintiff. He alleged defendants copied the tapes and published them to others, resulting in extreme embarrassment and emotional distress to plaintiff. He sought compensatory and punitive damages, as well as return of the videotapes, and attorneys' fees.

All defendants filed answers responding to the specific allegations of the complaint and asserting affirmative defenses. In her answer, defendant Field, who is plaintiff's sister, admitted that in February 1997, she had gone into a barn on property owned by her father and uncle, and had removed several pornographic videotapes which were being stored on the property. She also admitted that she had shown the videotapes to members of her family, and asserted that she returned the videotapes to the place where she had found them shortly thereafter.

At the same time this action was pending, there was also pending in the Superior Court of Wake County a caveat proceeding, *In the matter of the Will of JAMES LLOYD SUGG, SR., Deceased* (98 SP 0020), filed by defendant Field, in which she challenged a paper writing dated 26 February 1997 purporting to be the will of plaintiff's and defendant Field's father. Plaintiff was the sole beneficiary under the will. Superior Court Judge Wade Barber presided over all of the discovery proceedings in both the caveat proceeding and this action.

Beginning in April 1998, in the caveat proceeding, defendant Field sought to discover information from plaintiff about the videotapes and a person depicted therein; on 12 August 1998, the trial court entered an order compelling plaintiff to provide the informa-

tion requested by Field's discovery and to produce the videotapes on or before 19 August 1998. Plaintiff did not produce the tapes as ordered and claimed they had been stolen from him within the preceding sixty days.

Defendant Field also sought discovery with respect to the videotapes in the present action. On 7 October 1998, plaintiff refused, at his deposition, to answer any questions with regard to the content of the videotapes other than to say that he had produced them, that they depicted sexually explicit activity, and included other persons named "Holly" and "Stephanie," as well as plaintiff. He testified that most of the videotapes taken in February 1997 had been returned to him in June 1997, and that he had thereafter put them in his barn and had not seen them since June 1998. He testified that he had discovered them missing about 20 August 1998, that he had neither removed the videotapes from the barn nor destroyed them, and that he did not know what had happened to them.

Defendant Field moved for sanctions in the caveat proceedings for plaintiff Sugg's failure to produce the videotapes as ordered. Judge Barber continued the hearing until 5 November 1998; at that time plaintiff continued to deny the videotapes were in his possession or subject to his control. The hearing was further continued to 10 November 1998. On 9 November, an attorney appeared in Judge Barber's court *ex parte* and delivered a box containing the videotapes. The attorney declined to identify his client. The following day, plaintiff Sugg authenticated the tapes as being those to which the court's order was directed, but Sugg's attorney declined to disclose to the court as to whether he knew from where the tapes had come.

Defendant Field also moved for an order compelling discovery in the present action. On 8 December 1998, Judge Barber entered an order in this case in which he ordered plaintiff Sugg to reconvene his deposition, to answer questions concerning the tapes, and, as to any videotapes which are the subject of the present action, to answer questions related to the possession, custody and control of such tapes. On 16 December, the deposition was reconvened. When asked if he had possession, custody or control of any of the tapes at the time of his earlier deposition, Sugg invoked his Fifth Amendment privilege against self-incrimination. He continued to assert the privilege when asked if the tapes had been in his possession, custody or control at any time between the 7 October deposition and the time when they were delivered to Judge Barber's courtroom on 9 November, as well as to questions relating to possession of the tapes since June 1998 and

the identity of persons to whom he had spoken about the tapes between June and November 1998.

Defendants moved to dismiss the action based on plaintiff's refusal to disclose information relevant and material to his case against defendants. The motion was heard by Judge Barber, who entered an order containing detailed findings of fact with respect to plaintiff Sugg's responses to discovery in both the caveat proceeding and this proceeding. Judge Barber found that plaintiff Sugg's testimony with respect to his inability to produce the videotapes due to their theft was "incredulous and not truthful," that information relating to the possession, custody and control of the videotapes was "critical, essential, and material evidence" to the present case, and that plaintiff Sugg's continued assertion of his privilege against self-incrimination, while lawful, was prejudicial to the rights of defendants and their ability to defend the present action. He entered an order striking plaintiff Sugg's pleadings and dismissing this action. Plaintiff appeals.

The record on appeal contains thirty-seven separate assignments of error; plaintiff presents two arguments in support of seven of them. All remaining assignments of error are deemed abandoned. N.C.R. App. P. 28(a), 28(b)(5).

[1] Initially, we consider plaintiff's contention that the trial court erred by "effectively consolidating this civil action with the caveat action for purposes of discovery and dismissal." He bases his argument upon the trial court's statement, in its order dismissing this action, that "[t]he proceedings in this matter must be considered in conjunction with relevant and related proceedings in the Caveat," and its findings with respect to plaintiff's conduct in the discovery proceedings in this action as well as the caveat proceeding. Plaintiff argues the two actions were insufficiently similar to justify consolidation.

Plaintiff's argument must fail. There was no consolidation of the two actions; Judge Barber, who presided over the discovery proceedings in both actions, simply took notice of relevant proceedings in the caveat action as they related to similar proceedings in this action, and plaintiff's conduct and representations with respect to each. It is well established that a court of this State may take judicial notice of its own records in an interrelated proceeding involving the same parties. *See West v. G.D. Reddick, Inc.*, 302 N.C. 201, 274 S.E.2d 221 (1981);

State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963), *cert. denied*, 376 U.S. 956, 11 L.Ed.2d 974 (1964); *Bizzell v. Insurance Co.*, 248 N.C. 294, 103 S.E.2d 348 (1958); N.C. Gen. Stat. § 8C-1, Rule 201. The present case and the caveat proceeding both involve plaintiff and defendant Field, plaintiff referred to the caveat action in his First Set of Interrogatories to defendant Field in this case, and discovery of evidence with respect to the possession and content of the videotapes is relevant to both proceedings. Therefore, it was proper for the trial court to consider the discovery orders from the caveat proceeding in its consideration of sanctions for failure to comply with discovery in the present case. These assignments of error are overruled.

[2] The principal argument advanced by plaintiff is directed to the dismissal of his claims against defendants due to his lawful exercise of his privilege against self-incrimination. We affirm the trial court's order. Though it is true that a court cannot compel an individual to disclose information which may later be used against him in a criminal proceeding, this does not mean that an individual's decision to invoke the privilege may be done without consequence. The Fifth Amendment is "intended to be a shield and not a sword." *Qurneh v. Colie*, 122 N.C. App. 553, 558, 471 S.E.2d 433, 436 (1996). In *Qurneh* and *Cantwell v. Cantwell*, 109 N.C. App. 395, 427 S.E.2d 129, *review improv. allowed*, 335 N.C. 235, 436 S.E.2d 588 (1993), this Court has made it clear that where the privileged information sought from a plaintiff in discovery is material and essential to the defendant's defense, plaintiff must decide whether to come forward with the privileged information or whether to assert the privilege and forego the claim in which such information is necessary. Dismissal is not automatic; before dismissing a claim based upon plaintiff's refusal to testify in reliance upon the privilege against self-incrimination, the court must employ the balancing test recognized in *Qurneh* and *Cantwell*. This test involves weighing a party's privilege against self-incrimination against the other party's rights to due process and a fair trial. *See Cantwell* at 397, 427 S.E.2d at 130 (citing *Pulawski v. Pulawski*, 463 A.2d 151, 157 (R.I. 1983)).

In the present case, plaintiff seeks, for each of the seven claims in the complaint, compensatory damages in excess of $10,000, as well as punitive damages. The damages are sought as compensation for intangible injuries such as injury to feelings and damage to reputation. Testimony concerning the location of the tapes during the pendency of this action, the identity of persons with whom plaintiff may have discussed the tapes or to whom he may have even given the

tapes, and the extent to which he may have disseminated them himself, was essential to defendants' ability to defend against actual and punitive damages for their own actions flowing from the limited time the tapes were wrongfully in their possession. Plaintiff's refusal to answer such relevant questions severely limited defendants' ability to present a defense to plaintiff's claim for damages.

Nevertheless, plaintiff claims that because defendant Field admitted going into the storage barn and taking the tapes, the issue of who possessed the videotapes during the period for which he asserted the privilege was not relevant to his claim for invasion of privacy and, therefore, it was error to dismiss that claim. We disagree. If plaintiff himself was in possession, or had custody or control, of the videotapes for all or some parts of a several-month period during which he alleged defendants wrongfully possessed them, his damages would be significantly mitigated.

From the order, it appears that Judge Barber carefully considered and balanced plaintiff's right to assert his privilege against self-incrimination as opposed to defendants' due process rights to defend against his allegations and determined that, without access to the information which plaintiff refused to divulge, defendants' rights were unduly prejudiced. In light of plaintiff's election to shield himself from possible criminal liability for perjury, rather than waive the privilege and pursue his claims by providing information essential to defendants' ability to present a defense, the trial court properly ruled that plaintiff had abandoned his claims and dismissed the action.

For the foregoing reasons, the Order Striking Pleadings and Dismissing All Claims is affirmed.

Affirmed.

Judges LEWIS and WALKER concur.

BILLY RAY NOBLES AND CAROLYN NOBLES, PLAINTIFFS v. WAYNE E. TALLEY, DEFENDANT, AND CSX TRANSPORTATION, INC., DEFENDANT AND THIRD PARTY-PLAINTIFF v. D & T LIMOUSINE SERVICE, INC., THIRD PARTY-DEFENDANT

No. COA99-631

(Filed 18 July 2000)

1. **Employer and Employee— FELA—automobile accident—provision of seatbelt**

The trial court properly granted summary judgment for defendant CSX in an action arising from an automobile accident where the claims against CSX, an interstate railroad carrier, were brought pursuant to the Federal Employers' Liability Act (FELA); plaintiff contended that CSX failed to comply with the appropriate sections of the Code of Federal Regulations pertaining to seatbelts and was subject to strict liability; plaintiff presented only his statement that he had locked the seat belt closed and that it "obviously" came lose without making an offer of proof that it failed; his statement did not establish why the belt failed or how it was defective; and, assuming that it failed, plaintiff presented no evidence that the belt did not meet standards enunciated in the Code of Federal Regulations.

2. **Employer and Employee— FELA—automobile accident—speed and lookout**

The trial court erred by granting summary judgment for defendant CSX, an interstate railroad carrier, on the issue of whether it violated the Federal Employers' Liability Act (FELA) by providing a negligent driver where there was an issue of fact as to speed and proper lookout.

Appeal by plaintiffs from order entered 13 January 1999 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 13 March 2000.

Lucas Bryant & Denning, by Robert W. Bryant, Jr., Burge & Wettermark, P.C., by Frank O. Burge, Jr., and Edward L. Bleynat, Jr., for plaintiff-appellants.

Bode, Call & Stroupe, L.L.P., by Odes L. Stroupe, Jr., and James N. Jorgensen, for defendant-appellee CSX Transportation, Inc.

EDMUNDS, Judge.

Plaintiffs Billy Ray and Carolyn Nobles appeal the trial court's grant of defendant CSX Transportation, Inc.'s (CSX) motion for on all of plaintiffs' negligence claims. We affirm in part and reverse in part.

Plaintiff Billy Ray Nobles (Nobles) was an employee of defendant CSX, an interstate railroad carrier. On 10 June 1994, Nobles was part of a crew being driven in a van owned and operated by third-party defendant D&T Limousine Service, Inc. (D&T), which was under contract with CSX. The van was being driven by James Voliva east on Interstate 40 from Rocky Mount to Wilmington. At the same time, Wayne Talley (Talley) was traveling west on Interstate 40 in a pick-up truck towing another car. Talley lost control of his truck, skidded across the median separating the east- and westbound lanes of the interstate, and hit the guardrail protecting the eastbound lanes of the highway. The eastbound CSX van then collided with the vehicle that Talley was towing. Nobles, who had been lying down on the rear seat of the van, was injured in the accident.

Nobles alleged that he was wearing his seat belt at the time of the accident and that it came undone. The investigating state trooper recorded in his accident report that the accident occurred in daylight hours while rain was falling, and the road was straight, flat, and wet. In an affidavit, the investigating trooper stated that, based upon the wet roads and the heavy load that Talley was towing, he issued a citation to Talley for exceeding a safe speed. In his affidavit and accident report, the investigating trooper also noted that he "observed no evidence of seatbelt failure, only of a failure to wear a seatbelt."

Toni King (King), who was traveling west on Interstate 40, saw Talley lose control of his truck and witnessed the collision between the CSX van and the vehicle Talley was towing. In an affidavit, she stated that the "accident happened very quickly and the driver of the van could not have had a chance to react or avoid the accident." However, Sean Mathew (Mathew), a passenger in Talley's truck, stated in an affidavit:

> After Mr. Talley's truck hit the guardrail and came to a stop, I looked around in the cab of the truck to find a cigarette I had dropped. I then opened the truck door and put one foot out on the ground to get out of the truck when a white van ran into the car Mr. Talley was towing.

He estimated "that fifteen to twenty-five seconds passed between the time Wayne Talley's truck began to swerve and the time the van T-boned the car Mr. Talley was towing" and "six to nine seconds passed between the time Mr. Talley's truck hit the guardrail and the time the van collided with the car Mr. Talley was towing."

On 27 March 1996, Nobles filed a complaint against CSX pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C.A. §§ 51-60 (West 1986), and against Talley for common law negligence. On 25 April 1996, Talley filed an answer denying negligence. On 6 June 1996, CSX filed an answer denying all negligence and FELA claims and asserting that Talley was contributorily negligent. CSX also filed a cross-claim against Talley and a third-party complaint against D&T. D&T's answer denied negligence. On 29 October 1998, CSX filed a motion for summary judgment, and on 13 January 1999, the trial court granted the motion and dismissed plaintiffs' case with prejudice. Plaintiffs appeal. Although Carolyn Nobles, Nobles' wife, alleged loss of consortium against Talley, because the issues on appeal apply only to Mr. Nobles' claim against CSX, we hereafter refer to a singular "plaintiff."

Plaintiff's pertinent claims against CSX were brought pursuant to FELA. Plaintiff alleged that CSX violated its duty of care under that act by failing to provide him with a safe place to work in that the van driver was negligent and that the van seatbelts were defective. *See* 45 U.S.C.A. §§ 51-60. FELA applies when an injury occurs to "[a]ny employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce." 45 U.S.C.A. § 51. "The duty to provide a safe work place is non-delegable . . . ." *McKeithan v. CSX Transportation, Inc.*, 113 N.C. App. 818, 821, 440 S.E.2d 312, 314 (1994) (citing *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 10 L. Ed. 2d 709 (1963)). CSX is liable under FELA for the negligence of those with whom it contracts to provide operational activities for CSX. *See Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 2 L. Ed. 2d 799 (1958).

[1] Summary judgment is appropriate where there is no genuine issue of material fact and where the movant is entitled to judgment as a matter of law. *See Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). We review the record in the light most favorable to the nonmovant. *See Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). "Even though summary judgment is seldom appropriate in a negligence case, summary judgment may be granted in a negligence action where there are no genuine issues of material fact and the

plaintiff fails to show one of the elements of negligence." *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995) (citations omitted).

The elements of negligence are a duty owed by the defendant to the plaintiff and nonperformance of that duty proximately causing the plaintiff's injury. *See Camalier v. Jeffries*, 340 N.C. 699, 460 S.E.2d 133 (1995). "What constitutes negligence under FELA is a federal question." *Southern Railway Co. v. ADM Milling Co.*, 58 N.C. App. 667, 670, 294 S.E.2d 750, 753 (1982) (citations omitted). The United States Supreme Court has said that negligence is "the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67, 87 L. Ed. 610, 617 (1943). "Under federal law, FELA is accorded a liberal construction; recovery should be allowed if the employing railroad's negligence played any part, even the slightest, in causing the employee's injury." *McKeithan*, 113 N.C. App. at 821, 440 S.E.2d at 314 (citations omitted). "As the Supreme Court made clear in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-55, 106 S. Ct. 2505, 2512-13, 91 L. Ed. 2d 202 (1986), this evidentiary standard must inform our review on summary judgment." *Lisek v. Norfolk and Western Ry. Co.*, 30 F.3d 823, 832 (7th Cir. 1994) (citation omitted).

In his complaint, plaintiff alleged, "Defendant CSX failed to provide [p]laintiff . . . with a safe place to work by providing him with a negligent driver and defective seatbelts, in violation of its duties under the Federal Employers' Liability Act, 45 U.S.C. § 51." We first consider plaintiff's seatbelt claim. CSX's motion for summary judgment required plaintiff to produce a forecast of evidence to support this claim. *See Cockerham v. Ward and Astrup Co. v. West Co.*, 44 N.C. App. 615, 262 S.E.2d 651 (1980). When asked by CSX through interrogatory for plaintiff's "entire basis" for alleging that the van's seatbelt was defective, plaintiff responded, "I locked the seatbelt and it obviously came loose in the collision." When CSX further asked plaintiff to "identify by number and subject matter all regulations, including all provisions and requirements, which you claim defendant CSX violated" as to the allegedly defective seatbelt, plaintiff answered:

> Title 49, Code of Federal Regulations, Section 571.208 through 571.210. The subject matter is self-explanatory and the plaintiff claims that the defendant CSX caused the plaintiff to be hauled in

> a vehicle which did not comply with the provisions of Title 49 CFR, Section 571.208, .209 and .210 with regard to seatbelts, their application, and the fact that the railroad did not comply with those requirements and standards for seatbelt buckling and unbuckling and seatbelt anchoring securely. In addition, plaintiff claims that the defendant violated Title 45 U.S.C. Section 51, *et. seq.* by placing the plaintiff in a vehicle which was not reasonably safe under the circumstances and did not provide him a safe place to work as he rode in the said van up to the point of the collision.

Plaintiff made no additional allegations or offers of proof to establish that any seat belt requirements were violated.

Plaintiff argues that CSX failed to comply with the appropriate sections of the Code of Federal Regulations (49 C.F.R. §§ 571.208-.210 (1999), which, as plaintiff correctly noted above, pertain to seatbelts) and that this failure subjects CSX to strict liability without a need for a showing of negligence. However, plaintiff has not made an offer of proof that the belt failed, but has only presented plaintiff's statement that because he had locked the belt earlier, it "obviously" came loose. This conclusory statement fails to establish why the belt failed or how it was defective. *See Cockerham*, 44 N.C. App. 615, 262 S.E.2d 651. Moreover, even assuming that the van's seat belt failed in the collision, plaintiff has presented no evidence that the belt did not meet the standards enunciated in the Code of Federal Regulations; such a failure would not be *ipso facto* proof of noncompliance with the regulations. Consequently, plaintiff has not met his burden of forecasting sufficient evidence to support his claim that CSX did not fulfill its duty under FELA to provide a safe van. The trial court properly granted summary judgment as to this issue.

[2] Plaintiff additionally alleged that CSX provided a negligent driver who, at the time of the accident, was driving too fast for conditions and who failed to maintain a proper lookout. "The burden of establishing liability for negligence thus is considerably less imposing under the FELA than under the common law of North Carolina." *Southern Railway*, 58 N.C. App. at 670, 294 S.E.2d at 753. Upon a careful review of the record, we believe there are material issues of fact to be decided by a jury in determining whether the driver of the van was negligent.

The issues of speed and proper lookout may be interrelated. "[W]hether [the defendant] was negligent in respect of speed

depended largely . . . on whether in the exercise of due care she could and should have seen [the plaintiff] in a perilous position and under these circumstances failed to decrease speed." *Cassetta v. Compton*, 256 N.C. 71, 76, 123 S.E.2d 222, 226 (1961). Talley's passenger, Mathew, estimated that twenty-five seconds passed between the moment Talley lost control of his vehicle and the subsequent impact of the CSX van, and that as many as nine seconds elapsed after Talley's truck hit the guardrail before the van collided with Talley. After Talley's truck came to rest, Mathew had time to look for a cigarette he had dropped and open the truck door before the CSX van hit the vehicle Talley was towing.

In contrast to this evidence, which suggests that the van driver had sufficient time to see Talley in trouble and either avoid a collision or reduce his speed, is King's affidavit stating her belief that the driver of the van could not have avoided the accident. Viewing this conflicting evidence in the light most favorable to plaintiff, we conclude that there is an issue of fact to be decided by a jury. " 'If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied . . . .' " *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979) (omission in original) (citation omitted). The trial court therefore erred in granting summary judgment for CSX as to the issue of whether CSX violated the provisions of FELA by providing a negligent driver.

Affirmed in part and reversed in part.

Judges LEWIS and JOHN concur.

EDWIN MOSS, MALCOLM THOMAS, THOMAS HEREFORD, C. RAY EDWARDS, JIM STALLINGS, AND LEM LONG, PLAINTIFFS v. THE IMPROVED BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE WORLD, AND DONALD P. WILSON, DEFENDANTS

No. COA99-804

(Filed 18 July 2000)

Process and Service— Alabama default judgment—no proper service under Alabama law

The trial court did not err by granting defendants Rule 60 relief from an Alabama default judgment in a case arising from a struggle over the national leadership of the Elks where the court ruled that defendants were not properly served under Alabama law and concluded that the judgment was not entitled to full faith and credit.

Appeal by plaintiffs from order entered 12 March 1999 by Judge James G. Ragan III in Hertford County Superior Court. Heard in the Court of Appeals 17 April 2000.

Plaintiff-appellants Moss, et al, appeal Judge Ragan's order granting Defendant-appellees Donald Wilson (Wilson) and the Elks relief from an Alabama default judgment.

The underlying case arose out of a power struggle over the national leadership of the Improved Benevolent and Protective Order of Elks of the World (the Elks). Defendant-appellee Donald Wilson led the Elks as Grand Exalted Ruler from 1982 until 1994, when plaintiff-appellant Lem Long (Long) challenged him in a national election. Wilson was re-elected Grand Exalted Ruler and expelled Long and his supporters from the Elks.

Long and his supporters subsequently filed three lawsuits against Wilson and the Elks. Two of the cases, *Hicks, et al v. Wilson*, No. 2:95-CV-22-BO(3) (E.D.N.C. June 20, 1995), *aff'd*, *Hicks v. Wilson*, No. 95-2385 (4th Cir. May 20, 1996) and *Long v. Wilson*, No. 3:95CV215-P (W.D.N.C. Nov. 14, 1996), were previously dismissed pursuant to N.C. R. Civ. P. 12(b)(1) and 56, respectively.

This appeal concerns a default judgment entered in the circuit court for Dallas County, Alabama. In their complaint, plaintiffs sought (1) an accounting of Elks funds under Wilson's previous tenure as Grand Exalted Ruler, (2) reinstatement of plaintiffs into the Elks, (3)

an order restraining Wilson from interfering in meetings of the Alabama Elks chapter, (4) a declaration that Wilson's re-election as Grand Exalted Ruler was void, and (5) monetary damages, fees and "other relief" from Wilson's alleged misconduct during and after his re-election.

Notations on the Alabama court docket indicate that (1) certified mail was "issued" to Wilson and the Elks on 7 February 1996; (2) Wilson and the Elks were "served" by certified mail on 12 and 13 February, and (3) "return cards" were received by the court from the Elks and Wilson on 12 and 20 February. The docket does not indicate what was "issued" by certified mail or what was "served" on defendants on 12 and 13 February. The return cards are not in the record here.

After Wilson and the Elks did not answer, the Alabama circuit court clerk made an entry of default against defendants on 18 April 1996.

On 19 April 1996, Larry Wallace (Wallace), the Elks' former legal counsel in Atlanta and Washington, DC, attended a "first status call" hearing on the case in Alabama. Wallace was not licensed to practice law in Alabama and did not move for admission *pro hac vice.* According to affidavits supporting the defendants' motion for relief to the North Carolina court here, Wallace responded to the Alabama trial court's inquiry about potential defenses by explaining that "the Grand Lodge and Wilson had not been served." Plaintiffs' Alabama counsel, J.L. Chestnut, in his affidavit in support of plaintiffs' response to the motion for relief, noted that Wallace argued that the certified mail package "issued" to defendants was "left allegedly with an unauthorized employee at the corporate defendant's headquarters." Wallace and Wilson further stated by way of affidavits that although Wallace commented on improper service, (1) Wilson was not personally served with the summons and complaint before the 19 April 1996 hearing; (2) Wallace neither waived nor agreed to accept service on behalf of either defendant at the 19 April 1996 hearing, and was not authorized by defendants to do so, and (3) neither Wallace nor Wilson signed any written authorization for Wallace to waive or accept service on their behalf.

In his affidavit, Chestnut stated that "out of state-lawyers introduced by local opposing counsel are frequently permitted to argue initial pretrial motions before formally complying with the *pro hac vice* process." Chestnut further wrote that at the 19 April hearing,

Wallace (1) "acknowledged representation of the two defendants in open court and made no mention whatsoever of appearing specially to 'learn,' 'to explain' or for any other limited purpose," (2) "graciously volunteered in open court to accept service for his clients," and (3) in the judge's presence, "informally" accepted service on his clients' behalf from Chestnut in accordance with local practice.

Even after the 19 April 1996 hearing, defendants failed to answer plaintiffs' complaint. Plaintiffs moved for a default judgment against defendants on 2 August 1996. On 5 August 1996, the Alabama circuit court clerk issued notice to defendants of a 23 August 1996 hearing on plaintiffs' motion. On 6 August 1996 the court signed a Default Judgment and Order, which judgment was entered 12 August. In its ruling, the Alabama court found that

> 1. [D]efendants . . . were properly served in open court with a copy of the complaint and summons on April 19, 1996.
>
> 2. Mr. Larry Wallace, Attorney from Atlanta and Washington, D.C. appeared before the court as counsel for the Grand Lodge and Wilson on April 19, 1996. Mr. Wallace argued that his client, Mr. Wilson, had not been properly served because Mr. Wilson's secretary received the registered mail and signed for same. He gave some indication, that his other client, the Grand Lodge, had not been properly served; however, Mr. Wallace agreed to accept service for his two clients and was served.

Plaintiffs sought to enforce the Alabama judgment in North Carolina by filing a notice of foreign judgment in Hertford County Superior Court pursuant to G.S. § 1C-1701, *et seq.* Defendants filed a motion for relief from the Alabama judgment pursuant to N.C. R. Ev. 60(b). After a 1 March 1999 hearing, the Superior Court of Hertford County granted defendants' motion, finding as fact that:

> 1. Plaintiffs argued that the defendants accepted service of process [of the Summons and Complaint] through an attorney, Larry Wallace. . . . Wilson and the Grand Lodge dispute that Wallace was authorized to represent them in Alabama or that he accepted service . . . on April 19, 1996. Wallace specifically denies that he accepted service of process [as held by the Alabama court in its default judgment and order]. *Assuming what the plaintiffs say is true, they have not shown proper service in accordance with Alabama law.* Acceptance of service of process by an attor-

ney in Alabama must be in writing, signed by the defendant and a credible witness. See Ala. R.Civ.P. 4(h). The plaintiffs have put forth no evidence of compliance with any portion of Ala.R.Civ.P. 4(h), and the defendants' affidavits effectively show compliance did not occur.

The court concluded that:

1. The plaintiffs have the burden to establish that the Alabama Default Judgment is entitled to full faith and credit in North Carolina. See [G.S. §] 1C-1705(b). The plaintiffs failed to meet that burden as set forth herein.

2. The Alabama Default Judgment is not entitled to full faith and credit because the plaintiffs failed to establish proper service of process on Wilson and the Grand Lodge under Alabama law, which deprives the Alabama court of personal jurisdiction. *Assuming that an attorney for the defendants at the April 19, 1996 hearing in Dallas County did accept service of process, that acceptance was not valid service of process because it did not comply with Ala.R.Civ.P. 4(h), which governs acceptance of service by an attorney.* The failure to comply with Rule 4(h) renders the judgment void under Alabama law. *See Singleton v. Allen*, 401 S.2d 547 (Ala Civ. App. 1983) (granting relief from summary judgment for lack of proper service where no evidence that attorney was authorized to accept service in accordance with Rule 4(h); *Colvin v. Colvin*, 628 S.2d 802 (Ala. Civ. App. 1992) (default judgment improper where no evidence that attorney was authorized to accept service for defendants in compliance with Rule 4). North Carolina courts have not granted full faith and credit to foreign judgments when there are defects in service of process in the rendering jurisdiction. *Boyles v. Boyles*, 308 N.C. 488, 491[, 302 S.E.2d 790] (1980) (refusing to enforce Florida judgment); *Jaffe v. Vasilakos*, 90 N.C.App. 662, 663-64[, 369 S.E.2d 640] (1988) (refusing to enforce New York default judgment).

Plaintiffs appeal.

Poyner & Spruill, LLP, by Joseph E. Zeszotarski, Jr., for plaintiff-appellants.

Robinson, Bradshaw & Hinson, P.A., by Mark W. Merritt and Sarah B. Kemble, for defendant-appellees.

EAGLES, Chief Judge.

In deciding whether the Alabama default judgment was enforceable in North Carolina under the full faith and credit clause of the federal constitution, *see* U.S.Const. Art IV, § 1, we first consider whether defendants Wilson and the Elks were properly served under Alabama law. Defendants argue that they were not properly served with a summons and complaint. Plaintiffs argue that service was accomplished by (1) certified mail and (2) personal service on Larry Wallace at the 19 April default hearing. Because we affirm the North Carolina trial court's ruling that defendants were not properly served under Alabama law, we discuss only that issue.

Plaintiffs first argue that notations on the Alabama court docket sheets, indicating that the court received return cards from Wilson and the Elks, establish that defendants were properly served by certified mail in accordance with A.R.C.P.4.2. *See generally Insurance Mgmt. & Administration, Inc. v. Palomar Insurance Corp.*, 590 So.2d 209 (Ala. 1991). The docket sheets were attached to plaintiffs' one-page response to defendants' motion for relief. However, the record reveals no arguments on the propriety of service by certified mail (1) on the face of plaintiffs' response to defendants' motion for relief, (2) in the affiants' testimony in support of plaintiffs' response or (3) in plaintiffs' oral arguments before the North Carolina court. Accordingly, we hold that plaintiffs waived the service argument by failing to argue it in North Carolina, and we decline to address it here. *See* N.C. R. App. P. 10(b)(1).

We also note that although *mentioned* in the Alabama order, neither the Alabama nor North Carolina courts *decided* whether service was accomplished by certified mail. Absent the return cards "received" by the Alabama court, there was insufficient proof of proper service by mail under *Insurance Mgmt.*, cited by both parties, which held that "proof of service is evidenced by the return receipt and the circuit court clerk's notation on the docket sheet that the process has been properly mailed." *Id.* at 212-13 (emphasis added).

Plaintiffs remaining argument is that defendants were properly served through their attorney at the 19 April 1996 hearing. We are not persuaded. Appellate review of a trial court's ruling pursuant to Rule 60(b) is limited to determining whether the trial court abused its discretion. *Vaughn v. Vaughn*, 99 N.C. App. 574, 575, 393 S.E.2d 567, 568, *disc. rev. denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). For a foreign

judgment to be accorded full faith and credit in North Carolina, and thereby survive a Rule 60(b) motion,

> the rendering court must . . . have respected the demands of due process. That is, the rendering court must . . . have afforded the parties adequate notice and opportunity to be heard before full faith and credit will be accorded the judgment.
>
> . . . .
>
> [I]t follows that when a party against whom a default was entered subsequently challenges the validity of the original proceeding on grounds that he did not receive adequate notice, the reviewing court ordinarily must examine the underlying facts in the record to determine if they support the conclusion that the notice given of the original proceeding was adequate.

Boyles v. Boyles, 308 N.C. 488, 491-92, 302 S.E.2d 790, 793 (1983), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865 (1950).

As in *Boyles*, here we decide whether the defendants were properly served under the law of a foreign state. We agree with both parties that A.R.C.P. 4(h), as interpreted in *Colvin v. Colvin*, 628 So.2d 802 (Ala. Civ. App. 1993), controls this issue. Rule 4(h) provides that

> [a] defendant or the defendant's attorney may accept or waive service of process, provided that said acceptance or waiver is in writing and signed by the defendant and a credible witness.

In *Colvin*, an Alabama defendant's attorney accepted process on her behalf without complying with the writing requirement in Rule 4(h), but withdrew prior to entry of default against her. Citing Rule 4(h), the court dismissed the default judgment for lack of proper service, holding that

> [n]either the Alabama Code nor our Rules of Civil Procedure authorize process service on the defendant's attorney unless performed in compliance with Rule 4(h), *Singleton v. Allen*, 431 So.2d 547 (Ala.Civ.App. 1983) . . . .
>
> . . . .
>
> This Court is aware of the long-standing informal practice by most members of the bar whereby they regularly accept service on behalf of their clients *and later file their appearance on*

> *behalf thereof.* Nothing in this opinion is intended to change that practice; however, in a case such as here, where the attorney has withdrawn, *and no other appearance has been filed*, Rule 4(h) . . . must be strictly adhered to in order to enter a default judgment. Failure of personal service . . . renders the judgment by default void.

Colvin v. Colvin, 628 So.2d at 803 (emphasis added).

We disagree with plaintiffs' argument that under *Colvin*, Rule 4(h) applies only when a defendant's attorney has withdrawn or failed to file an appearance. Recognizing both Alabama practice and the plain language of Rule 4(h), *Colvin* merely extended the time for compliance with Rule 4(h) in the case of "informal" service on a party's attorney by allowing an attorney's later-filed notice of appearance to qualify as a "writing" under the rule. There being no evidence of *any* written notice of appearance or other writing, this argument is overruled.

Affirmed.

Judges TIMMONS-GOODSON and HUNTER concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v. SHERRY GURLEY, JIMMY D. GURLEY, GUARDIAN AD LITEM FOR KATHRYN LYNN GURLEY, AND WENDY WOOLARD, BY AND THROUGH HER GUARDIAN AD LITEM, GREGORY JAMES, DEFENDANTS

No. COA99-861

(Filed 18 July 2000)

1. Insurance— automobile—UIM coverage—statutory limit—per-person or per-accident

The applicable UIM coverage limit under N.C.G.S. § 20-279.21(b)(4) will depend on the number of claimants seeking coverage under the UIM policy and whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap. The applicable limit will not be the same in every circumstance; here, there were three claimants who were compensated under the per-accident liability coverage limit and the applicable UIM limit is also the per-accident limit.

2. Insurance— automobile—UIM coverage-limit of liability—policy provision

The term "limit of [UIM] liability" in an automobile insurance policy is construed to mean the per-accident limit where defendants' contention that the "limit of [UIM] liability" is the per-person limit would require an extra step to ensure that the per-accident limit was taken into account—a step nowhere contemplated in the policy.

Appeal by plaintiff from order entered 14 April 1999 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 19 April 2000.

Pinto Coates Kyre & Brown, PLLC, by Paul D. Coates and Nancy R. Meyers, for plaintiff-appellant.

Gaskins & Gaskins, P.A., by Herman E. Gaskins, Jr., for defendant-appellees Sherry Gurley and Kathryn Lynn Gurley.

Ward & Smith, P.A., by V. Stewart Couch and A. Charles Ellis, for defendant-appellee Wendy N. Woolard.

LEWIS, Judge.

This is a case of first impression involving the interpretation of our underinsured motorist ("UIM") statute, which appears in section 20-279.21(b)(4) of our General Statutes. Specifically, we address whether the applicable limit of coverage under that statute is the UIM carrier's per-person or per-accident limit.

On 3 March 1996, an automobile owned and operated by defendant Kathryn Gurley collided with another automobile being driven by Charles Fornes. The accident resulted from Mr. Fornes' negligence. The three defendants, Kathryn Gurley and her two passengers, Sherry Gurley and Wendy Woolard, sustained serious injuries in the accident. At the time of the accident, Mr. Fornes was insured by Allstate Insurance Company ("Allstate") under a 25/50 liability policy (i.e. having applicable limits of $25,000 per person and $50,000 per accident). Pursuant to this policy, Allstate tendered its $50,000 limit to defendants, with the Gurleys each receiving $17,000 and Ms. Woolard receiving $16,000. Defendants then sought coverage under Sherry Gurley's UIM policy with North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau"). That policy had applicable limits of $50,000 per person and $100,000 per accident. Farm Bureau then

instituted this declaratory judgment action to ascertain whether the per-person or per-accident limit was the applicable UIM limit. The trial court concluded that the per-person limit applied. From this order, Farm Bureau appeals.

[1] The North Carolina UIM statute necessitates a two-step analysis in resolving any UIM claims. First, we must address whether the insured is even eligible for UIM coverage. UIM coverage is available if two conditions are satisfied: (1) the negligent driver's automobile was an "underinsured highway vehicle"; and (2) the negligent driver's liability coverage has been exhausted. N.C. Gen. Stat. § 20-279.21(b)(4) (1999). Under our statute, an "underinsured highway vehicle" is:

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

Id. The respective liability and UIM limits are thus directly compared to each other. Because Mr. Fornes' insurance policy carried 25/50 liability coverage and Sherry Gurley's policy carried 50/100 UIM coverage, Mr. Fornes' automobile was an "underinsured highway vehicle." *See generally Ray v. Atlantic Casualty Ins. Co.*, 112 N.C. App. 259, 261-62, 435 S.E.2d 80, 81, *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993). Furthermore, given that Allstate tendered its $50,000 limit to defendants, Mr. Fornes' liability coverage has been exhausted. Thus, both conditions have been satisfied and defendants are entitled to UIM coverage.

Once UIM coverage is available, the second step in applying our UIM statute is determining how much coverage the insureds are entitled to receive under the UIM policy. Our statute outlines the limit as follows:

> [T]he limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the *limit of underinsured motorist coverage applicable* to the motor vehicle involved in the accident.

N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis added). Thus, each defendant here is entitled to "the limit of underinsured motorist cov-

erage applicable," less the amount each received from Allstate under Mr. Fornes' liability policy. Our task then is to determine that applicable UIM limit.

Farm Bureau contends that the applicable UIM limit is always the per-accident limit. Thus, in this case, defendants would be entitled to a total of $50,000 in UIM coverage (the $100,000 per-accident limit less the $50,000 combined they received from Allstate). Defendants, on the other hand, argue that the per-person limit is always the applicable limit. Under this interpretation, the two Gurleys would receive $33,000 each (the $50,000 per-person limit less the $17,000 already received) and Ms. Woolard would receive $34,000 (the $50,000 per-person limit less the $16,000 already received). Farm Bureau would thus be obligated to pay defendants $100,000 in total UIM coverage, which is within the $100,000 per-accident limit under the policy. The parties have cited *Progressive Am. Ins. Co. v. Vasquez*, 350 N.C. 386, 515 S.E.2d 8, *reh'g denied*, 350 N.C. 852, —— S.E.2d —— (1999), and *Aills v. Nationwide Mutual Ins. Co.*, 88 N.C. App. 595, 363 S.E.2d 880 (1988), for their respective interpretations. We find neither case instructive, as each ultimately relies on the language of the UIM policy itself, rather than the UIM statute. *Progressive*, 350 N.C. at 396-97, 515 S.E.2d at 14; *Aills*, 88 N.C. App. at 598, 363 S.E.2d at 882.

Furthermore, neither party's construction is entirely correct. The applicable UIM limit will not always be the same in every circumstance; it will vary. Specifically, we conclude that the applicable UIM limit under N.C. Gen. Stat. § 20-279.21(b)(4) will depend on two factors: (1) the number of claimants seeking coverage under the UIM policy; and (2) whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap.

Quite intuitively, when only one UIM claimant exists, the per-person limit under the policy will be the applicable UIM limit. But when more than one claimant is seeking UIM coverage, as is the case here, how the liability policy was exhausted will determine the applicable UIM limit. In particular, when the negligent driver's liability policy was exhausted pursuant to the per-person cap, the UIM policy's per-person cap will be the applicable limit. However, when the liability policy was exhausted pursuant to the per-accident cap, the applicable UIM limit will be the UIM policy's per-accident limit.

By way of illustration, suppose *A* and *B* are seriously injured due to the negligence of *C*, who has 100/300 liability coverage. In that situation, the per-person liability cap applies, and *A* and *B* each would

receive $100,000. Suppose further that *A* has UIM coverage for *A* and *B* of 250/750. If both *A* and *B* then claim under the UIM policy, the $250,000 per-person UIM cap would also apply, because that was the limit used to exhaust the liability coverage. Thus *A* and *B* would each receive $150,000 from the UIM carrier ($250,000 less the $100,000 already received).

In the case before us, however, we have three claimants who were compensated under the per-accident liability coverage limit. Now, the applicable UIM limit is also the per-accident UIM limit of $100,000. Accordingly, after the $50,000 liability payment is taken into account, defendants are entitled to a combined UIM compensation of $50,000, to be divided between the three of them.

Our interpretation of the applicable UIM limit under the statute makes sense both logically and pragmatically. Logically, our interpretation provides internal consistency with the rest of the UIM statute. For instance, to determine whether UIM coverage even applies, the statute explicitly mandates that the UIM limits be compared directly with the negligent driver's liability limits. N.C. Gen. Stat. § 20-279.21(b)(4); *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 188, 420 S.E.2d 124, 127 (1992). Because our legislature requires a comparison between the liability and UIM limits in determining the *availability* of UIM coverage, we conclude the legislature intended a similar comparison in determining the *limit* of that coverage.

On the pragmatic side, a contrary interpretation of the applicable UIM limit would lead to absurd results. Specifically, interpreting the statute to mandate the per-person cap to be the applicable limit would result in defendants receiving more compensation than if Mr. Fornes had been either fully insured or uninsured altogether. For example, if Mr. Fornes' liability coverage had been 50/100 instead of 25/50, defendants would not have been entitled to any UIM coverage because his automobile would not have been an "underinsured highway vehicle." Thus, defendants would have received $100,000 total in liability coverage from his carrier. Likewise, if Mr. Fornes had been uninsured altogether, defendants would have again recovered a total of $100,000, this time in uninsured motorist ("UM") coverage. But under defendants' espoused interpretation, they would be entitled to $50,000 in liability coverage and $100,000 in UIM coverage, for a grand total of $150,000 in compensation. This would give defendants a windfall simply because they were involved in an accident with an underinsured motorist, as opposed to an insured or uninsured

motorist. We do not believe our legislature intended such a result. After all, the purpose of UM and UIM insurance is the same—"to compensate innocent victims of financially irresponsible motorists." *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 684, 462 S.E.2d 650, 653 (1995). Since the purpose is the same, no windfall should be created as between the two.

In this regard, we find the words of the Colorado Supreme Court to be very insightful:

> While we realize that the insureds will never be fully compensated for their loss, we see no evidence that the legislature intended to award the insureds more than they would have received if the tortfeasor had been insured or uninsured.

Union Ins. Co. v. Houtz, 883 P.2d 1057, 1065 (Colo. 1994) (en banc); *see also Mutual of Enumclaw Ins. Co. v. Key*, 883 P.2d 875, 877 (Or. Ct. App. 1994) ("UIM coverage is intended to place a policy holder in the *same position* that the policy holder would have been in if the tortfeasor had had liability coverage equal to the amount of the UM/UIM coverage.") (emphasis added).

[2] Although we have concluded that the UIM statute, as applied here, mandates use of the $100,000 per-accident UIM limit, this does not end our inquiry. Farm Bureau's policy itself of course could provide more UIM coverage than that required by statute. We therefore must next consider the policy language to determine whether that is the case.

Farm Bureau prescribes the following limit to its UIM coverage:

> The most we will pay under this [UM/UIM] coverage is the lesser of the amount by which the:
>
> a. *limit of liability* for this coverage; or
>
> b. damages sustained by an insured for bodily injury;
>
> exceeds the amount paid under all bodily injury liability bonds and insurance policies applicable to the insured's bodily injury.

(Emphasis added). Defendants again contend that the "limit of [UIM] liability" here is the per-person limit. We disagree.

This provision is the exclusive provision for calculating the amount of UIM coverage. It outlines a simple one-step formula: subtract the amount of liability coverage received from the maximum

UIM limit. Here, that calculation requires subtracting the $50,000 defendants received from the $100,000 UIM per-accident limit.

Under defendants' interpretation, however, we would subtract the amount received by each defendant ($16,000 in the case of Ms. Woolard and $17,000 each in the case of the Gurleys) from the $50,000 per-person limit to compute the UIM coverage. But this interpretation never accounts for the $100,000 per-accident limit. Defendants' interpretation would thus force an extra step to be added to the UIM formula to ensure that the per-accident UIM limit is taken into account—a step that is nowhere contemplated in either the above provision or elsewhere in the policy. Specifically, that step would require adding the respective UIM coverages as to each claimant ($34,000 in the case of Ms. Woolard and $33,000 each in the case of the Gurleys) and then comparing this sum with the per-accident UIM limit to ensure that limit is not exceeded. As stated, this extra step is nowhere suggested within the UIM policy. Accordingly, under these facts, we construe the term "limit of [UIM] liability" here to mean the $100,000 per-accident limit.

We therefore reverse the trial court's entry of summary judgment in favor of defendants and remand for entry of summary judgment in favor of Farm Bureau.

Reversed and remanded.

Judges MARTIN and WALKER concur.

STATE OF NORTH CAROLINA v. ELVIS RAY HUTCHINGS

No. COA99-776

(Filed 18 July 2000)

1. Sexual Offenses— indictment—child victim—date of offenses—notice

Even though defendant was not served with the bills of indictment in a first-degree sexual offense and taking indecent liberties with a minor case and defendant also alleges the State destroyed his alibi defense by offering evidence that the offenses occurred on dates different from those in the arrest warrants, defendant's

due process rights were not violated because: (1) the notice requirement of N.C.G.S. § 15A-630 is inapplicable where a defendant is represented by counsel as defendant was on the date of the return of the true bills of indictment in this case; (2) defendant and his counsel waived formal arraignment where they would have been informed of the allegations contained in the bills of indictment; (3) courts have adopted a policy of leniency toward any differences in the dates alleged in the indictments and those proven during trial in cases of sexual abuse against children; and (4) defendant did not rely solely upon his alibi defense since he also presented evidence contradicting the victim's account of the incidents.

2. Criminal Law— motion for a mistrial—mention of word "polygraph"

The trial court did not abuse its discretion in a first-degree sexual offense and taking indecent liberties with a minor case by denying defendant's motion for a mistrial when a police investigator mentioned the word "polygraph" during her testimony, because: (1) while the results of a polygraph test are inadmissible in North Carolina, not every reference to a polygraph test necessary results in prejudicial error; (2) the reference to the word "polygraph" in this case was neutral since the investigator did not mention the results of the test nor any information from which the jury could have inferred a result unfavorable to defendant; and (3) any possible prejudice was removed by the trial court's prompt and timely instruction to disregard the comment.

3. Sexual Offenses— indictment—child victim—language of statute used—notice—double jeopardy

Although defendant contends the indictments for two counts of first-degree sexual offense under N.C.G.S. § 14-27.4 and three counts of taking indecent liberties with a minor under N.C.G.S. § 14-202.1 do not sufficiently identify the offenses so as to protect him from multiple prosecutions and multiple punishments for the same offenses, the trial court did not commit plain error by accepting the verdicts and entering judgment upon them because: (1) each of the indictments used the language of the applicable statute; and (2) an indictment which charges a statutory offense by using the language of the statute is sufficient both to give a defendant adequate notice of the charge against him and to protect him from double jeopardy.

Appeal by defendant from judgments entered 8 January 1999 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 April 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Sarah Y. Meacham, for the State.

Allen C. Brotherton and John T. Hall for defendant-appellant.

MARTIN, Judge.

Defendant appeals from judgments entered upon his convictions of two counts of first degree sexual offense in violation of G.S. § 14-27.4 and three counts of taking indecent liberties with a minor in violation of G.S. § 14-202.1. The State offered evidence at trial tending to show for approximately thirty days in July and August 1995, the victim, A.J., and her family were living with her maternal aunt in Charlotte. Her maternal uncle, defendant, and his wife lived in the same complex. In early August 1995, A.J., along with her brother, Tim, and her cousin, Daniel, spent the night at defendant's home. A.J. was then nine years of age. Defendant's wife was not at home. Tim and Daniel were apparently watching pornographic material on television and Tim began pretending that A.J. was performing oral sex on him. Defendant discovered the children engaged in this behavior, questioned them, and threatened to tell their mother. He told the children to go to bed and said he would think about it in the morning.

Later the same night, defendant woke A.J. and told her to come upstairs to watch television with him in his bedroom. While they were in bed, defendant exposed his penis and asked A.J. to suck it. He forced her head down and put his penis in her mouth. He told her not to tell her mother.

On a subsequent occasion when A.J. and Tim spent the night at defendant's home, defendant woke A.J. and told her to get in the shower. After she was in the shower, defendant came into the bathroom, undressed, and got into the shower with her. He rubbed soap on A.J.'s chest and on her genital area; he then had her wash his penis. After they got out of the shower, defendant performed cunnilingus on A.J. in the bedroom.

On another occasion while A.J. was at defendant's house, defendant and A.J. were sitting on a couch watching television. Defendant's wife was at home. Defendant took A.J.'s hand and placed it inside his

shorts and onto his penis. Defendant's wife came into the room and A.J. quickly removed her hand. Defendant's wife looked at them and told them it was time for lunch. After she left the room, defendant locked the door, exposed his penis, pulled A.J.'s clothing aside, and pressed his penis against A.J.'s vagina.

A.J. moved with her family to Minnesota sometime during the last two weeks of August 1995. In May 1996, A.J. told her mother about the events involving defendant.

Defendant testified on his own behalf and categorically denied any improper conduct with A.J. He testified that when he came downstairs, he observed A.J. performing oral sex on her brother. When he separated and scolded them, A.J. said that if he told her parents, she would tell them that he had made her perform oral sex on him. He also testified that his wife was at home the entire night.

Defendant's wife testified that defendant was continuously employed during the month of August 1995, and that he always left for work before she did and arrived home after she did. Defendant admitted that he had ended one job on 4 August and did not start a new job until 14 August, but offered evidence that he was never alone with A.J. during the period of time the offenses were said to have occurred.

On rebuttal, A.J.'s mother testified that defendant had been unemployed during part of August and stayed at home while his wife worked.

I.

[1] Defendant first contends his due process rights were violated because the warrants upon which he was arrested alleged the offenses had occurred on 15, 16, 17, and 18 August 1995, while the bills of indictment alleged the dates of the offenses as "on or about the month of August 1995." He contends that he was never served with the bills of indictment and prepared his defense based upon the dates alleged in the warrants. Though he concedes the indictments were sufficient to charge the offenses, he argues the change in dates prejudiced his ability to present an alibi defense. Acknowledging that he made no objection or motion at trial relating to the State's failure to serve him with the bills of indictment, defendant seeks review under the "plain error" standard. *See* N.C.R. App. P. 10(c)(4). Plain error entails an error of such magnitude "as to amount to a miscar-

riage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251, *cert. denied*, 485 U.S. 1036, 99 L.Ed.2d 912 (1988).

A valid bill of indictment is required to confer jurisdiction upon the court to try an accused for a felony. *State v. Snyder*, 343 N.C. 61, 468 S.E.2d 221 (1996). G.S. § 15A-630 requires that notice of the return of a true bill of indictment, including a copy of the bill and notice concerning discovery limitations, be given to a defendant *unless he is then represented by counsel.* The notice requirement of G.S. § 15A-630 is not applicable where a defendant is represented by counsel. *State v. Miller*, 42 N.C. App. 342, 256 S.E.2d 512 (1979). Defendant was represented by counsel of record on the date of the return of the true bills of indictment in this case. Moreover, defendant and his counsel waived formal arraignment, at which they would have been informed of the allegations contained in the bills of indictment.

An indictment is "constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *Snyder* at 65, 468 S.E.2d at 224. In cases alleging sexual abuse against children, courts have adopted a policy of leniency toward any differences in the dates alleged in the indictments and those proven during trial. *State v. Burton*, 114 N.C. App. 610, 442 S.E.2d 384 (1994).

Defendant argues, however, that his alibi defense was directed to the dates alleged in the warrants, that he was surprised by the unspecific date alleged in the bills of indictment, and that evidence the offenses occurred at times preceding the dates alleged in the warrants destroyed his alibi defense. Relying on *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961), defendant contends that after he had established an alibi for the dates alleged in the warrants, the State offered rebuttal evidence that the offenses had occurred on different dates, violating his rights to due process. *Whittemore* is inapposite to this case; the rebuttal evidence complained of by defendant showed only that defendant was unemployed for approximately two weeks in August 1995, and that defendant had allowed A.J. and the other children to spend the night at his home three or four times on week nights during that time. However, defendant presented evidence that he was never alone with A.J. during any of the times during which the

State's evidence showed the offenses occurred. Moreover, defendant did not rely solely upon alibi; he presented evidence through his own testimony and the testimony of others directly contradicting A.J.'s account of the incidents. Thus, we find no error, plain or otherwise, with respect to defendant not having been served with the bills of indictment or with respect to the State offering evidence that the offenses occurred on dates different from those alleged in the arrest warrants. This assignment of error is overruled.

II.

[2] Defendant assigns error to the trial court's denial of his motion for a mistrial after Investigator Riveria of the Charlotte-Mecklenburg Police Department mentioned the word "polygraph" during her testimony. Defendant argues the officer's use of the word necessitated an objection by defense counsel and caused the jury to assume defendant had either refused such a test or the results were unfavorable to him.

A mistrial is required if "there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (1999). "A mistrial should be granted 'only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict,' and such ruling is within the trial court's sound discretion." *State v. Suggs*, 117 N.C. App. 654, 660, 453 S.E.2d 211, 215 (1995) (quoting *State v. Harris*, 323 N.C 112, 371 S.E.2d 689 (1988)). The trial court's ruling will not be reversed absent an abuse of discretion. *State v. Chavis*, 134 N.C. App. 546, 518 S.E.2d 241 (1999), *cert. denied*, — N.C. —, — S.E.2d — (4 May 2000).

While the results of a polygraph test are inadmissible in North Carolina, not every reference to a polygraph test necessarily results in prejudicial error. *State v. Gartlan*, 132 N.C. App. 272, 512 S.E.2d 74, *disc. review denied*, 350 N.C. 597, 537 S.E.2d 485 (1999). Here, Investigator Riveria was asked by the prosecutor to describe the demeanor of defendant during the interview. The investigator responded:

> He came in cordial enough, but then during the 15, 20 minutes we talked, tops 20 minutes, he became fidgety. He played with his sunglasses. He even put them on once and he raised his voice once and told me—while we talked, I asked him a question and he

raised his voice. And I guess I wasn't supposed to talk about the polygraph, but—

Defendant's counsel made a timely objection which was sustained. Defendant's motion to strike was allowed and the trial court instructed the jury: "The jury is to disregard the last comment of the witness and not to consider that at all."

The investigator's reference to the word "polygraph" was neutral; there was no mention of the results of the test nor any information from which the jury could have inferred a result unfavorable to defendant. Any possible prejudice was removed by the trial court's prompt and timely instruction, thus the investigator's mention of the word "polygraph" was not such a "serious impropriety" as to render it impossible for defendant to receive a fair and impartial verdict. The trial court did not abuse its discretion in denying the defendant's motion for a mistrial. This assignment of error is overruled.

III.

[3] Finally, defendant argues the trial court committed plain error by accepting the verdicts and entering judgment upon them because the indictments do not sufficiently identify the offenses so as protect him from multiple prosecutions and multiple punishments for the same offenses. We disagree.

In order to sustain a conviction, an indictment needs "to give defendant sufficient notice of the charge against him, to enable him to prepare his defense, and to raise the bar of double jeopardy in the event he is again brought to trial for the same offense." *State v. Ingram*, 20 N.C. App. 464, 466, 201 S.E.2d 532, 534, *appeal after remand*, 23 N.C. App. 186, 208 S.E.2d 519 (1974). Each of the indictments in the present case used the language of the applicable statute to charge the offense. It is established law that an indictment need not allege the evidentiary basis for the charge; an indictment which charges a statutory offense by using the language of the statute is sufficient both to give a defendant adequate notice of the charge against him and to protect him from double jeopardy. *State v. Miller*, 137 N.C. App. 450, 528 S.E.2d 626 (2000).

Defendant's remaining assignment of error, which is neither presented nor discussed in defendant's brief, is deemed abandoned. N.C.R. App. P. 28(a), 28(b)(5).

Defendant received a fair trial, free from prejudicial error.

No error.

Judges LEWIS and WALKER concur.

VIRGINIA BLUE, PLAINTIFF v. MIGUEL CANELA, HORACE VERNON PENDERGRASS, JR., AND CAMPER PRODUCTS, INC.

No. COA99-1073

(Filed 18 July 2000)

Motor Vehicles— contributory negligence—accident—summary judgment improper

The trial court erred by granting summary judgment in favor of defendants in an automobile accident where plaintiff hit a truck parked on the side of the street in an attempt to avoid hitting a vehicle stopped and parked in the middle of the road, because a genuine issue of material fact exists concerning plaintiff's contributory negligence based on the parties' pleadings and affidavits contesting whether plaintiff's conduct was reasonable under the circumstances.

Appeal by plaintiff from an order entered 3 May 1999 by Judge W. Osmond Smith, III in Vance County Superior Court. Heard in the Court of Appeals 16 May 2000.

Harvey D. Jackson for plaintiff-appellant.

Baker, Jenkins, Jones & Daly, P.A., by Ernie K. Murray, for defendant-appellee Miguel Canela.

Yates, McLamb & Weyher, L.L.P., by John W. Minier, for defendant-appellees Horace Vernon Pendergrass, Jr. and Camper Products, Inc.

HUNTER, Judge.

The superior court granted summary judgment to defendants Miguel Canela, Horace Vernon Pendergrass, Jr., and Camper Products, Inc. (collectively "defendants"), finding as a matter of law that: (1) plaintiff's contributory negligence was a proximate cause of the injuries alleged in her complaint; and (2) the doctrine of "last clear chance" does not apply. Virginia Blue ("plaintiff") appeals. Upon

review of the record before us, we reverse the trial court's order, and remand the case for trial by jury.

The facts pertinent to this case are as follows. At about 2:00 p.m. on 29 July 1994, plaintiff was driving her employer's van on Lynnbank Road in Henderson, North Carolina. Lynnbank Road is a curvy, hilly, two-lane road, and it was raining on the day in question. Soon after the vehicle (a Volkswagon) immediately in front of her turned left onto a dirt road, plaintiff noticed another car in front of her—a station wagon operated by defendant Canela.

In her complaint, dated 28 July 1997, plaintiff alleged that "it was raining, the weather conditions were very cloudy, and visibility was poor[,]" when she first observed the station wagon. Plaintiff believed the station wagon to be moving when, in fact, it had stopped and parked in the middle of the road. The station wagon had no brake, rear, or any other type of lights operating to warn approaching traffic, and by the time plaintiff realized it was not moving, she could not bring her van to a stop, nor could she pass the vehicle because of oncoming traffic to her left. In her effort to avoid hitting defendant Canela's occupied vehicle, plaintiff attempted to swerve to the right shoulder. However, a truck, owned by defendant Camper but operated by defendant Pendergrass (Camper's employee) who lived directly across the street, was parked on the right shoulder. Seeing the truck there, plaintiff attempted to fit her van between defendant Canela's vehicle and the truck, but could not. Consequently, plaintiff hit the truck causing serious injury to herself.

Plaintiff brought her complaint against defendant Canela on the grounds that he was negligent in: carelessly and recklessly parking his car in the middle of the road, willfully and wantonly disregarding the rights and safety of others, operating his vehicle with defective equipment, and creating a danger to other vehicular traffic on the highway due to the inclement weather conditions at the time. Against defendant Pendergrass, plaintiff alleged negligence in his parking the truck on the side of the road. Against defendant Camper, plaintiff imputed Pendergrass' negligence as Camper was his employer and owner of the truck.

In considering defendants' motion for summary judgment, the trial court reviewed all pleadings on file, plaintiff's deposition and attached exhibits, plaintiff's affidavit, and the affidavit of F. Darryl Barile, a photographer who later took pictures at the scene of the accident. Stating it

> ha[d] determined as a matter of law that plaintiff's contributory negligence was a proximate cause of the injuries alleged . . . ; and
>
> ha[d] considered plaintiff's argument that defendant Miguel Canela had the "last clear chance" to avoid the alleged accident and ha[d] determined as a matter of law that the doctrine of "last clear chance" does not apply;

the trial court granted defendants' summary judgment motion.

Plaintiff brings forward only one assignment of error, that the trial court erred in granting defendants' summary judgment motion because there were genuine issues of material fact before the court. Plaintiff argues that the trial court erred in finding *as a matter of law* that she was contributorily negligent and that the doctrine of last clear chance did not apply to Canela. We agree.

> The North Carolina Rules of Civil Procedure provide that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). The burden of establishing a lack of any triable issue resides with the movant. . . .
>
> "The movant may meet this burden by proving that . . . the opposing party cannot . . . surmount an affirmative defense which would bar the claim."

Roumillat v. Simplistic Enterprises, Inc., 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). However, "all conflicts are resolved against the moving party[] . . . [and this Court must] therefore view allegations in the light most favorable to plaintiff[.]" *Dobson v. Harris*, 134 N.C. App. 573, 580, 521 S.E.2d 710, 716, (1999). Furthermore:

> As a general rule, one who has capacity to understand and avoid a known danger and fails to take advantage of that opportunity, and injury results, he is chargeable with contributory negligence, which will bar recovery. *Burgess v. Mattox*, 260 N.C. 305, 132 S.E.2d 577; *Huffman v. Huffman*, 271 N.C. 465, 156 S.E.2d 684; *Tallent v. Talbert*, 249 N.C. 149, 105 S.E.2d 426. In such event, [summary judgment] is proper on the theory that defendant's neg-

> ligence *and* plaintiff's contributory negligence are proximate causes of the injury. . . .

Presnell v. Payne, 272 N.C. 11, 13, 157 S.E.2d 601, 602 (1967) (emphasis added). Therefore, if no genuine issue of material fact exists as to plaintiff's having been contributorily negligent, she is precluded from any recovery based on the negligence of another party in the same accident. *Id.*

Applying then the doctrine of contributory negligence to the case at bar, we disagree with the trial court and defendants that plaintiff "was contributorily negligent *as a matter of law*." (Emphasis added.) On this issue, we find *Meeks v. Atkeson*, 7 N.C. App. 631, 173 S.E.2d 509 (1970) dispositive. In that case, defendant argued that plaintiff was contributorily negligent in hitting his unlighted vehicle which was "parked across both lanes of a two-lane highway, while defendant searched for his lost cat[.]" *Id.* at 636, 173 S.E.2d at 511. Holding that these facts were "clearly sufficient to require submission [to the jury] of an issue as to defendant's actionable negligence[,]" *id.*, this Court reversed the trial court's granting of defendant's nonsuit, stating that: " 'Judgment of involuntary nonsuit on the ground of contributory negligence should be granted when, and only when, the evidence, . . . establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. . . .' " *Id.* at 636, 173 S.E.2d at 512 (quoting *Brown v. Hale*, 263 N.C. 176, 178, 139 S.E.2d 210, 212 (1964)).

In the case *sub judice*, plaintiff's evidence considered in the light most favorable to her supports finding that: (1) plaintiff was driving at a reasonable speed (which defendants do not contest); (2) the weather conditions were rainy, cloudy, with poor visibility (none of which defendants contested before the trial court); (3) the road was wet, hilly and curvy; (4) plaintiff observed defendant Canela's vehicle in the road when she was some 400-500 feet away however, there was another car moving between them and she believed the vehicle to be moving; (5) when the vehicle between them turned off the road, and plaintiff realized she was much closer to defendant Canela's vehicle, she applied her brakes but could not stop; (6) plaintiff would have gone around defendant Canela's vehicle to the left, but there was oncoming traffic; (7) defendant Canela's vehicle had no lights burning to warn approaching traffic that it was stopped in the middle of the road; (8) when plaintiff attempted to go to the right, she ran into the truck parked there; and, (9) defendant Canela was behind the wheel

of his vehicle while plaintiff's vehicle was approaching. These findings support plaintiff's contention that defendant Canela was negligent, but they do *not* clearly establish that plaintiff was contributorily negligent. Defendants' argue that plaintiff failed to keep a proper lookout and that plaintiff lost control of her vehicle thus, she was contributorily negligent. However, because plaintiff's evidence negates defendants' argument, it raises an issue of material fact—and defeats defendants' motion for summary judgment.

> "Negligence is the failure to exercise proper care in the performance of a legal duty owed by a defendant to a plaintiff under the circumstances." *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996). . . . "When there are factual issues to be determined that relate to the defendant's duty, or when there are issues relating to whether a party exercised reasonable care, summary judgment is inappropriate." *Ingle v. Allen*, 71 N.C. App. 20, 26, 321 S.E.2d 588, 594 (1984).

Holshouser v. Shaner Hotel Grp. Props. One, 134 N.C. App. 391, 394, 518 S.E.2d 17, 21 (1999). Thus, the discrepancy should have been resolved by a jury and it was inappropriate for the trial court to decide that plaintiff was contributorily negligent "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 v. American Safety Utility Corp., 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997) (citations omitted). We note that in the instant case, on the issue of plaintiff's contributory negligence, "defendants' and plaintiff's pleadings and affidavits contest whether plaintiff's conduct was reasonable under the circumstances. . . . Therefore, an issue of fact exists as to the reasonableness of plaintiff's conduct under the circumstances." *Id.*

We need not reach plaintiff's argument as to the trial court's determination that the doctrine of last clear chance is inapplicable *as a matter of law*.

> [B]ecause we hold that a genuine issue of material fact exists with respect to the issue of plaintiff's contributory negligence,

> we need not address the parties' arguments as to whether defendants had the last clear chance to avoid the collision, as that issue is not material unless plaintiff's contributory negligence is established. . . .

Monk v. Cowan Transportation, Inc., 121 N.C. App. 588, 592, 468 S.E.2d 407, 410 (1996). Therefore, the trial court's order is reversed. This case is

Reversed and remanded for jury trial.

Judges GREENE and HORTON concur.

CHARLES JOSEPH STOCKTON, AS ADMINISTRATOR OF THE ESTATE OF TIMOTHY ALLEN TAYLOR, DECEASED, PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., DEFENDANT

No. COA99-421

(Filed 18 July 2000)

Insurance— automobile—UIM coverage—family coverage—designated insured

The trial court properly granted summary judgment for plaintiff in a declaratory judgment action to ascertain entitlement to underinsured motorist insurance where decedent, the son of Mr. and Mrs. Stockton, was killed in a motor vehicle collision; his estate received liability coverage from the insurer of the other vehicle and then sought UIM coverage from the Stockton's personal auto policy with defendant; and defendant denied UIM coverage because the named insured was "Oak Farm" and the family members of the insured would not include any person. Although it has been held that a corporation is a legal entity distinct from its employees which cannot have a spouse or relatives, the designated insured here is not a commercial entity with a defined legal existence, but the name of a parcel of land belonging to Mr. Stockton's mother which was used to obtain vehicle registration in another county and a more favorable tax valuation. A genuine ambiguity was created because there was no existing entity which could bring an action on the policy and the matter should

be resolved in favor of the policy holder, Mr. Stockton, who paid the premiums.

Appeal by defendant from order entered 8 February 1999 by Judge Ronald K. Payne in Rutherford County Superior Court. Heard in the Court of Appeals 16 February 2000.

Feagan and Foster, by Phillip R. Feagan and Cynthia C. Harbin, for plaintiff-appellee.

Willardson & Lipscomb, L.L.P., by William F. Lipscomb, for defendant-appellant.

LEWIS, Judge.

This action for declaratory judgment was instituted by Charles Stockton, administrator of the estate of Timothy Taylor, seeking to ascertain entitlement to underinsured motorist (UIM) coverage under an insurance policy issued by North Carolina Farm Bureau Mutual Insurance Company, Inc. ("Farm Bureau").

The substance underlying this UIM claim is as follows: On 27 October 1995, Timothy Taylor, the son of Charles and Diane Stockton, was killed in a motor vehicle collision between an automobile owned and operated by Nicholas Ranta and another automobile. Timothy's estate received liability coverage from Ranta's insurance policy in the amount of $33,334. His estate then sought UIM coverage from the Stocktons' "Personal Auto Policy" with Farm Bureau, providing UIM coverage limits of $100,000 per person and $300,000 per accident.

On 13 February 1996, Farm Bureau denied Timothy's estate UIM coverage under the Stocktons' personal policy, on the basis that the named insured was listed as "Oak Farm" and the family-oriented policy provisions extending coverage to the "spouse" and "family member[s]" of the named insured did not cover Timothy Taylor or any other person. On 8 February 1999, the trial court entered an order granting summary judgment in favor of the plaintiff Charles Stockton, concluding that Timothy Taylor was entitled to UIM coverage under the Stocktons' policy and allowing his estate to recover. From this order, defendant appeals.

The standard for summary judgment has been often recited by this Court. Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, a party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue 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).

On appeal, Farm Bureau maintains that Timothy Taylor could not receive coverage because the named insured was designated as Oak Farm, and not as either Mr. or Mrs. Stockton. Farm Bureau thus disputes the *legal effect* of listing Oak Farm as the named insured on the Stocktons' insurance policy. Potential issues of fact surrounding the listing of Oak Farm as the named insured on the policy would necessarily involve the identity of Oak Farm, namely, whether it exists as a commercial or other type of entity. However, Farm Bureau does not argue on appeal that there remains an issue regarding Oak Farm's identity. While Farm Bureau suggests on appeal that Oak Farm is a "legal entity," this interpretation is contrary to the forecast of evidence presented at the summary judgment hearing.

The forecast of evidence indicates that no questions of fact remain on the issue of Oak Farm's identity. The evidence reveals that Oak Farm has no legally independent existence—it has no tax identification number, does not exist as a corporation, partnership, or any other commercial or legal entity and may be classified as neither a commercial nor any other type of existing entity. Oak Farm is the name of a parcel of land operated as a farm in Cleveland County and belonging to Mr. Stockton's mother. The Stocktons testified they titled their vehicle in the name of Oak Farm in order to obtain a more favorable tax value on the insured vehicle. Specifically, Cleveland County would accept the purchase price stated in the bill of sale as the vehicle's taxable value, which in this case was lower than the value the car would have been assessed in Rutherford County, where the Stocktons resided. The Stocktons titled the vehicle under the Oak Farm name, since Oak Farm is located in Cleveland County. Farm Bureau's company manual provides that the named insured of a personal auto policy must be the same as the name in which the vehicle is titled, and accordingly, Farm Bureau listed the named insured as Oak Farm. No discussion took place between the Stocktons and Farm Bureau as to the identity of Oak Farm in reference to this insurance policy.

Mr. Stockton used the name "Oak Farm" in his personal and farm-related business dealings prior to 1983. However, after 1983, he used it only as the named insured in the Farm Bureau policy in 1995. At no time was Oak Farm anything but a bucolic designation for rural property.

The issue for our review, then, is purely a *legal* one, *see, e.g., G.E. Capital Mortgage Servs., Inc. v. Neely*, 135 N.C. App. 187, 519 S.E.2d 553 (1999), namely, the *legal effect* of listing a named insured incapable of being classified as an individual or as an entity, commercial or otherwise, on a personal auto policy containing family-oriented language.

A provision of the policy is ambiguous if the writing itself leaves the agreement uncertain. *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989). As a general rule, "ambiguities in insurance policies are to be strictly construed against the drafter, the insurance company, and in favor of the insured and coverage since the insurance company prepared the policy and chose the language." *West American Insurance Co. v. Tufco Flooring East*, 104 N.C. App. 312, 320, 409 S.E.2d 692, 697 (1991), *overruled on other grounds by Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, No. 10PA99 (N.C. Sup. Ct. Feb. 4, 2000). We have but to look at the language of the policy to illustrate the interpretive difficulties arising here. The Stocktons' "Personal Auto Policy" contains terms and definitions relevant to persons and families.

The UIM coverage provisions of the Farm Bureau policy allow insureds to recover for personal injuries, defining "insured" as:

"1. You or any family member.

2. Any other person occupying:

a. your covered auto; or

b. any other auto operated by you.

3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person listed in 1. or 2. above."

Under the "Definitions" section, the terms "you" and "your" are defined as "[t]he 'named insured' shown in the Declarations" and "[t]he spouse if a resident of the same household." "Family member" means "a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child."

The policy thus provides two groups with uninsured motorist coverage. The "named insured" and any family members of the named insured are covered wherever they may be; all others are only cov-

ered while occupying an insured vehicle. The two groups set forth under the policy are nearly identical to those set forth by our statutes in N.C. Gen. Stat. § 20-279.21(b)(3). *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 143, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991).

Plaintiff argues that the language in the UIM endorsement defining "insured" to include family of the named insured mandates a finding that the Stocktons are also named insureds under the policy. Farm Bureau, on the other hand, maintains that the language of the policy is clear and unambiguous and is subject to only one interpretation: the Stocktons are not named insureds under the policy, they do not fall into the category of family members of Oak Farm, and the vehicle involved in the accident is not an automobile covered under the policy.

In support of its argument, Farm Bureau has cited *Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991), wherein our Supreme Court analyzed the effect of family-oriented language where the named insured was a corporation. In *Sproles*, employees sued to collect under their corporate-employer's UIM coverage provisions. The *Sproles* court refused to extend coverage, noting that a corporation is a legal entity distinct from its employees and thus, cannot have a spouse or relatives. *Id.* at 609, 407 S.E.2d at 500; *see also Busby v. Simmons*, 103 N.C. App. 592, 406 S.E.2d 628 (1991) (despite family-oriented language in policy where corporation was named insured, court refused to expand the term "named insured" to employees of corporation).

The most important difference between *Sproles* and *Busby* and this case is that the designation of the named insured here is not a commercial entity with a defined legal existence, but rather, has no legal existence complete in itself. This distinction is of critical significance. All parties in *Busby* and *Sproles* had knowledge of the entity insured, while the named insured in this case becomes meaningful only in reference to the person who bought the policy and gave the listing "Oak Farm." Thus, we decline to extend the analysis employed in either *Sproles* or *Busby* to the facts of this case.

While our courts have never addressed these precise facts, at least one other jurisdiction has addressed this question. In *Patrevito v. Country Mutual Insurance Co.*, 455 N.E.2d 289 (Ill. App. Ct. 1983), an insurance policy using family-oriented language was issued to "Patrevito's Florist & Greenhouse," an unincorporated business. The plaintiff, James Patrevito's wife, sought UIM coverage under the pol-

icy. The court determined the designation was "merely the name and style under which James Patrevito did business" and that no entity could bring an action on the policy. *Id.* at 291. In determining the legal effect of this designation, the *Patrevito* court construed the policy in favor of coverage. *Id.* Other jurisdictions have reached the same conclusion where the named insured was designated as a trade name. *See, e.g., O'Hanlon v. Hartford Accident & Indem. Co.*, 639 F.2d 1019 (3d Cir 1981); *Samples v. Georgia Mut. Ins. Co.*, 138 S.E.2d 463 (Ga. Ct. App. 1964); *Gabrelcik v. National Indem. Co.*, 131 N.W.2d 534 (Minn. 1964).

Here, there was also no existing entity which could bring an action on the policy. We believe there is a genuine ambiguity created here so that the matter should be resolved in favor of the policy holder, and thus the person who paid the premiums. Without significant explanation, indeed proof and association shown, no person, firm or commercial entity could have brought a declaratory judgment on behalf of Oak Farm. Oak Farm was designated by Mr. Stockton, who paid the premiums and obtained the family coverage stated so clearly in the policy.

We conclude the trial court properly granted summary judgment in favor of the plaintiff.

Affirmed.

Judges JOHN and EDMUNDS concur.

TRIANGLE PARK CHIROPRACTIC, PLAINTIFF v. FRED BATTAGLIA, JR., DEFENDANT

No. COA99-1019

(Filed 18 July 2000)

Damages and Remedies— chiropractor bills—action against patient and attorney—medical provider liens—election of remedies

The trial court erred by concluding that the doctrine of election of remedies barred plaintiff's recovery from defendant-attorney where plaintiff provided chiropratic care to Williams and McAllister following an automobile accident, defendant-attorney settled the claims arising from the accident but disbursed the pro-

ceeds without paying or withholding any amount to pay plaintiff under instructions from Williams and McAllister, plaintiff filed suit against Williams and McAllister and obtained default judgments but collected nothing, and plaintiff then filed this action to enforce medical provider liens pursuant to N.C.G.S. § 44-50. Actions by plaintiff against either its patients or their attorney are not inconsistent and do not seek any additional or alternative forms of relief; there is no threat of double recovery.

Appeal by plaintiff from judgment entered 29 January 1999 and filed 3 February 1999 and order entered 24 May 1999 and filed 26 May 1999 by Judge Charles T. L. Anderson in Durham County District Court. Heard in the Court of Appeals 18 May 2000.

Gregory Alan Heafner for plaintiff-appellant.

Bryant, Patterson, Covington & Idol, P.A., by Lee A. Patterson, II, for defendant-appellee.

WALKER, Judge.

Plaintiff provided chiropractic care to Angela Williams and Tony McAllister as a result of personal injuries suffered in an automobile accident on 4 August 1995. Defendant, an attorney, represented Williams and McAllister in their respective personal injury claims arising out of the accident. Defendant requested from plaintiff copies of Williams' and McAllister's medical records and bills for its services, which totaled $2,229.99 and $2,937.00, respectively.

Defendant settled Williams' and McAllister's claims for $6,000.00 and $10,000.00, respectively. Williams and McAllister were dissatisfied with plaintiff's services and each instructed defendant that no portion of the settlement proceeds was to be disbursed to plaintiff. Defendant disbursed these settlement proceeds to Williams and McAllister without paying or withholding any amount to pay plaintiff's bills for services.

On 1 November 1996, plaintiff filed suit against Williams and McAllister and obtained default judgments in the amount of $2,229.00 and $2,937.00, respectively, but plaintiff collected nothing on the judgments. On 3 January 1997, plaintiff filed this action against defendant seeking to enforce two medical provider liens pursuant to N.C. Gen. Stat. § 44-50. Plaintiff alleged that defendant failed to honor its liens when defendant disbursed the two settlement proceeds.

In its order and judgment filed 3 February 1999, the trial court found that the McAllister lien was invalid, based upon N.C. Gen. Stat. §§ 44-49 and -50, and found that the Williams lien was valid but denied recovery, based upon the doctrine of election of remedies. The trial court concluded that:

> Plaintiff in prosecuting the Magistrate's action against Williams, individually, resulting in a judgment in favor of the Plaintiff, in the full amount of his billings, which judgment was rendered by the Magistrate Division of the District Court of Durham County on or about December 4, 1996, constituted an election of remedies by Plaintiff and that pursuant to the doctrine of election of remedies, Plaintiff cannot prosecute this claim against Defendant, and that Plaintiff's claim as to Williams is thus barred by Plaintiff's election of remedies as herein set out.

On 26 May 1999, pursuant to plaintiff's motion for amendment of judgment, the trial court found that the McAllister lien was valid, but again denied recovery to plaintiff based upon the doctrine of election of remedies. The trial court's order concluded in part:

> that the Plaintiff's claim to enforce the above referenced [McAllister] lien is however barred by the doctrine of election of remedies for the same reasons as such doctrine is applied to Plaintiff's claim to enforce the lien arising from Plaintiff's treatment of Angela Williams as same is set forth in the January 29, 1999 Order and Judgment of this Court in this action.

Additionally, the trial court's order stated that:

> the parties have consented to and agreed that the sole and only issue which either party may raise on appeal from the rulings of this Court is the applicability of the doctrine of election of remedies as same has been applied by this Court in this action.

Plaintiff argues the trial court erred in concluding that its action was barred by the election of remedies doctrine. Specifically, plaintiff contends there is nothing inconsistent in its action against Williams and McAllister resulting in default judgments and now bringing suit against defendant for failure to honor its liens.

A plaintiff is deemed to have made an election of remedies, and therefore estopped from suing a second defendant, only if he has sought and obtained final judgment against a first defendant and the remedy granted in the first judgment is repugnant or inconsistent

with the remedy sought in the second action. *See McCabe v. Dawkins*, 97 N.C. App. 447, 448, 388 S.E.2d 571, 572 (1990). The purpose of the doctrine of election of remedies is to prevent more than one redress for a single wrong. *Id.* One is held to have made an election of remedies when one chooses with knowledge of the facts between two inconsistent remedial rights. *See Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d 685, 687 (1989). The doctrine does not apply to "coexisting and consistent remedies." *See Richardson v. Richardson*, 261 N.C. 521, 530, 135 S.E.2d 532, 539 (1964). Although Rule 20 of the North Carolina Rules of Civil Procedure permits a plaintiff to join defendants in one action if there is a right to relief arising out of the "same transaction, occurrence, or series of transactions or occurrences," it does not require joinder. *See Swain v. Leahy*, 111 N.C. App. 884, 886, 433 S.E.2d 460, 462, *disc. review denied*, 335 N.C. 242, 439 S.E.2d 162 (1993); N.C. Gen. Stat. § 1A-1, Rule 20(a) (1999). A plaintiff does not pursue inconsistent claims by proceeding with separate actions. *Id.*

In *Nye v. Lipton*, 50 N.C. App. 224, 225, 273 S.E.2d 313, 314, (1980), *disc. review denied*, 302 N.C. 630, 280 S.E.2d 441 (1981), plaintiff Nye loaned defendant Roberts $33,000.00. Defendant Lipton was Roberts' attorney and handled Roberts' finances. *Id.* Plaintiff alleged that both Roberts and Lipton represented to him that the loan was to be paid off from the sale of a note owned by Roberts. *Id.* Additionally, plaintiff alleged that Roberts gave written instructions to Lipton to pay the plaintiff the amount of the loan plus interest; however, plaintiff was never paid. *Id.* Plaintiff filed suit against the estates of Roberts and Lipton for recovery of the money owed by Roberts. *Id.* Roberts did not contest the allegations and summary judgment was entered against him. *Id.* Plaintiff was also granted summary judgment against Lipton's estate, which appealed and argued that summary judgment was improper because plaintiff elected his remedy by obtaining a judgment against Roberts. *Id.* at 229, 273 S.E.2d at 316.

This Court held:

> plaintiff is pursuing separate claims growing out of the same transaction. His claim against [the borrower] is based on the theory that he has made a loan to [the borrower] which has not been paid. His claim against the appellant is on the theory that [appellant] as attorney-in-fact for [the borrower] was under instructions from [the borrower] to pay the debt to plaintiff, and [appellant] failed to pay the debt after receiving funds to do so. These two

> claims are consistent and plaintiff may pursue both of them. The payment of either claim will extinguish both.

Nye, 50 N.C. App. at 229, 273 S.E.2d at 316.

Here, plaintiff's action against McAllister and Williams was based on the theory that amounts owed for services had not been paid. Plaintiff's present action against defendant is based on the theory that defendant violated N.C. Gen. Stat. § 44-50 by failing to honor valid medical provider liens. *See N.C. Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 532, 374 S.E.2d 844, 846 (1988) (agreeing with defendant's argument that "N.C.G.S. § 44-50 provides the only mechanism by which to obtain funds from an attorney who has received them for a client in satisfaction of a personal injury claim").

Williams and McAllister are liable to plaintiff for having received services for which they have not paid. Defendant is liable to plaintiff pursuant to N.C. Gen. Stat. § 44-50. Actions by plaintiff against either its patients or their attorney are not inconsistent and do not seek any additional or alternative forms of relief. There is no threat of double recovery as the defendants in each action can claim contribution for payments made by the other, both in defense of the suit and in defense of any proceedings to collect a judgment.

Accordingly, the trial court erred in concluding that the doctrine of election of remedies barred plaintiff's recovery from defendant.

Reversed.

Judges TIMMONS-GOODSON and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 JULY 2000

BAILEY v. GLENDALE HOSIERY CO. No. 99-370	Ind. Comm. (650446)	Affirmed
BEALL v. BEALL No. 99-1101	Wake (98CVS2211)	Reversed and Remanded
BOWEN v. BALL No. 99-851	Craven (96CVD58) (96CVD59)	Affirmed
DONALDSON v. DONALDSON No. 99-1125	Watauga (98CVD435)	Affirmed
ENNIS v. FISH No. 99-1382	Catawba (99CVD754)	Affirmed
FARMER v. WILSON MEM'L HOSP., INC. No. 99-1079	Wilson (98CVS1186)	Affirmed in part, reversed in part, and remanded
HILL v. HILL No. 99-803	Henderson (97CVS725)	Dismissed
IN RE GILLIAM No. 99-1502	Mecklenburg (94J682)	Affirmed
IN RE KELLEY No. 99-1196	Haywood (94J139)	Affirmed
J.M. PARKER & SONS, INC. v BROWN No. 99-927	Brunswick (98CVS150)	Reversed and remanded in part; affirmed in part
KRMC GRP., INC. v. NG No. 99-797	Orange (97CVS1164)	Affirmed
MONTFORD v. CARTERET COUNTY SCH. No. 99-7	Ind. Comm. (205915)	Affirmed
MOORE BUICK PONTIAC, GMC TRUCK, INC. v. FREEMAN No. 99-1054	Onslow (98CVS3470)	Dismissed
MORRISON v. SAGEBRUSH STEAKHOUSE No. 99-807	Ind. Comm. (652124)	Affirmed
P&A CUSTOM HOMES, INC. v. SPRITZER No. 99-1047	Orange (98CVS253)	Affirmed

PROTECK SERVS. CO. v. N.C. EQUIP. CO. No. 99-1229	Sampson (98CVS1369)	Dismissed
SMITH v. PETERS No. 99-1026	Rutherford (97CVD330)	Affirmed in part, vacated in part and remanded
SPADONI v. EGIDIO No. 99-1444	Avery (98CVD552)	Affirmed
STATE v. BROWN No. 99-581	Duplin (98CRS561) (98CRS562) (98CRS563) (98CRS564)	No Error
STATE v. CHESSON No. 99-350	Wayne (97CRS14659) (98CRS2332)	No error in trial. Remanded for sentencing rehearing as to the possession of a controlled substance on the premises of a penal institution.
STATE v. COLLINS No. 99-997	New Hanover (98CRS14554)	Affirmed
STATE v. DAVIS No. 99-1462	Forsyth (97CRS48224)	No Error
STATE v. DUNSTON No. 99-1468	Wake (98CRS108209)	No Error
STATE v. FAIRLEY No. 99-1195	Cumberland (96CRS60599) (96CRS62297) (98CRS23663)	Affirmed
STATE v. HAITH No. 99-603	Alamance (98CRS18726) (98CRS18727)	No Error
STATE v. McKENZIE No. 99-1456	Mecklenburg (93CRS69802) (93CRS69803)	No Error
STATE v. McMILLIAN No. 99-979	Carteret (98CRS2014)	No Error
STATE v. MILLER No. 99-668	Guilford (98CRS25929) (98CRS27632) (98CRS26633)	No Error

STATE v. MOORE No. 99-1269	Durham (97CRS30319) (97CRS30320) (99CRS4031)	No Error
STATE v. POWELL No. 99-1453	Halifax (97CRS1533) (96CRS6290) (96CRS4221)	No Error
STATE v. PURDIE No. 99-1394	Robeson (97CRS5389)	Affirmed
STATE v. ROUSE No. 99-1366	Lenoir (98CRS9749) (98CRS9750)	No Error
STATE v. SHAFFER No. 99-1418	Stokes (98CRS2458) (98CRS2459) (98CRS4042)	Affirmed
STATE v. TRICE No. 99-1321	Durham (98CRS052266)	Remanded for resentencing
STATE v. WARREN No. 99-1280	Martin (98CRS2581)	Remanded for entry of a corrected written judgment; in all other respects, no error.
STATE v. WIGFALL No. 99-1466	Onslow (98CRS9024)	No Error
STATE v. WILLIAMS No. 99-278	Martin (97CRS1286)	No Error
STATE v. YATES No. 99-1539	Guilford (98CRS46073)	No Error
SWAIN COUNTY v. N.C. ABC COMM'N No. 99-1448	Swain (99CVS179)	Dismissed
TURNER v. WHITMIRE No. 99-318	Jackson (96CVD543)	Affirmed
ZINN v. VFW POST 1706 No. 99-722	Lincoln (97CVS378)	Affirmed

STATE OF NORTH CAROLINA v. JAMES ALLEN SMITH

No. COA99-573

(Filed 1 August 2000)

1. Sentencing— habitual felon—habitual misdemeanor assault—substantive offense

The trial court did not err by sentencing defendant as an habitual felon under N.C.G.S. § 14-7.1 in cases 98 CRS 3061 and 3062 in which defendant was convicted of two counts of habitual misdemeanor assault under N.C.G.S. § 14-33.2, because habitual misdemeanor assault is a substantive offense rather than merely a status for purposes of sentence enhancement, and therefore, can be used as one of the three felonies required to support an habitual felon conviction.

2. Assault— habitual misdemeanor—no ex post facto violation

The trial court did not violate the prohibition against ex post facto laws by convicting defendant of habitual misdemeanor assault under N.C.G.S. § 14-33.2 even though some of the misdemeanors used to support the conviction occurred prior to the effective date of the statute, because the habitual misdemeanor assault statute does not impose punishment for previous crimes, but imposes an enhanced punishment for behavior occurring after the enactment of the statute based on the repetitive nature of such behavior.

3. Constitutional Law— effective assistance of counsel—failure to object to alleged improper question—evidence already adduced

Although defendant argues he received ineffective assistance of counsel based on his trial counsel's failure to object to an allegedly improper question posed by the prosecutor during the direct examination of the victim allowing the admission of evidence without which the State could not have obtained the convictions for habitual misdemeanor assault, a review of the transcript reveals that the incriminating evidence had in fact been given earlier by the witness.

4. Constitutional Law— effective assistance of counsel—failure to request jury instruction on disorderly conduct

Defendant did not receive ineffective assistance of counsel in an habitual misdemeanor assault case based on his trial counsel's

failure to submit a written request for a jury instruction as required by N.C.G.S. § 15A-1231 on the issue of misdemeanor disorderly conduct under N.C.G.S. § 14-288.4, because: (1) disorderly conduct is not a lesser included offense of any charge for which defendant was on trial; and (2) even if defense counsel submitted a written request for the instruction, it is unlikely the request would have been granted or that a different result would have been reached.

5. Assault— on a female—motion to dismiss

The trial court did not err by failing to grant defendant's motion to dismiss the charge of assault on a female under N.C.G.S. § 14-33(c)(2), because the evidence viewed in the light most favorable to the State reveals that there was substantial evidence from which a jury could determine defendant's guilt or innocence based on the alleged victim's testimony that defendant hit the victim across the chest.

6. Criminal Law— defendant's removal from courtroom—failure to instruct—harmless error

Although the trial court erred by failing to instruct the jurors according to N.C.G.S. § 15A-1032(b)(2) that defendant's removal from the courtroom during trial was not to be considered in weighing evidence or determining the issue of guilt, there was no reasonable probability that a different result would have been reached had the required instruction been given based on the facts that: (1) defendant's outbursts occurred after the jury had already returned verdicts finding defendant guilty of injury to property, communicating threats, and two counts of assault on a female; (2) the only issue left for determination by the jury was defendant's guilt or innocence of having attained the status of an habitual felon; and (3) the evidence with respect to the remaining issue was clear and undisputed.

7. Appeal and Error— preservation of issues—failure to cite authority

Although defendant contends the trial court erred by refusing to instruct the jury on disorderly conduct, this argument is deemed abandoned based on defendant's failure to cite any reason or authority as required by N.C. R. App. P. 28(b)(5).

8. Criminal Law— defendant's argument—request to show statute to jury—incorrect statement of law

The trial court did not abuse its discretion under N.C.G.S. § 7A-97 by refusing to allow defendant to show the jury a copy of the habitual misdemeanor assault statute under N.C.G.S. § 14-33.2 and its effective date, in an attempt to argue that two of the offenses named in the indictment occurred prior to the enactment of the habitual misdemeanor assault statute and could not be considered in determining defendant's guilt, because: (1) the argument defendant wanted to make regarding N.C.G.S. § 14-33.2 was both incorrect and unrelated to the issues before the jury at that time; and (2) the use of offenses occurring before the effective date of N.C.G.S. § 14-33.2 to satisfy its elements is neither improper nor unconstitutional.

9. Sentencing— prior record level

The trial court did not err during a sentencing proceeding by determining that defendant's prior record level is level IV under N.C.G.S. § 15-1340.14(c)(4), because: (1) defendant was convicted of two separate offenses of assault on a female on 16 May 1994, and one of these convictions was used to establish defendant's guilt of habitual misdemeanor assault under N.C.G.S. § 14-33.2 while the other was applied as a point on his prior record level; and (2) even though there was insufficient evidence to show that defendant was on probation while he committed the current offenses and a prior record point was erroneously assessed, the error was harmless based on the fact that defendant already had nine prior record points.

Judge WYNN concurring.

Appeal by defendant from judgments entered 5 October 1998 by Judge Zoro J. Guice, Jr., in Henderson County Superior Court. Heard in the Court of Appeals 24 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Donald W. Laton, for the State.

Phillip T. Jackson for defendant-appellant.

MARTIN, Judge.

Defendant appeals from judgments entered upon his convictions of two counts of habitual misdemeanor assault, and being an habitual

felon. The evidence presented at trial tended to show that on 15 May 1998 defendant beat Karen Conard with his fists while Conard was on the ground outside the home of her neighbor, Susan Philipsheck. Conard's daughter, Kieyoundra McDowell, was standing behind defendant and pulling on his shirt while defendant was beating Conard and defendant then turned and hit McDowell.

Conard sought safety in the Philipsheck's house, where she was protected until defendant broke into the Philipsheck's home by kicking in the front door. Law enforcement officers arrived shortly thereafter; defendant surrendered and was arrested.

Defendant challenges his convictions of habitual misdemeanor assault and being an habitual felon and the sentences imposed upon those convictions by numerous assignments of error. We have carefully considered his arguments and find no error.

I.

Defendant first contends the trial court erred by sentencing him as an habitual felon under G.S. § 14-7.1 in cases 98 CRS 3061 and 3062, in which he was convicted of habitual misdemeanor assault. Defendant argues (1) the recently enacted habitual misdemeanor assault statute, G.S. § 14-33.2, does not constitute a substantive offense but merely confers a status onto defendant, (2) two of his past convictions could not be used to support the convictions under G.S. § 14-33.2 because they occurred prior to the enactment of that statute and to permit their use would violate the *ex post facto* prohibition contained in both the United States Constitution and the Constitution of North Carolina.

[1] Defendant first argues the habitual misdemeanor assault statute merely confers a status upon a defendant for the purpose of enhancing punishment and does not constitute a substantive offense. Therefore, defendant argues, a conviction of habitual misdemeanor assault may not be used as one of the three felonies required to support an habitual felon conviction. A close analysis of the precise wording of the habitual offender statutes in North Carolina reveals the intent of the Legislature that habitual misdemeanor assault be a substantive offense rather than merely a status for purposes of sentence enhancement.

G.S. § 14-33.2, the habitual misdemeanor assault statute, provides in pertinent part:

> A person *commits the offense* of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33(c) or G.S. 14-34 and has been convicted of five or more prior misdemeanor convictions, two of which were assaults. A person convicted of violating this section is guilty of a Class H felony (emphasis added).

The language of this statute is very similar to that used in G.S. § 20-138.5, the habitual impaired driving statute, which provides in pertinent part:

> (a) A person *commits the offense* of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense (emphasis added).
>
> (b) A person convicted of violating this section shall be punished as a Class F felon . . . .

In contrast, G.S. § 14-7.1, the habitual felony statute, reads:

> Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof *is declared to be* an habitual felon (emphasis added).

Both the habitual misdemeanor assault statute and the habitual impaired driving statute declare that a person "commits the offense" if that person currently commits specified acts and has been convicted of a specified number of similar offenses in the past. The habitual felon statute, by contrast, provides only that a person is an habitual felon if he has been convicted of three felonies. G.S. § 14-33.2 and G.S. § 20-138.5 both describe the habitual conduct as an "offense," denoting that it is a substantive offense, while G.S. § 14-7.1 employs the phrase "declared to be" immediately before "habitual felon," denoting a status, rather than an offense. There is no reference in the habitual felon statute to any current behavior, thus imposing a status on defendant that would have consequences during the penalty phase of subsequent convictions. *See generally State v. Penland*, 89 N.C. App. 350, 365 S.E.2d 721 (1988).

In *State v. Priddy*, 115 N.C. App. 547, 445 S.E.2d 610, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994), we relied heavily on the Legislature's use of distinctive language in determining that the

Legislature intended the habitual impaired driving statute to affect more than a defendant's status at a sentencing hearing.

> Because G.S. § 14-7.1 simply defines certain persons to be habitual felons, who, as such, are subject to greater punishment for criminal offenses, our Supreme Court has held that being an habitual felon is not a crime and cannot support, standing alone, a criminal sentence. Rather, being an habitual felon is a status justifying an increased punishment for the principal felony. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).
>
> By contrast, the legislature chose the specific language to define the crime of habitual impaired driving as a separate felony offense, capable of supporting a criminal sentence. Thus, the legislature must not have intended to make habitual impaired driving solely a punishment enhancement status.

Id. at 549, 445 S.E.2d at 612. We find the reasoning articulated in *Priddy* equally applicable to the habitual misdemeanor assault statute, G.S. § 14-33.2. Thus, we hold the habitual misdemeanor statute to be a substantive offense.

[2] Even so, defendant argues that he was improperly convicted of habitual misdemeanor assault because some of the misdemeanors used to support the conviction occurred prior to the effective date of the statute. Defendant argues that to allow convictions prior to the effective date of G.S. § 14-33.2 to satisfy elements of the habitual misdemeanor assault charge violates the prohibition against *ex post facto* laws in both the United States Constitution, Art. I § 10, cl. 1, and the North Carolina Constitution, Art. I § 16, by increasing the penalty for these crimes after the offenses were committed. We disagree.

Noting the increased danger that a repeat offender poses to society, our Supreme Court has held that the habitual felon statute does not violate the prohibition against *ex post facto* laws because it does not punish defendant for his previous conduct, but rather for his current conduct to a greater degree, due to his previous similar offenses. *See State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985). Likewise, in *State v. Mason*, 126 N.C. App. 318, 488 S.E.2d 818 (1997), we determined that the violent habitual felon statute, G.S. § 14-7.7, withstood the same constitutional scrutiny. As the habitual misdemeanor assault statute similarly does not impose punishment for previous crimes, but imposes an enhanced punishment for behavior occurring after the enactment of the statute, because of the repetitive nature of

such behavior, we hold the habitual misdemeanor assault statute does not violate the prohibition on *ex post facto* laws.

II.

[3] Next, defendant argues that he received ineffective assistance from his counsel during trial because his counsel failed to object to a question, elicited incriminating evidence from the victim on cross-examination, and failed to submit a proposed jury instruction in written form.

To establish ineffective assistance of counsel, "defendant must show that: (1) the counsel's performance fell below an objective standard of reasonableness as defined by professional norms and (2) the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error." *State v. Pretty*, 134 N.C. App. 379, 387, 517 S.E.2d 677, 683, *disc. review denied*, 351 N.C. 117, — S.E.2d — (1999). Defendant first argues his trial counsel's failure to object to an allegedly improper question posed by the prosecutor during the direct examination of the victim, combined with trial counsel's cross-examination of the victim, allowed the admission of evidence without which the State could not have obtained the conviction. Defendant bases this argument on the assertion that prior to the prosecutor's allegedly improper question and the cross-examination by trial counsel, the incriminating evidence had yet to be adduced. However, a close inspection of the trial transcript reveals that the incriminating evidence in question had, in fact, been given earlier by the witness in response to the prosecutor's question: "Okay, what happened then?" Because the transcript does not substantiate defendant's arguments in support of these contentions, we reject them.

[4] Defendant further argues the result of his trial would have been different if his trial counsel had been prepared to submit a written request for a jury instruction on the issue of misdemeanor disorderly conduct. Defendant asserts that, had the requested instruction been given, the jury could have found defendant guilty of disorderly conduct instead of one or both counts of assault. We are not persuaded.

Defense counsel requested an instruction on the issue of defendant's guilt or innocence of misdemeanor disorderly conduct. The State argued in opposition that disorderly conduct was not a lesser included offense for any charge defendant was facing. Although the trial court stated the motion was denied "unless [defense counsel]

has something prepared and written out," we cannot assume the trial court would have granted defendant's request had the instruction been properly presented as required by G.S. § 15A-1231. Disorderly conduct, a violation of G.S. § 14-288.4, is not a lesser included offense of any charge for which defendant was on trial. Therefore, even if defense counsel had submitted a written request for the instruction, it is unlikely that the request would have been granted or that a different result would have been reached. This assignment of error is overruled.

III.

[5] Defendant next assigns error to the trial court's failure to grant his motion to dismiss the charge of assault on a female against Kieyoundra McDowell. Defendant argues there was not substantial evidence to prove each element of the crime.

To survive a defendant's motion to dismiss a criminal charge, the State must offer substantial evidence of every essential element of the crime. *State v. Cross*, 345 N.C. 713, 483 S.E.2d 432 (1997). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 717, 483 S.E.2d at 434 (citation omitted). In ruling upon a motion to dismiss, all the evidence is considered in the light most favorable to the State, and the motion must be denied if there is substantial evidence of each element of the crime charged and that defendant was the perpetrator. *See State v. Jacobs*, 128 N.C. App. 559, 495 S.E.2d 757, *disc. review denied*, 348 N.C. 506, 510 S.E.2d 665 (1998); *State v. Allen*, 127 N.C. App. 182, 488 S.E.2d 294 (1997). Under G.S. § 14-33(c)(2), one commits assault on a female if he "[a]ssaults a female, he being a male person at least 18 years of age."

Ms. McDowell, who is a female, testified defendant, a male over age 18, "hit me across the chest . . . ." This evidence viewed in the light most favorable to the State presents substantial evidence from which a jury could determine whether defendant was guilty or not guilty of assault on a female. This assignment of error is overruled.

IV.

[6] Defendant next assigns error to the trial court's decision to remove him from the courtroom during trial. Defendant further argues that the trial court erred in failing to give an appropriate instruction warning the jury not to consider defendant's removal in making their determination as to his guilt or innocence.

"A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner." N.C. Gen. Stat. § 15A-1032(a) (1999). "A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior." *State v. Callahan*, 93 N.C. App. 579, 583, 378 S.E.2d 812, 814, *disc. review denied*, 325 N.C. 274, 384 S.E.2d 521 (1989).

Defendant made two outbursts during the State's presentation of evidence regarding the charge of habitual felon. After the first outburst, the trial court warned defendant not to speak out of turn again. After defendant again disrupted the trial and verbally abused persons in the courtroom, the trial court made the appropriate findings of fact and conclusions of law and ordered that defendant be removed from the courtroom. Defendant was allowed to return to the courtroom for his sentencing hearing the following Monday and his counsel was permitted to consult with him during the portion of the trial from which defendant was excluded. The trial court, however, failed to comply with the requirements of G.S. § 15A-1032(b)(2) which provides: "If the judge orders a defendant removed from the courtroom, he must . . . (2) [i]nstruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt." This omission was error.

Not every error, however, warrants a new trial. *See State v. Ginyard*, 334 N.C. 155, 431 S.E.2d 11 (1993). An error is considered harmful when there is a reasonable probability that without the error a different result would have occurred. N.C. Gen. Stat. § 15A-1443(a). Defendant's outbursts occurred after the jury had already returned verdicts finding defendant guilty of injury to real property, communicating threats, and two counts of assault on a female. The only issue left for determination by the jury was defendant's guilt or innocence of having attained the status of an habitual felon. The evidence with respect to the issue consisted of proof, through three exhibits, that defendant had been previously convicted of second degree arson, assault with a deadly weapon inflicting serious injury, and habitual misdemeanor assault. The exhibits were comprised of transcripts of the pleas and judgments as to each of the offenses. Given the clear and undisputed nature of the evidence before the jury, it is difficult to imagine that defendant's outburst and subsequent removal had any

effect on the determination of his guilt or innocence of being an habitual felon. Under these narrow circumstances, we do not find any reasonable probability that a different result would have been reached had the required instruction been given. Accordingly, this assignment of error is overruled.

V.

[7] Defendant's next assignment of error, directed to the trial court's refusal to instruct the jury on disorderly conduct, is deemed abandoned for his failure to cite any reason or authority in support thereof. N.C.R. App. P. 28(b)(5). In any event, disorderly conduct is not a lesser included offense of any offense with which defendant was charged.

VI.

[8] Defendant next assigns error to the trial court's refusal to allow him to show the jury a copy of G.S. § 14-33.2, including its effective date. Defendant contends that he should have been permitted to argue that because two of the offenses named in the indictment occurred prior to the enactment of the habitual misdemeanor assault statute, they should not have been considered in determining the issue of defendant's guilt on this charge.

Control of jury arguments is within the trial court's discretion, *State v. Parker*, 350 N.C. 411, 516 S.E.2d 106 (1999), *cert. denied*, 528 U.S. 1084, 145 L.Ed.2d 681 (2000), and the decisions of the trial court "will not be disturbed 'in the absence of [a] gross abuse of discretion.' " *State v. Little*, 126 N.C. App. 262, 268, 484 S.E.2d 835, 838 (1997) (citations omitted). G.S. § 7A-97 states in pertinent part that "[i]n jury trials the whole case as well of law as of fact may be argued to the jury." The statute is permissive in allowing the law to be argued to juries, but presents no mandatory requirement that, upon request by defendant, he be allowed to argue his version of the law. The permissive nature of G.S. § 7A-97 comports with the wide discretion that trial courts have in controlling the arguments presented by counsel. *See generally Parker, supra; Little, supra.*

Moreover, the argument defendant wished to make regarding G.S. § 14-33.2 was both incorrect and unrelated to the issues before the jury at that time.

> Counsel may, in his argument to the jury, . . ., read or state to the jury a statute or other rule of law relevant to such case, ...

> He may not, however, state the law incorrectly . . . . Nor may counsel argue to the jury that the law ought to be otherwise, . . . and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely.

State v. Britt, 285 N.C. 256, 273, 204 S.E.2d 817, 829 (1974). As explained above, the use of offenses occurring before the effective date of G.S. § 14-33.2 to satisfy its elements is neither improper nor unconstitutional. Therefore, the trial court properly exercised its discretion in thus limiting defendant's argument to the jury and this assignment of error is overruled.

VII.

[9] Finally, defendant assigns error to the sentencing proceeding. The trial court determined defendant's prior record level to be level IV, based upon its finding that he had ten prior record points. The point range for level IV is nine to fourteen points. N.C. Gen. Stat. § 15-1340.14(c)(4). Defendant takes issue with two of the ten points found by the trial court and contends the trial court should have determined his prior record points to be eight and, therefore, his prior record level to be level III.

With respect to one of the prior record points, defendant contends a 16 May 1994 conviction of assault on a female was used to support his convictions of habitual misdemeanor assault and could not, therefore, also be used to establish his prior record level. *See* N.C. Gen. Stat. § 14-7.6 (conviction used to establish status as habitual felon may not be used to determine prior record level); *State v. Misenheimer*, 123 N.C. App. 156, 472 S.E.2d 191, *disc. review denied*, 344 N.C. 441, 476 S.E.2d 128 (1996). However, a close examination of the record reveals there was evidence that defendant was convicted of two separate offenses of assault on a female on 16 May 1994; one of these convictions was used to establish defendant's guilt of habitual misdemeanor assault under G.S. § 14-33.2, and the other conviction was applied as a point on his prior record level.

As to the other prior record point contested by defendant, he contends there was insufficient evidence to show that he was on probation when he committed the current offenses, and that the prior record point assessed by reason thereof was error. Our review of the evidence reveals no proof with respect to defendant's probationary status at the time of the offenses in the present cases, thus we must

agree that the point was erroneously assessed. However, because defendant was correctly found to have nine prior record points, the erroneous finding of a tenth point based on his probationary status was harmless and defendant was correctly determined to have a prior record level of IV.

We have considered and find no merit in defendant's argument that the trial court's remarks after the verdict showed an incapacity to accord defendant an impartial sentencing hearing; we find no abuse of discretion in the imposition of consecutive sentences. Defendant's assignments of error with respect to his sentencing proceeding are overruled.

Defendant's remaining assignments of error, which were not argued in his brief, are deemed abandoned. N.C.R. App. P. 28(a), 28(b)(5).

No error.

Judge HUNTER concurs.

Judge WYNN concurs in a separate opinion.

Judge WYNN concurring.

I join in the majority opinion and concur that the habitual misdemeanor assault statute creates a substantive felony offense. This conclusion is based upon similarities between the habitual misdemeanor assault statute and the habitual impaired driving statute, and upon this court's holding in *State v. Priddy* that the habitual impaired driving statute creates a substantive felony offense as opposed to a status offense. *State v. Priddy*, 115 N.C. App. 547, 445 S.E.2d 610, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994).

The habitual misdemeanor assault statute and the habitual impaired driving statute are unusual in nature in that they both purport to create a substantive recidivist felony out of conduct which would otherwise constitute a misdemeanor. For that reason, I find it prudent to take the analysis a step further to address whether a conviction under N.C. Gen. Stat. § 14-33.2 (1996) for habitual misdemeanor assault will properly serve to support an ancillary indictment under the Habitual Felons Act, N.C. Gen. Stat. §§ 14-7.1 *et seq.* (1993), to adjudge the defendant an habitual felon. As to the habitual impaired driving statute, this court has previously addressed this

question in *State v. Baldwin*, 117 N.C. App. 713, 453 S.E.2d 193, *cert. denied*, 341 N.C. 653, 462 S.E.2d 518 (1995), in which we held that "a conviction for [habitual impaired driving] may serve as the basis for enhancement to habitual felon status." *Id.* at 716, 453 S.E.2d at 194. Analogizing the habitual misdemeanor assault statute and the habitual impaired driving statute again allows a similar conclusion that a conviction under N.C.G.S. § 14-33.2 will indeed support an ancillary indictment under the Habitual Felons Act to adjudge the defendant an habitual felon.

However, neither this court nor our Supreme Court has directly addressed the constitutionality of either the habitual misdemeanor assault statute or the habitual impaired driving statute. In concluding that the habitual misdemeanor assault statute survives constitutional scrutiny, the majority relies upon our Supreme Court's determination of the constitutionality of the Habitual Felons Act in *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985). While I believe that this analysis and outcome is proper given the current state of our case law, I am concerned that we may be, in a sense, comparing apples and oranges.

In *Todd*, our Supreme Court held that the Habitual Felons Act comports with constitutional guarantees of due process and equal protection. 313 N.C. at 117, 362 S.E.2d at 253 (*citing Rummell v. Estelle*, 445 U.S. 263, 63 L. Ed. 2d 382 (1980); *Spencer v. Texas*, 385 U.S. 554, 17 L. Ed. 2d 606 (1967)). In addition, the United States Supreme Court has long upheld such statutes in the face of challenges that they violate constitutional prohibitions against double jeopardy and *ex post facto* laws, reasoning that the defendant is being prosecuted for the present crime charged (rather than being punished again for the prior crimes), and that the punishment upon conviction for the present crime may be enhanced based on the previous convictions. *See, e.g., Gryger v. Burke*, 334 U.S. 728, 92 L. Ed. 1683 (1948).

Our reliance on such logic to establish the constitutionality of the habitual misdemeanor assault statute is troublesome given our efforts in the majority opinion to establish the following important distinction: That the Habitual Felons Act creates a status offense (which will *not* independently support a criminal sentence) and the habitual misdemeanor assault statute creates a substantive offense (which will). With respect to the Habitual Felons Act, the defendant's prior convictions must be proven by the state in the sentencing phase, but arguably are not true elements of the offense (given that they are

relevant only to the sentencing for the underlying principal felony). With respect to the habitual misdemeanor assault statute, however, the defendant's prior convictions are, by statute, essential elements of the substantive offense, which offense will independently support a criminal sentence. The question arises whether the habitual misdemeanor assault statute, which is dependent on elements consisting of prior convictions, is constitutional given this distinction. The same question may be asked of the habitual impaired driving statute. Since our Supreme Court has never directly addressed this issue, perhaps this case will present an opportunity for it to do so.

DAVID E. BREWER AND WIFE, REE E. BREWER, PLAINTIFFS v. RICHARD EDWARD BREWER AND SONJA KAY DUKES ALDUCIN, DEFENDANTS

No. COA99-1042

(Filed 1 August 2000)

1. **Appeal and Error— appealability—temporary child custody order—review in one year—no unresolved issues**

An appeal was not interlocutory where the trial court issued a child custody order on 2 July 1999, noted that the order was "temporary," and decreed that it would review the order in "the summer of the year 2000." A year is too long a period to be considered "reasonably brief" in a case where there are no unresolved issues.

2. **Child Support, Custody, and Visitation— custody—action between natural parent and uncle and aunt—*Petersen* presumption—findings of changed circumstances**

A child custody order was remanded where defendants had two children; both defendants have a history of drug use and other criminal activity and defendant Alducin worked as a topless dancer; when defendant Alducin was arrested in Georgia for a probation violation in mid-1997; defendant Brewer moved back to North Carolina; the defendants entered into a consent order granting defendant Brewer custody of the two minor children in July of 1997; defendant Brewer kept the children until February of 1998, when he decided that his work schedule prevented him from being able to care for the children properly and allowed the children to live with plaintiffs, the paternal uncle and aunt of the

children; plaintiffs filed this action for permanent custody on 14 October 1998 and Alducin also filed for custody; and the court granted custody to Alducin. It would violate a natural parent's due process rights to deny her the presumption of *Petersen v. Rogers*, 337 N.C. 397, against a non-parent where the parent had voluntarily relinquished custody to the other parent, had never voluntarily or involuntarily relinquished custody to a non-parent, had never been adjudged unfit, and had never acted in a manner inconsistent with her protected parental status. However, to modify the custody order here, Alducin first had to show that there was a substantial change of circumstances affecting the welfare of the children, and, while the evidence shows that she made major lifestyle improvements, the trial court failed to make specific findings regarding any effect the change of circumstances had on the welfare of the children.

Judge LEWIS dissenting in part.

Appeal by plaintiffs from order entered 2 July 1999 by Judge Jimmy L. Myers in Davidson County District Court. Heard in the Court of Appeals 15 May 2000.

Michelle D. Reingold and Theodore M. Molitoris for the plaintiff-appellants.

Jon W. Myers and The Law Offices of Rosalind Baker, by Rosalind Baker, for defendant-appellee Alducin.

EAGLES, Chief Judge.

This case involves a custody dispute concerning two minor children who are four and six years of age respectively. The plaintiffs, David and Ree Brewer are the children's paternal uncle and aunt. Defendants Richard Brewer and Sonja Alducin are the children's estranged parents. Plaintiffs instituted this action in order to modify an earlier custody decree and obtain custody.

Defendants Brewer and Alducin lived together in the mid-1990's in both North Carolina and Georgia. During their relationship, they had two children. Those children are at the center of this custody dispute. The record indicates that both defendants have a history of drug use and other criminal activity during that time. The record also shows that defendant Alducin worked as a topless dancer while living with defendant Brewer. In mid-1997, defendant Alducin was arrested in Georgia for a probation violation. After defendant Alducin's arrest,

defendant Brewer took the children and moved back to North Carolina. In July of 1997, the defendants entered into a consent order granting defendant Brewer custody of the two minor children. The order granted defendant Alducin visitation rights and ordered her to pay $60.00 per week in child support.

Defendant Brewer kept the children until February of 1998. At that time, defendant Brewer decided that his work schedule prevented him from being able to care for the children properly. Accordingly, defendant Brewer unilaterally allowed the children to live with the plaintiffs.

On 14 October 1998, plaintiffs filed this action to obtain permanent legal custody of the children. The same day, 14 October 1998, the trial court granted the plaintiffs temporary custody in an *ex parte* order. In January of 1999, Alducin filed a motion to vacate the *ex parte* order and asked the court to grant custody of the children to her. On 2 July 1999 after a hearing, the trial court granted custody of the children to Alducin. In awarding her custody, the trial court relied heavily on Alducin's life transformation. In its order, the trial court found that Alducin had a reckless lifestyle prior to the entry of the 1997 consent order.

> 15. That the Defendant, Sonja Kay Dukes Alducin, admits to having used marijuana with the Defendant Richard Edward Brewer, but denies any use of drugs at this time.
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> . . . .
>
> 29. That the Defendant, Sonja Kay Dukes Alducin married at a very early age, fifteen. That she had a child Danielle, by her husband, Michael Dukes. That she had a child Siera, who was stillborn, during the course of her marriage to Michael Dukes. That they separated and that Michael Dukes voluntarily placed the minor child with his estranged wife, Defendant Alducin due to the fact that he believed that a young child should be with her mother. That there was an investigation by the Department of Family and Children's Services in the State of Georgia concerning deprivation of the minor child, Danielle. That the paternal grandparents of the minor child, Danielle sued in Juvenile court in the state of Georgia for custody of the minor child, Danielle. That the minor child, Danielle was placed with the paternal grandparents. That efforts were made unsuccessfully by the Department of Family and Children's Services in Georgia to reestablish (sic) of

the minor child, Danielle with the Defendant Alducin. That the minor child Danielle, was ultimately placed into the custody of Michael Dukes, who had married Christy. That Christy Dukes then sued for the adoption of the minor child, Danielle. That the Defendant, Sonja Kay Dukes Alducin, considering the situation felt like it was in the best interest of the minor child, Danielle to grow up in the home of Michael and Christy Dukes; and that she made the decision not to challenge the petition to terminate her parental rights or the petition to adopt and that Christy Dukes adopted the minor child Danielle.

30. That following the relationship and marriage to Michael Dukes, the Defendant, Sonja Kay Dukes Alducin, began living with the Defendant Richard E. Brewer, both in the State of Georgia and the State of North Carolina. That it was during this relationship that the two minor children, Kirstyn and Cainaan were born. . . . That the Defendants were never married. That during this time, the Defendant Alducin took a job as a topless dancer in clubs in the states of Georgia and North Carolina. That the Defendant, Alducin, was arrested in the state of Georgia for a probation violation and that she had not paid her fine for an emissions violation in driving without an operator's license. That the Defendant, Alducin, testified that she was placed in jail for fifteen days for the violation of her probation. During this time, the Defendant, Brewer took the minor children and moved back to North Carolina. That the Defendant, Alducin, entered into the consent order in Davidson County, North Carolina file number 97 CVD 1066 wherein she gave the Defendant, Brewer, custody of the minor children.

However, according to the trial court, Alducin matured and made positive lifestyle changes after the consent order.

5. That the Defendant, Sonja Kay Dukes Alducin, is now married to Paul Alducin and that it is more of a stable relationship giving both parents rights and responsibilities rather than a live-in situation.

. . . .

31. That since the entry of the consent order, the Defendant Alducin has turned her life around. That the Defendant Alducin has impressed the court that she has turned her life around. That the Defendant, Alducin has met and married Paul Alducin. That

the Defendant, Alducin's husband Paul has two associated degrees in the area of engineering and arts. That Paul Alducin has a job with Active Production and Design and is the Operations Manager. That Paul Alducin does lighting and sound for sporting events, concerts and political rallies. That Paul Alducin supervises nine employees and several dozen freelancers. That he and Defendant, Alducin, lived together prior to their marriage and they were married on September 5, 1998. That they had known each other for two years. That the Defendant, Alducin is currently working fifteen to twenty hours part time at Briarcliff Balloons, having been employed there for two months. That Briarcliff Balloons is a florist and decorations type business. That the Defendant, Alducin, had previously worked at Hyatt Regency in the valet car division but left that job in order to have time to visit her children in North Carolina.

. . . .

33. That the Defendant, Alducin and her husband have two vehicles, a Jeep Cherokee and a Ford Tempo which are paid in full. That they live in a two bedroom condo that is paid in full. That they have no significant debts. That they have health insurance and can obtain health insurance on the minor children if they obtain custody. That they live in a gated community. That Defendant Alducin's husband has a trust account that was set up by his father. That the Defendant, Alducin and her husband can draw upon the trust for additional income if necessary.

34. That the Defendant, Alducin, and her husband wish to place the minor children in private schools. That they do have a computer with Internet access in the home. That Paul Alducin's family has a mountain home in Rabon County, Georgia that they visit on a regular basis, about every other weekend. That the mountain home has four bedrooms, four bathrooms and a full basement residence. That they have two dogs.

35. That this court is impressed that when Paul Alducin was asked why he did want the minor children, that he stated that he loves them. That Paul Alducin's income is from $500.00 dollars to $700.00 dollars per week. That the Defendant Alducin's income is $175.00 dollars per week. That the Defendant Alducin will be twenty five years of age on June 12. That the Defendant Alducin has a tenth grade education having completed the ninth grade and quit in the tenth grade. That Defendant Alducin has been studying

to take the GED and will take the GED a week from Saturday. That the Defendant Alducin completed parenting classes several years ago during the time in which her minor child, Danielle, had been removed from her. That the Defendant Alducin admitted to having smoked marijuana and states that she has not smoked marijuana since having left the Defendant Richard E. Brewer.

. . . .

37. That the Defendant Alducin, has had a poor record with having these children in her custody, Danielle as well as Kirstyn and Cainaan. That she has presented evidence that she has turned her life around. That she is no longer a topless dancer. That she has a stable and loving marriage. That she has strong support from her husband and is financially in a good situation.

The trial court concluded that these lifestyle changes amounted to a substantial change in circumstances and made the following relevant conclusions of law.

2. That the proper standard of review for this matter is what is in the best interests of the minor children. In addition, there has also been a substantial and material change in circumstances since the entry of the consent order (97 CVD 1066) in that the Defendant, Alducin, has basically turned her life around in obtaining a stable marriage, stable residence and stable income.

3. That the Defendant, Alducin, is a fit and proper person to have the physical custody of the minor children and it is in the best interest of the minor children to be placed with Defendant Alducin.

The court entered the order on 2 July 1999 and noted that it was "temporary." Additionally, the court decreed that it would review the order in "the summer of the year 2000." Plaintiffs appeal from the order.

[1] The first issue we must address is whether the plaintiff's appeal is interlocutory. "An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree." *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986). Normally, "a temporary child custody order is interlocutory and does not affect any substantial right . . . which cannot be protected by timely appeal from the trial court's ultimate disposition . . . on the merits." *Berkman v. Berkman*, 106 N.C. App. 701, 702, 417 S.E.2d 831,

832 (1992) (quoting *Dunlap*, 81 N.C. App. at 676, 344 S.E.2d at 807). Temporary custody orders resolve the issue of a party's right to custody pending the resolution of a claim for permanent custody. *Regan v. Smith*, 131 N.C. App. 851, 852, 509 S.E.2d 452, 454 (1998). The trial court's mere designation of an order as "temporary" is not sufficient to make the order interlocutory and nonappealable. Rather, an appeal from a temporary custody order is premature only if the trial court: (1) stated a clear and specific reconvening time in the order; and (2) the time interval between the two hearings was reasonably brief. *Cox v. Cox*, 133 N.C. App. 221, 233, 515 S.E.2d 61, 69 (1999). Likewise, an order is interlocutory if the trial court does not determine all issues prior to appeal. *Id.*

We hold that the order here is not interlocutory because the period between the hearings was not reasonably brief. The present order does set a specific reconvening date, the summer of 2000. However, the trial court made its decision in July of 1999. Therefore, the set time between hearings could amount to over a year. Contrary to defendant Alducin's contentions, this is not a reasonably brief period of time. Additionally, this is not a case where the trial court has not yet decided all issues. *See id.* Indeed, the court resolved every issue dealing with custody in its July 1999 order. The court did not leave any question open for further review when it concluded that it was in the children's best interests to remain with their mother. The court then allowed the children to live with Alducin for a full year before it will even begin to reconsider the issue. Accordingly, we hold that this order is not "temporary," despite its label.

Defendant Alducin correctly points to cases where this Court has held extended periods of time to be "reasonably brief." However, none of those cases involve a situation where the time between hearings was in excess of a year. *See Dunlap*, 81 N.C. App. at 676, 344 S.E.2d at 807 (holding that an appeal is premature where the order provided for temporary custody pending a hearing date set three months later). While we certainly do not want to encourage piecemeal appeals, a year is too long a period to be considered as "reasonably brief," in a case where there are no unresolved issues. Therefore, we will consider the merits of the case.

[2] We must first consider the effect of the Supreme Court's decision in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). In *Petersen*, our Supreme Court held that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the

constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail" in a dispute with a non-parent. *Id.* at 403-04, 445 S.E.2d at 905. This Court based this principle on a presumption that a fit parent will act in the best interests of his or her child. *Price v. Howard,* 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). In *Price,* the Supreme Court expanded on what constitutes unfitness or neglect by holding that conduct inconsistent with a parent's constitutionally protected status would lead to the application of the best interests of the child standard. *Id.* Therefore, in custody disputes between parents and non-parents, our Supreme Court has disavowed the best interests and welfare analysis. *Lambert v. Riddick,* 120 N.C. App. 480, 482, 462 S.E.2d 835, 836 (1995). However, where a trial court determines that a parent is unfit, has neglected the child, or acted inconsistently with the parent's protected interest, the best interests of the child test would apply. *Price,* 346 N.C. at 79, 484 S.E.2d at 534.

In subsequent cases, this Court has carefully applied *Peterson. See Bivens v. Cottle,* 120 N.C. App. 467, 462 S.E.2d 829 (1995), appeal dismissed, 346 N.C. 270, 485 S.E.2d 296 (1997); *Lambert v. Riddick,* 120 N.C. App. 480, 462 S.E.2d 835 (1995); *Speaks v. Fanek,* 122 N.C. App. 389, 470 S.E.2d 82 (1996). In the *Bivens* line of cases, this Court stated that *Peterson* only applies to an initial custody determination. Since those cases all involved modification of custody orders, we held there that the moving party parents had to show (1) a substantial change of circumstances affecting the welfare of the child and (2) that a change would be in the child's best interests. *Id.* According to the *Bivens* line of cases, "there are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified." *Bivens,* 120 N.C. App. at 469, 462 S.E.2d at 831. Because the trial court in those cases relied on *Petersen,* this Court remanded for the court to make findings whether the parent had shown a substantial change of circumstances affecting the welfare of the child. *See Bivens,* 120 N.C. App. at 470, 462 S.E.2d at 831; *Speaks,* 122 N.C. App. at 391, 470 S.E.2d at 84.

Notably, a concurring opinion in *Bivens,* questioned whether the majority had decided whether *Petersen* should apply if the parents made a showing of a substantial change in circumstances.

> I agree that any movant (including a natural parent) in a section 50-13.7(a) child custody modification hearing is required to first show a substantial change in circumstances affecting the welfare

> of the child (since the prior order of custody). *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992). If this showing is made, the trial court is required to enter an order of custody that is in the best interest of the child. *Id.* In making this best interest determination, is the natural parent entitled to a custody order unless the nonmovant shows that the parent is unfit? . . . Under the majority's construction of *Petersen* the answer is less clear and **indeed the majority does not reach that issue.** (Emphasis added).

Bivens, 120 N.C. App. at 470, 462 S.E.2d at 831 (Greene, J., concurring). Despite this concurring opinion, it is apparent that those decisions indicated that *Petersen* did not apply to those particular modification proceedings.

To understand the *Bivens* cases and our decision here, it is necessary to have a firm grasp on the facts of the *Bivens* decisions. Those cases reveal a common fact pattern whereby the natural parents were seeking to modify an order granting custody to a non-parent. *Bivens*, 120 N.C. App at 468, 462 S.E.2d at 830 (mother seeking to retain custody from order awarding children to maternal grandparents); *Speaks*, 122 N.C. App. at 389, 470 S.E.2d at 83 (parents seeking to retain custody after they had voluntarily relinquished legal custody to non-parents); *Lambert*, 120 N.C. App. at 481, 462 S.E.2d at 835-36 (dealt with an initial custody dispute between a parent and non-parent and merely stated proposition). Therefore, in those cases, the trial court awarded the non-parents custody either because the natural parents voluntarily surrendered custody of the children in a consent order or the court removed children from the parents' custody by order. In those cases, (unlike the instant case), a court would have already judicially determined that the best interests of the child lay with the non-parent third parties. The implication from *Bivens* and *Speaks* is that a parent loses her *Petersen* presumption if she loses custody to a non-party in a court proceeding or consent order. To hold otherwise, would ease the burden of proof on a parent in a modification proceeding who had lost custody to a non-parent in a prior proceeding. Therefore, the natural parent under the protection of *Petersen* could modify the custody order by simply showing fitness. This Court correctly rejected that reasoning by requiring that the parent who had lost custody to a non-parent show that a substantial change of circumstances had occurred and that a change would now be in the child's best interests.

In contrast to the *Bivens* cases, the instant case does not present a question where the moving parent either voluntarily or involuntarily lost custody to a non-parent third party. Alducin never surrendered custody of her children to the non-parent plaintiffs. The record reveals that Alducin, through no fault of her own was unaware where the children were. Additionally, no court has ordered that it would be in the children's best interests to live in the plaintiffs' custody. Instead, Alducin voluntarily relinquished custody to the other natural parent, defendant Brewer. Further, a court has never concluded that Alducin was unfit, neglected her children, or acted inconsistently with her parental status.

These factual differences require a different analysis and result than the *Bivens* line of cases. We now hold that the restriction that *Bivens* places on *Petersen* does not bind us on these facts. First, we agree with *Bivens* in so far as it requires a moving party to show a substantial change of circumstances affecting the welfare of the child in order to modify a custody order. *Bivens*, 120 N.C. App. at 469, 462 S.E.2d at 831. This is true whether the moving party is a parent or a non-parent. However, we differ from *Bivens* in that a natural parent should maintain her *Petersen* presumption against a non-parent where that parent has voluntarily relinquished custody to the other parent and has never been adjudicated unfit. To hold otherwise would violate a parent's due process rights to care, custody and control of their child. The U.S. Constitution protects a parent's interest in companionship, custody, care and control of his or her child. *Price*, 346 N.C. at 79, 484 S.E.2d at 534. Absent a finding of unfitness or neglect by the natural parent, a best interest of the child test would violate the parent's constitutional rights. *Id.* The U.S. Supreme Court has recently reaffirmed these principles in *Troxel v. Granville*, — U.S. —, — L.Ed.2d — (2000). In *Troxel*, the U.S. Supreme Court stated that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* According to the Court these rights cannot be doubted. *Id.* Further,

> [t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions. More important, historically, it has recognized the natural bonds of affection lead parents to act in the best interests of their children. . . . Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit) there will normally be no reason for

> the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of the parent's children.

Id. (Internal citations omitted).

Accordingly, we hold that it would violate a natural parent's due process rights to deny her the *Petersen* presumption against a non-parent where the parent had voluntarily relinquished custody to the other parent, had never voluntarily or involuntarily relinquished custody to a non-parent, had never been adjudged unfit, and had never acted in a manner inconsistent with her protected parental status. To modify the custody order here, Alducin first has to show that there has been a substantial change of circumstances affecting the welfare of the children. **If** she meets that burden, she is then entitled to a *Petersen* presumption against the plaintiffs so long as there is no finding that she was unfit, neglected her children, or acted inconsistent with her parental rights.

We note that our holding here is limited strictly to the facts presented by this case. As we have stated previously, cases in this area present a vast number of unforeseen fact patterns. *Ellison v. Ramos*, 130 N.C. App. 389, 395, 502 S.E.2d 891, 894-95, *disc. review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998). Any bright-line rule would undoubtedly face a serious risk of stumbling against an unforeseen situation. *Id.* Therefore, as to this factual situation we hold that a parent who voluntarily gave custody to the other parent and has never been adjudged unfit does not lose her *Petersen* presumption against a non-parent third party so long as the non-parent third party does not have court-ordered custody. Of course, the natural parent could also lose the protection of *Petersen* by acting in a manner inconsistent with her parental status, being unfit or neglecting her child's welfare.

Based on that standard, we will now address this case. In order to modify a child custody order, the moving party must show that there has been a substantial change of circumstances affecting the welfare of the child. *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). The change in circumstances does not have to be adverse. *Id.* "[A] showing of a change in circumstances that is, or is likely to be beneficial to the child may also warrant a change in custody." *Id.* at 620, 501 S.E.2d at 900.

The plaintiff presented the following evidence of changed circumstances at the hearing. Prior to the entry of the 1997 custody

order, Alducin had a troubling lifestyle. She was a drug user and engaged in other criminal activity. She did not have a stable job and when she did work, she worked as a topless dancer. However, after entering the consent order with defendant Brewer, Alducin made substantial lifestyle improvements. She stopped using drugs and married her current husband. She obtained stable employment, attended parenting classes, and at the time of the order at issue was preparing to obtain her G.E.D. The record shows that her husband was financially stable, had steady employment and showed affection for the children. These facts show that Alducin has made major lifestyle improvements and constitute a substantial change in circumstances.

However, the trial court failed to make specific findings regarding any effect the change of circumstances had on the welfare of the children. *See Evans v. Evans*, 138 N.C. App. 135, 530 S.E.2d 576 (2000); *Browning v. Helff*, 136 N.C. App. 420, 524 S.E.2d 95, 98 (2000). Further, we cannot construe any of the trial court's findings as determinations that the change affected the children's welfare. The trial court did find that Alducin could now provide the children with the opportunity of private school, insurance, a computer, and a stable home life. However, the court does not make findings how those results affect the children's physical and emotional well-being. Therefore, we remand this matter to the trial court for findings as to how the relevant change in circumstances affected the children's well-being.

We note that the trial court relied solely on the mother's lifestyle change as the substantial change in circumstances. On remand, the trial court may also consider the fact that defendant Brewer gave up his children to the plaintiffs apparently without Alducin's knowledge. These facts may also amount to a substantial change affecting the children's welfare.

Reversed and remanded.

Judge EDMUNDS concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting in part.

I respectfully dissent from that portion of the majority's opinion concluding the trial judge made insufficient findings of fact with

respect to the effect of the changed circumstances on the children's welfare. There is no question that any change of circumstances must actually or potentially affect the welfare of the child before a court may consider modifying custody. *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998). I agree with the majority that the trial judge should make findings as to any such effects, but I believe the court's findings with respect to Mrs. Alducin's drastically-reformed lifestyle were sufficiently detailed and specific to show it properly considered such effects.

Here, the trial court's findings with respect to Mrs. Alducin's reformation can be summarized as follows: (1) at the time of the original custody order, Mrs. Alducin was unmarried and living alone, whereas she is now remarried and living in a more stable, two-parent household; (2) Mrs. Alducin used to have "a poor record" with respect to the custodial care of her children, but has now completed parenting classes; (3) her child Cainaan presently has no health or medical insurance coverage, but Mrs. Alducin would now be able to provide him with such coverage; and (4) Mrs. Alducin used to smoke marijuana, but has not done so since the original order. Although the trial court did not explicitly find that any of these changes would have an effect on the children's welfare, the clear import of the above findings is that Mrs. Alducin's reformed lifestyle would indeed affect their welfare—emotionally, medically, and financially.

Though we in the appellate courts should ensure that trial judges follow the applicable law and make sufficient findings to demonstrate that they did so, our role of judicial oversight should not be so rigid as to bog down trial dockets with remanded cases simply because their orders failed to make explicit findings that are clearly implied within their other findings. Essentially, the majority has remanded this case to the trial court so that one sentence can be added to the trial judge's findings, namely that Mrs. Alducin's reformed lifestyle will affect the children's welfare emotionally, medically, and financially. In light of the findings the trial judge did make, and the clear import of those findings, I believe the learned district court judge has done enough to make his extensive work clear to all parties. I say his work is done.

NORMAN J. LEVASSEUR, PLAINTIFF-APPELLEE v. BILLY JOE LOWERY, DEFENDANT, BEAM ELECTRIC CO., INC., INTERVENOR-APPELLANT KEY RISK MANAGEMENT SERVICES INC., INTERVENOR-APPELLANT

No. COA99-598

(Filed 1 August 2000)

1. Jurisdiction— automobile accident—workers' compensation lien—underinsured motorist coverage—subrogation

The trial court did not err in assuming jurisdiction under N.C.G.S. § 97-10.2(j) to determine the amount of an employer's workers' compensation lien in an action where plaintiff-employee was injured in an automobile accident in the course of his employment while driving a company vehicle, because: (1) the unnamed defendant underinsured motorist carrier is a third party based on plaintiff's injury being caused under circumstances creating a liability in some person to pay damages therefor, N.C.G.S. § 97-10.2(a); (2) the trial judge is given jurisdiction where the judgment is insufficient to compensate the subrogation claim of the workers' compensation carrier or where a settlement has been agreed upon by the employee and the third party; (3) the settlement agreement reached by plaintiff and the third party in the instant case gave the trial court jurisdiction; and (4) even though the Industrial Commission assumed jurisdiction over disbursement of the $25,000 recovery, the trial court is not precluded from assuming jurisdiction as a result of the settlement reached between plaintiff and the third party.

2. Insurance— automobile—underinsured motorist policy—subrogation—workers' compensation lien

The trial court erred by concluding intervenor-employer did not have a lien on plaintiff-employee's settlement with the employer's underinsured motorist (UIM) carrier in an action where plaintiff-employee was injured in an automobile accident in the course of his employment while driving a company vehicle, because: (1) the settlement merely allowed the insurance carrier to reduce the arbitration award by the amount of the employer's workers' compensation lien; (2) the issue of whether the employer was entitled to a workers' compensation lien on the UIM proceeds in addition to the insurance carrier reducing the UIM proceeds by the lien amount was irrelevant to the settlement; and (3) once the lien was established, the trial court abused

its discretion by stating it was eliminating the lien in order to prevent an injustice, based on the trial court's failure to make a reasoned choice and enter findings and conclusions which could provide for meaningful review on appeal as required by N.C.G.S. § 97-10.2(j).

3. Costs— attorney fees—contingent fee agreement

The trial court did not abuse its discretion by approving the contingent fee agreement between plaintiff and his attorneys for one-third of plaintiff's recovery in an action where plaintiff-employee was injured in an automobile accident in the course of his employment while driving a company vehicle, because N.C.G.S. § 97-10.2(f)(1) provides that the attorney fees can be up to one-third of the amount obtained or recovered.

Judge GREENE concurring in part and dissenting in part.

Appeal by intervenors from order entered 15 January 1999 by Judge Jesse B. Caldwell, III, in Gaston County Superior Court. Heard in the Court of Appeals 22 February 2000.

Arthurs & Foltz, by Nancy E. Foltz and Douglas P. Arthurs, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, a Professional Limited Liability Company, by Clayton M. Custer and Laura M. Wolfe, for intervenors-appellants.

WALKER, Judge.

Plaintiff, an employee of appellant Beam Electric Co., Inc. (Beam), was injured in an automobile accident in the course of his employment. Defendant Lowery, the negligent third party, was covered by a liability automobile insurance policy in the amount of $25,000.00, issued by State Farm Mutual Automobile Insurance Company (State Farm). At the time of the accident, plaintiff was operating a vehicle owned by Beam which was insured by an underinsured motorist (UIM) policy from Travelers Insurance Companies (Travelers), with policy limits of $1,000,000.00. Appellant Key Risk Management Services, Inc. (Key Risk) administers Beam's workers' compensation claims.

As a result of plaintiff's injuries, Beam paid $92,723.45 in medical expenses, $5,754.93 in rehabilitation expenses, and $92,625.58 in indemnity benefits, for a total workers' compensation lien of

$191,103.96, as it appeared on Form 28B dated 9 December 1998. Plaintiff received $65,000.00 in workers' compensation benefits for his permanent partial disability ratings from the injuries. Additionally, plaintiff's attorney was awarded a fee of $16,250.00 from the Industrial Commission (Commission) based on the $65,000.00 benefit payment.

On 1 July 1997, plaintiff filed suit against defendant Lowery and unnamed defendant Travelers. Prior to the filing of the lawsuit, State Farm tendered its policy limits of $25,000.00. The $25,000.00 was then advanced by Travelers to protect its subrogation rights under N.C. Gen. Stat. § 20-279.21(b)(4). Pursuant to N.C. Gen. Stat. § 97-10.2, Beam gave notice of appearance and notice of lien to the trial court on 17 October 1997. The Commission distributed the $25,000.00 recovery one-third ($8,333.33) to plaintiff, one-third to Beam, and one-third to plaintiff's counsel for attorney fees.

On 11 March 1998, plaintiff moved the case against Travelers to binding arbitration. Plaintiff and Travelers agreed that the arbitrators would not decide:

> the issue of what amount is recoverable under the UIM policy issued by Travelers because they will not decide any offsets for credits for payment by any liability carrier and any offsets for any credit for payments by the carrier pursuant to any workers' compensation claim [plaintiff] has made, or the limits of the UIM policy, if any.

Instead, the issue of damages was limited to "what amount is the plaintiff entitled to recover as damages for his personal injuries from Travelers?" The arbitration resulted in an award of $625,000.00 to plaintiff.

Thereafter, Travelers took the position that no UIM proceeds were payable to plaintiff until his workers' compensation claim was "closed." On 29 September 1998, plaintiff moved, in the underlying action (97 CVS 2452), for a judgment on the arbitration award and to extinguish Beam's workers' compensation lien.

On 29 December 1998, prior to a hearing on plaintiff's motion, plaintiff and Travelers entered into an agreement whereby Travelers would reduce its payment of the arbitration award by the amount of Beam's workers' compensation lien, receive credit for the $25,000.00 recovery from State Farm, and make a net payment of $450,000.00 to

plaintiff in full payment of the arbitration award. The parties determined Beam's lien to be $185,349.03, as opposed to the $191,103.96 appearing on the Form 28B. All the parties, including Beam, stipulated that plaintiff, Travelers and State Farm "resolved all matters and things in dispute between them" through this agreement.

On 15 January 1999, the trial court ordered that (1) Beam's workers' compensation lien did not attach to the proceeds from plaintiff's agreement with Travelers; and alternatively, (2) the trial court extinguished the lien in its discretion in the event it was later determined that Beam did have a lien on the plaintiff's settlement proceeds.

Recently, in *Liberty Mut. Ins. Co. v. Ditillo*, 348 N.C. 247, 253, 499 S.E.2d 764, 768 (1998), our Supreme Court specifically declined to decide whether a workers' compensation carrier has a right under N.C. Gen. Stat. § 97-10.2 to a lien on uninsured motorist (UM) benefits paid to an employee in a case where the UM coverage limits exceed the amount of workers' compensation benefits. We are now presented with a case where the UIM benefits paid to an employee exceed the amount of workers' compensation benefits.

[1] Beam first argues that the trial court lacked jurisdiction to determine the amount of the workers' compensation lien and distribute the third party recovery under N.C. Gen. Stat. § 97-10.2(j).

To determine whether the trial court had jurisdiction under N.C. Gen. Stat. § 97-10.2(j), we first consider whether Travelers is a "third party" within the meaning of N.C. Gen. Stat. § 97-10.2. Under the statute, "third party" is defined as follows:

> The right to compensation and other benefits . . . shall not be affected by the fact that the injury . . . was caused *under circumstances creating a liability in some person other than the employer to pay damages therefor*, such person hereinafter being referred to as the "third party."

N.C. Gen. Stat. § 97-10.2(a) (Cum. Supp. 1998) (emphasis added).

In *Creed v. R.G. Swaim and Son, Inc.*, 123 N.C. App. 124, 128-29, 472 S.E.2d 213, 216 (1996), this Court held that, under N.C. Gen. Stat. § 97-10.2, payments made by the UIM carrier as well as the tort-feasor are from a "third party," and that the workers' compensation carrier "has a lien on the proceeds of plaintiff's underinsured motorist policy" under the statute.

Here, the policy states that Travelers will pay all sums the plaintiff is "legally entitled to recover as damages from" the underinsured motorist. This Court has held that an action under a UIM policy is based on the tort of the other motorist and that UIM coverage is a type of liability coverage. *See Ensley v. Nationwide Mut. Ins. Co.*, 80 N.C. App. 512, 515, 342 S.E.2d 567, 569, *cert. denied*, 318 N.C. 414, 349 S.E.2d 594 (1986) (stating the UIM carrier "assumed . . . the liability of the uninsured motorist for damages which the plaintiff is legally entitled to recover from the uninsured motorist"). Traveler's liability to plaintiff, while derivative, exists by reason of defendant Lowery's negligence. *See Baxley v. Nationwide Mutual Ins. Co.*, 104 N.C. App. 419, 424, 410 S.E.2d 12, 15 (1991), *affirmed*, 334 N.C. 1, 430 S.E.2d 895 (1993) (holding that an action under a UIM policy is "actually one for the tort allegedly committed by the [underinsured] motorist") (citations omitted). Therefore, Travelers is a "third party" in that plaintiff's injury was "caused under circumstances creating a liability in some person . . . to pay damages therefor." N.C. Gen. Stat. § 97-10.2(a).

N.C. Gen. Stat. § 97-10.2(j) establishes when the superior court is given jurisdiction. The statute, as in effect at the time of the present case, provides in part:

> 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 . . . to determine the subrogation amount.

N.C. Gen. Stat. § 97-10.2(j) (1998)[1]. Accordingly, there are two instances whereby the trial court is given jurisdiction: (1) where the judgment is insufficient to compensate the subrogation claim of the workers' compensation carrier, or (2) where a settlement has been agreed upon by the employee and the third party.

Beam contends the trial court erred in assuming jurisdiction since the agreement between plaintiff and Travelers was not a valid "settlement" as recognized by the statute, but merely an attempt to circumvent it.

1. Effective 18 June 1999, N.C. Gen. Stat. § 97-10.2(j), Session Laws 1999-194, s. 1, among other changes, substituted "by the employee in an action against a third party" for "which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier."

The trial court found in part:

> 16. The plaintiff, Travelers and the defendant have resolved all issues in dispute among them concerning the payment of the arbitration award, issues of setoff under the Travelers policy for workers' compensation benefits paid, pre- and post-judgment interest, and all other issues, by way of an Agreement dated December 29, 1998. Said Agreement is part of the record of this case.
>
> 17. The settlement agreement provides that Travelers, pursuant to the language of its policy and recent North Carolina Supreme Court cases interpreting that policy language, is entitled to a setoff or credit for amounts paid to the plaintiff by workers' compensation . . . .

The parties to the agreement do not contest its validity. We agree with the trial court's findings and conclusion that the settlement agreement reached by the plaintiff and the third party gave the trial court jurisdiction.

Beam also argues that since plaintiff agreed to invoke the jurisdiction of the Commission for the interim disbursement of the $25,000.00 recovery, the Commission had exclusive jurisdiction. Beam cites *Buckner v. City of Asheville*, 113 N.C. App. 354, 438 S.E.2d 467, *disc. review denied*, 336 N.C. 602, 447 S.E.2d 385 (1994), for the proposition that once the request for disbursement is submitted to the Commission, the superior court no longer has jurisdiction.

In *Buckner*, the plaintiff-employee, while in the course of his employment, was injured in an automobile accident by a tortfeasor. The employer provided UIM coverage for the employee. The employee, employer, and tortfeasor executed a consent judgment and submitted the matter to the superior court for disbursement. *Id.* at 356-57, 438 S.E.2d at 468. To give the superior court jurisdiction, N.C. Gen. Stat. § 97-10.2(j), as in effect at that time, required that the employee-third party settlement be entered when the "action [was] pending on a trial calendar and the pretrial conference with the judge ha[d] been held." Since there was no evidence that the settlement occurred at such a time, this Court held that the superior court did not have jurisdiction and exclusive jurisdiction was therefore assumed by the Commission. *Id.* at 360, 438 S.E.2d at 470.

Under N.C. Gen. Stat. § 97-10.2, the "distribution issue can be decided in some instances by either the Commission or the trial court, with 'a different standard for disbursement when the case is before the Superior Court than that for cases before the Industrial Commission.' " *Id.* at 359, 438 S.E.2d at 470 (*quoting Pollard v. Smith*, 90 N.C. App. 585, 588, 369 S.E.2d 84, 86 (1988), *reversed on other grounds*, 324 N.C. 424, 378 S.E.2d 771 (1989)).

Here, even though the Commission assumed jurisdiction over disbursement of the $25,000.00 recovery, this does not preclude the superior court from properly assuming jurisdiction as a result of the settlement reached between plaintiff and Travelers.

[2] Next, Beam argues the trial court erred in concluding it did not have a lien on the plaintiff's settlement with Travelers.

In *McMillian v. N.C. Farm Bureau Mut. Ins. Co.*, 347 N.C. 560, 565, 495 S.E.2d 352, 354-55 (1998), our Supreme Court held that UM carriers are entitled under N.C. Gen. Stat. § 20-279.21(e)[2] to reduce coverage by the amount of workers' compensation benefits received by the employee. The plaintiff in *McMillian* filed a declaratory judgment action to determine the coverage available under a UM policy and a policy which provided UM and UIM coverage. The *McMillian* court held that "UM carriers are entitled to reduce coverage . . . by the amount of workers' compensation . . . already received." *Id.* In so holding, the *McMillian* court rejected the analysis of *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647, *disc. review denied*, 327 N.C. 484, 396 S.E.2d 614 (1990), which focused on the entity who provided the UM/UIM policies. *See Liberty Mutual*, 348 N.C. at 252, 499 S.E.2d at 767 (noting that *McMillian* overruled *Ohio Casualty* "in part").

However, the *Ohio Casualty* Court also interpreted N.C. Gen. Stat. § 97-10.2, and stated that:

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2. The 1999 amendment to N.C. Gen. Stat. § 20-279.21(e), entitled "An act to clarify that liability, uninsured, and underinsured coverage is not reduced by receipt of subrogated Workers' Compensation benefits," specifically references the workers' compensation lien of N.C. Gen. Stat. § 97-10.2 and states in part that the UIM carrier "shall insure that portion of a loss uncompensated by any workers' compensation law and the amount of an employer's lien determined pursuant to G.S. 97-10.2(h) or (j)." N.C. Gen. Stat. § 20-279.21(e) (1999). Under the rewritten G.S. § 20-279.21(e), which presumes that a workers' compensation lien attaches to UM/UIM proceeds, the potential for a double recovery by the insured is eliminated. However, the rewritten § 20-279.21(e) does not establish the priority in which the amounts are to be satisfied in the event the policy limits are insufficient to cover both the insured's loss and the employer's lien.

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

Ohio Casualty, 99 N.C. App. at 134, 392 S.E.2d at 649 (emphasis added).

Additionally, this Court in *McMillian*, 125 N.C. App. 247, 254, 480 S.E.2d 437, 441 (1997), interpreted N.C. Gen. Stat. § 97-10.2 such that:

> the workers' compensation insurance carrier . . . is entitled to be subrogated, upon reimbursement of the employee, to any payment, including UM/UIM motorist insurance proceeds, made to the employee by or on behalf of a third party as a result of the employee's injury.

These constructions of N.C. Gen. Stat. § 97-10.2 by this Court were not addressed by our Supreme Court in *McMillian*. Accordingly, pursuant to N.C. Gen. Stat. § 97-10.2, *McMillian*, and *Ohio Casualty*, Beam's workers' compensation lien attached to plaintiff's settlement proceeds from Travelers.

Plaintiff argues that his UIM benefits have already been reduced by the amount of the lien and to now allow Beam's lien would result in a double penalty.

Plaintiff and Travelers reached a settlement as to the amount of UIM proceeds to which plaintiff was entitled. Travelers did not reduce its liability by operation of its policy provisions or the law. Rather, plaintiff's settlement with Travelers allowed the insurance carrier to reduce the arbitration award by the amount of the employer's workers' compensation lien. Since plaintiff and Travelers settled, the issue of whether Beam was entitled to a workers' compensation lien on the UIM proceeds in addition to Travelers reducing the UIM proceeds by the lien amount is irrelevant. Plaintiff cannot now contend that his private settlement with Travelers operated to extinguish his employer's workers' compensation lien.

Next, Beam contends that the trial court abused its discretion in eliminating the lien. Under N.C. Gen. Stat. § 97-10.2(j), the "judge shall determine, in his discretion, the amount, if any, of the

employer's lien . . . ."[3] However, this Court has held that "the power given the trial court in N.C. Gen. Stat. § 97-10.2(j) is not unbridled or unlimited," rather:

> the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported. We hold that the trial court, in considering a request for disbursement under subsection (j), must enter an order with findings of fact and conclusions of law sufficient to provide for meaningful appellate review.

Allen v. Rupard, 100 N.C. App. 490, 495 S.E.2d 330, 333 (1990) (citations omitted).

The trial court made findings concerning the extent of plaintiff's injuries. The trial court concluded Beam did not have a lien on plaintiff's settlement but that if Beam were later determined to have a lien, then the trial court, in its discretion, eliminated the lien to prevent an injustice.

The findings and conclusions of the trial court do not comport with the requirements set forth in *Allen*, supra. Once the lien is established and the trial court considers a request for disbursement, it must make a reasoned choice, a judicial value judgment and enter findings and conclusions which can provide for meaningful review on appeal.

[3] Finally, Beam argues the trial court erred in awarding an unreasonable attorney fee to plaintiff, which was one-third of plaintiff's recovery from Travelers.

Plaintiff and his attorneys entered a contingent fee agreement which provided that the attorney fee would be one-third of the amount recovered after suit was filed plus costs. N.C. Gen. Stat. § 97-10.2(f)(1) requires the Commission to disburse monies as prioritized in the statute and provides for the attorney fee "not [to]

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3. Effective 18 June 1999, and applicable to judgments or settlements entered against third parties on or after that date pursuant to N.C. Gen. Stat. § 97-10.2, subsection (j) now requires the judge to:

> consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

N.C. Gen. Stat. § 97-10.2(j) (1999).

exceed one third of the amount obtained or recovered of the third party." While the trial court is not boundby this subsection, it supports the trial court's approval of the contingency fee agreement. Accordingly, we find no abuse of discretion in the trial court's approval of the attorney fee agreement.

In sum, Travelers is a "third party" within the meaning of N.C. Gen. Stat. § 97-10.2 and the trial court properly assumed jurisdiction of the matter pursuant to N.C. Gen. Stat. § 97-10.2(j). The trial court did not err in approving the fee agreement between plaintiff and his attorneys. The trial court erred in concluding that Beam did not have a lien on the UIM benefits recovered by plaintiff from Travelers, and we remand this case for further proceedings consistent with this opinion.

Affirmed in part; reversed in part and remanded.

Judge TIMMONS-GOODSON concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

I do not agree Beam's workers' compensation lien attached to plaintiff's settlement proceeds from Travelers.

This case presents for the first time the issue of whether a workers' compensation carrier/employer is entitled to a lien on the employee/plaintiff's personal injury proceeds received from a UIM carrier, when the UIM carrier has been given a credit in the amount of the payments made by the workers' compensation carrier/employer to the insured/employee. Our Supreme Court has held a UIM carrier is entitled to reduce its UIM coverage to its insured by the amount of workers' compensation the insured/employee has already received. *McMillian v. N.C. Farm Bureau Mut. Ins. Co.*, 347 N.C. 560, 565, 495 S.E.2d 352, 354-55 (1998). In so holding, the *McMillian* court overruled this Court's holding in *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647 (1990) that the UIM carrier was not entitled to a credit for the workers' compensation payments made to the insured/employee. *McMillan*, 347 N.C. at 565, 495 S.E.2d at 355. The *McMillian* court did not address the question of whether the workers' compensation carrier/employer was also entitled to a lien on the UIM proceeds received by the insured/employee. Accordingly, left undis-

turbed was that portion of the *Ohio Casualty* opinion that the workers' compensation carrier/employer was entitled to a lien on the UIM proceeds received by the insured/employee. *Ohio Casualty*, 99 N.C. App. at 137, 392 S.E.2d at 651.

Beam, plaintiff's employer in this case, argues and the majority agrees *McMillian* and *Ohio Casualty*, when read together, hold the UIM carrier is entitled to a credit for workers' compensation payments made *and* the workers' compensation carrier/employer is entitled to a lien on the proceeds received by the insured/employee. I disagree.

That portion of the *Ohio Casualty* opinion relating to the workers' compensation lien must be read in the context of its holding that the UIM carrier was not entitled to a credit for payments made by the workers' compensation carrier/employer.[4] To allow both a credit to the UIM carrier and a lien to the workers' compensation carrier/employer would penalize the insured/employee and thus deny him the full compensation for his injuries to which he is entitled under the law.[5] Therefore, *McMillian* must be read, in the context of a case where the UIM carrier has previously been given a credit for the workers' compensation payments, to overrule that portion of *Ohio Casualty* providing for a workers' compensation lien on the UIM proceeds received by the insured/employee.[6] Accordingly, because Travelers received a credit for the workers' compensation payments made by Beam in its payment to plaintiff, Beam was not

4. The rationale for the *Ohio Casualty* holding is to prevent the insured/employee from recovering twice for the same injury: once from the workers' compensation carrier and once from the UIM carrier. 99 N.C. App. at 137, 392 S.E.2d at 651.

5. For example: employee is injured in the course and scope of his employment by a non-employee underinsured tortfeasor. Employee collects $100,000.00 from his workers' compensation carrier/employer and obtains a $300,000.00 judgment against his UIM carrier. If we allow both the UIM credit and the workers' compensation lien, the insured/employee receives a net of $200,000.00. Utilizing these principles, employee would be better served to refuse any workers' compensation benefits and pursue the UIM carrier, thus, netting him a total of $300,000.00.

6. Even if *McMillian* cannot be read in this manner, so as to contravene the workers' compensation lien provided for in section 97-10.2(f)(1)c, the trial court in its discretion may choose to eliminate the lien when the UIM carrier has been given credit for the workers' compensation payments. N.C.G.S. § 97-10.2(j) (1999). I disagree with the conclusion of the majority that the trial court's decision to waive the lien must include any findings of fact beyond the finding that the UIM carrier had been given a credit for the workers' compensation payments. Thus, as an alternative basis, I would affirm the trial court's alternative basis for its decision to eliminate Beam's workers' compensation lien.

entitled to a lien on the proceeds received by plaintiff from Travelers.[7]

As I fully concur with the majority on the other issues addressed in its opinion, I would affirm the order of the trial court in all respects.

JAMES G. DUNNAGAN D/B/A DUNNAGAN'S MOVING & STORAGE, MOVIN' ON MOVERS, INC., HORNE STORAGE CO., INC., ATLANTIC-PACIFIC VAN & STORAGE, INC., CITY TRANSFER & STORAGE CO., INC., AND SECURITY STORAGE COMPANY OF RALEIGH, INC., INTERVENORS-PROTESTANTS-APPELLANTS v. KYRIAN C. NDIKOM D/B/A AMERICAN MOVING SERVICE, PETITIONER-APPELLEE AND STATE OF NORTH CAROLINA EX REL. UTILITIES COMM'N, RESPONDENT-APPELLEE

No. COA99-1020

(Filed 1 August 2000)

Carriers— moving company—intrastate transport of public goods—certificate of public convenience and necessity

The Utilities Commission erred by granting a certificate of public convenience and necessity to petitioner to transport household goods throughout the State of North Carolina where the Commission's conclusion that public convenience and necessity require the proposed service was not supported by the evidence and the record was devoid of evidence that the proposed operation would not impair the operations of existing carriers contrary to public interest, which petitioner had the burden of establishing. Contrary to the Commission's suggestion, the intervenors did not have the burden of showing that granting the application would have a ruinous effect upon them.

Judge WALKER dissenting.

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7. I reject the suggestion of the majority that plaintiff somehow waived his right to argue Beam is not entitled to a lien because he agreed, in settlement, to reduce the arbitration award by the amount of the workers' compensation payments. At the time of this settlement, our case law was unequivocal in holding the UIM carrier, Travelers, was entitled to a credit for any workers' compensation benefits paid to the insured/employee. Plaintiff, thus, acted in accordance with the well-settled law and cannot now be penalized for that action.

Appeal by intervenors from judgment entered 12 May 1999 by the North Carolina Utilities Commission. Heard in the Court of Appeals 18 May 2000.

Parker, Poe, Adams & Bernstein, L.L.P., by James C. Thornton and Jason J. Kaus, for intervenors-protestants-appellants.

Bailey & Dixon, L.L.P., by Ralph McDonald, for petitioner-appellee.

No brief for respondent-appellee.

TIMMONS-GOODSON, Judge.

On 13 October 1998, Kyrian C. Ndikom d/b/a American Moving Service ("petitioner") filed an application for a certificate of public convenience and necessity with the North Carolina Utilities Commission ("the Commission"), seeking common carrier authority to transport Group 18-A household goods throughout the State of North Carolina.

Moving companies who had previously been authorized by the Commission to provide intrastate, long-distance moving services, namely James G. Dunnagan d/b/a Dunnagan's Moving & Storage, Movin' on Movers, Inc., Horne Storage Co., Inc., Atlantic-Pacific Van & Storage, Inc., City Transfer & Storage Co., Inc., and Security Storage Company of Raleigh, Inc., ("intervenors") filed a joint protest and petition to intervene in the matter. The Commission granted their motion to intervene.

The following evidence was presented at the hearing before Hearing Examiner Barbara A. Sharpe. Petitioner worked for his mother's moving company, American Moving Systems & Storage ("American"), for approximately one year. American provided local moving services in Durham, North Carolina. Petitioner had never provided statewide, long-distance moving services in North Carolina prior to filing his application with the Commission. Petitioner had one employee, and he planned to use four trucks for his moving service, at least three of which were titled in his mother's name. While working for American, petitioner provided unlawful moving services, failed to provide workers' compensation insurance coverage for his employee, failed to withhold payroll taxes from the employee's wages, and was partly responsible for false and misleading advertising published by the company.

Approximately two hundred goods carriers were authorized in North Carolina at the time of the hearing. Intervenors are sometimes idle due to a lack of demand for movers. They have not refused any potential customer for lack of capacity, and they are capable of accommodating any foreseeable increase in demand for intrastate moving services.

The Hearing Examiner issued a recommended order denying petitioner's application on 12 February 1999. Petitioner filed exceptions and the Commission heard oral arguments on the exceptions. On 12 May 1999, the Commission entered its final order, which included the following pertinent findings of fact:

> 2. Applicant is a sole proprietor located in Durham, North Carolina, and desires to operate under the trade name American Moving Service. Applicant currently works for American Moving Systems & Storage (American Moving Systems) owned by his mother. American Moving Systems operates within the Durham commercial zone and has provided some moves outside the Durham area prior to the receipt of its exemption certificate from the Division of Motor Vehicles in 1998. Applicant has performed no moves under the name of American Moving Service.
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> . . . .
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> 5. Henry L. Platts, Sr., is a resident of Durham and a retired, disabled truck driver. In February 1998, Mr. Platts met the Applicant when American Moving Systems moved him within the Durham city limits. Prior to the move, Mr. Platts called a number of moving companies in the Durham telephone book. He received some estimates and finally hired American Moving Systems. He was very satisfied with the move. Mr. Platts testified that he has no plans to move in the future but that his daughter will be moving from Roxboro to Durham in the future. He would recommend that she use the Applicant for the move if this authority is granted. Mr. Platts also testified that, based upon his knowledge of and acquaintance with the Applicant, he believes the Applicant would be a good business owner.
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> 6. Juliette Wilkerson is a resident of Durham, North Carolina. In October 1998, she needed to move within the city limits of Durham. She called several moving companies to find one that was reasonably priced. Ms. Wilkerson used American Moving Systems because they were the most reasonably priced of those

she contacted, and they were also the only company that could move her so quickly. She called on Wednesday for a move on Saturday. Ms. Wilkerson was very pleased with the move and testified that American Moving Systems [was] prompt, very courteous, and took good care of her many antique pieces of furniture. In a few months she will be purchasing a house within the Durham city limits and desires to once again use the services of American Moving Systems. She has no future plans to move outside of Durham. Ms. Wilkerson also testified that, based upon her experience with the Applicant as a representative of American Moving Systems, she believes the Applicant will be a good business owner.

7. City Transfer has statewide household goods authority under Certificate No. C-131. . . . Mr. Lassiter testified that City Transfer is providing service throughout North Carolina. In 1998, approximately 10-12 moves were performed in and out of the City of Durham. Mr. Lassiter further testified that the moving business is seasonal with the busiest time being summer months and the first and last of each month due to closings and expired leases. During the less busy times of the year, City Transfer does have idle equipment. Mr. Lassiter testified that he believes the granting of this application would adversely impact his company by reducing the potential revenue available for certificated household goods movers.

8. Security Storage is located in Raleigh and has Certificate No. C-721 which authorizes the statewide transportation of household goods. It has approximately 25 vehicles in the Raleigh location and employs about 25 full and part-time workers. . . . Mr. Carey estimated that his company receives four to five calls per month from customers desiring to move in and out of Durham. Mr. Carey further testified that he believes the granting of this application would impair the services his company renders in the Triangle area by reducing the overall revenue potential for certificated movers.

9. James Dunnagan is the owner of Dunnagan's Moving & Storage located in Wilmington, North Carolina. He holds statewide household goods authority under Certificate No. C-1456 issued in 1986. Mr. Dunnagan testified that during 1998, he made 13 regulated moves to and/or from Wilmington to the Raleigh/Durham area. He further testified that he has idle equipment. During 1998, he had 72 days in which no moves were made.

He has two straight trucks and a pack truck. Because the moving business is seasonal, however, Mr. Dunnagan stated that he will rent additional trucks and hire part-time employees during the busiest season, if needed, before he would turn down business.

Based on its findings of fact, the Commission made the following relevant conclusions of law:

> The Applicant, in addition to his own testimony, presented two witnesses who testified in support of his application. Both witnesses were acquainted with the Applicant because of previous moves performed for them by the moving company owned by the Applicant's mother, American Moving Systems. The Applicant works for his mother's company. These moves were within the city limits of Durham. . . .
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> Actual testimony by the Applicant's witnesses establishing the need for moves to and from other areas of the state would have been desirable, however, it is not mandatory . . . . It is within the discretion of the Commission, when viewing the record in [its] entirety, to conclude that the Applicant has met his burden. The testimony taken as a whole, in the discretion of the Commission, does support a grant of statewide authority.
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> . . . .
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> The second element of public convenience and necessity which must be considered is whether the proposed operation would impair the operations of the Protestants and other existing carriers contrary to public interest. Three of the seven Protestants appeared at the hearing to testify in opposition to the application. Basically, the Protestants testified that the granting of this application would adversely impact their companies by reducing the potential revenue available for certificated household goods movers. Again, it is within the discretion of the Commission, when viewing the record in [its] entirety, to conclude whether the proposed operation would or would not impair the operations of the Protestants and other existing carriers contrary to public interest.
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> The Commission concludes, therefore, that the evidence does not support a finding that the grant of statewide authority would have a ruinous competitive effect upon authorized carriers.

> The Commission concludes that public convenience and necessity require the proposed service . . . in addition to existing authorized transportation services.

Based on its conclusions of law, the Commission rejected the recommended order in part and granted petitioner's application. In its final order of 13 May 1999, the Commission issued an errata order modifying in part the 12 May 1999 order. Intervenors appeal.

On 30 September 1999, the North Carolina Court of Appeals ordered this matter consolidated with No. COA99-1085 pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

By their only assignment of error, intervenors argue that the Commission erred in granting petitioner's application for a certificate of public convenience and necessity. Specifically, intervenors argue that petitioner failed to show that public convenience and necessity required his proposed service for purposes of North Carolina General Statutes section 62-262(e). We agree.

Judicial review of an order of the Commission is governed by North Carolina General Statutes section 62-94(b), which provides:

> So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional provisions, or
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> (2) In excess of statutory authority or jurisdiction of the Commission, or
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> (3) Made upon unlawful proceedings, or
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> (4) Affected by other errors of law, or
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> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
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> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 62-94(b) (1999). The reviewing court must determine whether there is substantial evidence, in view of the entire record, in support of the position which the Commission adopted, regardless of whether evidence to the contrary exists. *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 355, 358 S.E.2d 339, 347 (1987). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Utilities Comm. v. Coach Co.*, 19 N.C. App. 597, 601, 199 S.E.2d 731, 733 (1973) (quoting *Consolidated Edison Co. v. National L. R. Bd.*, 305 U.S. 197, 229, 83 L. Ed. 126, 140 (1938)). As the Commission's decision is considered *prima facie* just and reasonable, N.C. Gen Stat. § 62-94(e) (1999), it should be affirmed if supported by substantial evidence.

To obtain authorization to provide intrastate, long-distance moving services, an applicant must prove to the satisfaction of the Commission:

(1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service, and

(2) That the applicant is fit, willing and able to properly perform the proposed service, and

(3) That the applicant is solvent and financially able to furnish adequate service on a continuing basis.

N.C. Gen. Stat. § 62-262(e) (1999). In order to meet the burden imposed by North Carolina General Statutes section 62-262(e)(1), an applicant must establish that there is a "substantial public need" for their proposed service in addition to existing authorized services. *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 690, 28 S.E.2d 201, 203 (1943) (holding that the Commission properly denied the petitioner's application where the present intrastate carriers over the proposed route reasonably met existing transportation needs).

> [W]hat constitutes "public convenience and necessity" is primarily an administrative question with a number of imponderables to be taken into consideration, *e.g.*, whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest.

Id. While the approval of an application is not prohibited by the fact that competing carriers would be adversely affected by competition, *Utilities Comm. v. American Courier Corp.*, 8 N.C. App. 358, 366, 174 S.E.2d 814, 820 (1970), "if the proposed operation under the certificate sought would seriously endanger or impair the operations of existing carriers contrary to the public interest, the certificate should not be issued," *Utilities Comm. v. Coach Co.*, 4 N.C. App. 116, 124, 166 S.E.2d 441, 446 (1969) (remanding to the Commission for findings of fact regarding whether the granting of the application would endanger or impair the operations of existing carriers and whether the existing carriers could reasonably meet the public need). "The convenience and necessity required are those of the public and not of an individual or individuals." *Utilities Comm. v. Coach Co. and Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 52, 132 S.E.2d 249, 255 (1963) (citation omitted).

Petitioner in the present case argues that he did not have the negative burden of showing that the existing authorized providers could not satisfy the public demand for long-distance moving services. However, the statutory language of section 62-262(e) clearly provides that the "burden of proof shall be on the applicant" to show that public convenience and necessity require the proposed service. N.C.G.S. § 62-262(e). As stated above, "public convenience and necessity" encompasses considerations such as whether existing carriers can reasonably meet the public demand for moving services and whether granting the proposed application would impair the operations of existing carriers. *Trucking Co.*, 223 N.C. at 690, 28 S.E.2d at 203. As such, we hold that petitioner had the burden of showing that existing authorized providers could not satisfy the public demand for long-distance intrastate moving services and that granting the proposed application would not impair the operations of existing carriers. We note, however, that these factors are not "solely determinative of the right of the Commission to grant the application." *Coach Co.*, 4 N.C. App. at 124, 166 S.E.2d at 446. Our holding is consistent with our Supreme Court's decision pertaining to communications in *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 271, 148 S.E.2d 100, 111 (1966) (stating that "a certificate will not be granted to a competitor in the absence of a showing that the utility already in the field is not rendering and cannot or will not render the specific service in question").

In the present case, petitioner presented the following evidence that there was a substantial public need for his proposed service.

Petitioner worked at American Moving Systems, the moving company owned by the his mother, for approximately one year. American Moving Systems performed local moves for Henry L. Platts, Sr. ("Platts") and Juliette Wilkerson ("Wilkerson"). Both witnesses were satisfied with the moving services. Platts would recommend that his daughter employ the petitioner for a contemplated long-distance move. Wilkerson plans to use American Moving Systems in the future for another move within the Durham city limits.

We hold that the Commission's conclusion that public convenience and necessity require the proposed service is unsupported by competent evidence in view of the entire record. Petitioner failed to show that any individual required his service for a non-local, intrastate move. The testimony by Platts that he would recommend that his daughter use petitioner's services for a long-distance move does not constitute material evidence of a substantial public need. In its conclusions of law, the Commission stated:

> Actual testimony by the Applicant's witnesses establishing the need for moves to and from other areas of the state would have been desirable, however, it is not mandatory. . . . It is within the discretion of the Commission, when viewing the record in [its] entirety, to conclude that the Applicant has met his burden. The testimony taken as a whole, in the discretion of the Commission, does support a grant of statewide authority.

However, in the absence of any other evidence, such as statistics or expert testimony, petitioner's application must fail where no witness demonstrates that petitioner's services are needed to execute a non-local, intrastate move.

Furthermore, petitioner failed to present evidence on the issues of whether existing carriers could reasonably meet the need for intrastate moving services and whether the granting of his application would impair the operations of existing carriers contrary to the public interest. While intervenors did not have the burden of showing that the proposed service would seriously impair their operation, they presented uncontroverted evidence that they are sometimes idle due to a lack of demand for movers, they have not refused any potential customer for lack of capacity, they are capable of accommodating any foreseeable increase in demand for intrastate moving services, and the proposed service would impair their companies by reducing the overall revenue potential for certificated movers. The Commission then concluded as a matter of law:

> The second element of public convenience and necessity which must be considered is whether the proposed operation would impair the operations of the Protestants and other existing carriers contrary to public interest. Three of the seven Protestants appeared at the hearing to testify in opposition to the application. Basically, the Protestants testified that the granting of this application would adversely impact their companies by reducing the potential revenue available for certificated household goods movers. Again, it is within the discretion of the Commission, when viewing the record in [its] entirety, to conclude whether the proposed operation would or would not impair the operations of the Protestants and other existing carriers contrary to public interest.
>
> The Commission concludes, therefore, that the evidence does not support a finding that the grant of statewide authority would have a ruinous competitive effect upon authorized carriers.

We hold that the Commission's conclusions both misapprehend the law and are not supported by the competent evidence in light of the whole record. The Commission's discretion "to conclude whether the proposed operation would or would not impair the operations of the Protestants" is not unfettered; its conclusions must be based on material and substantial evidence. As the record is devoid of evidence that the proposed operation would not impair the operations of existing carriers contrary to the public interest, the conclusion of the Commission is in error.

Furthermore, the Commission misapprehended the law when it concluded that "the evidence does not support a finding that the grant of statewide authority would have a ruinous competitive effect upon authorized carriers." As stated above, petitioner had the burden to establish that granting his proposed application would not seriously impair the operations of existing carriers. Intervenors did not, as the Commission suggested, have the burden of showing that granting petitioner's application would have a ruinous effect upon them.

For the reasons stated herein, we hold that the Commission erred in granting petitioner's application for a certificate of public convenience and necessity. The order of the Commission is therefore reversed.

Reversed.

Judge SMITH concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent from the majority opinion holding the Commission erred in granting petitioner's application. The appellants-intervenors are existing carriers seeking to prevent the petitioner from obtaining common carrier authority to transport Group 18-A household goods throughout the State.

The majority cites to the three requirements an applicant must prove to the satisfaction of the Commission pursuant to N.C. Gen. Stat. § 62-262(e). The only one of the three at issue here is the following:

> (1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service.

N.C. Gen. Stat. § 62-262(e) (1999).

In reviewing a decision of the Utilities Commission, this Court's role is to determine whether the entire record supports the Commission's decision; and where there are two reasonably conflicting views of the evidence, this Court may not substitute its judgment for that of the Commission. *See State ex rel. Util. Comm'n v. Carolina Indus. Group*, 130 N.C. App. 636, 639, 503 S.E.2d 697, 699-700, *disc. review denied*, 349 N.C. 377, 525 S.E.2d 465 (1998). The determination is whether the Utilities Commission's findings and conclusion are supported by substantial, competent, and material evidence. *See State ex rel. Utilities Comm'n v. N.C. Gas Service*, 128 N.C. App. 288, 291, 494 S.E.2d 621, 624 (1998). Substantial evidence is defined as "more than a scintilla or a permissible inference," and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Utilities Comm. v. Coach Co.*, 19 N.C. App. 597, 601, 199 S.E.2d 731, 733 (1973), *cert. denied*, 284 N.C. 623, 201 S.E.2d 693 (1974). In determining whether a petitioner has presented substantial evidence in support of his position, our Supreme Court has stated the Commission may agree with the evidence of a single witness even though there may be opposing wit-

nesses. *See State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987) (stating "the Commission may agree with a single witness—if the evidence supports his position—no matter how many opposing witnesses might come forward").

In *Utilities Comm. v. Coach Co. and Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 132 S.E.2d 249 (1963), cited by the majority, our Supreme Court addressed the issue of public convenience and necessity and stated:

> Whether there shall be competition in any given field and to what extent is largely a matter of policy committed to the sound judgment and discretion of the Commission. The Commission must maintain a reasonable balance to see that the public is adequately served and at the same time to see that the public and the public utilities involved are not prejudiced by the efforts which flow from excessive competition brought about by excessive services.

Id. at 51, 132 S.E.2d at 254-55 (citation omitted). Additionally, our Supreme Court held that "the facts in each case must be separately considered and from those facts it must be determined whether public convenience and necessity requires [sic] a given service to be performed or dispensed with." *Id.* at 52, 132 S.E.2d at 255. Furthermore, our Supreme Court stated:

> Upon the same facts we might have reached a different result. But it is not for this Court to find the facts or to regulate utilities. "The decisions of the Utilities Commission must be within the authority conferred by the Act, yet the weighing of the evidence and the exercise of judgment thereon as to transportation problems within the scope of its powers are matters for the Commission."
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> *Id.* at 54, 132 S.E.2d at 257 (citations omitted).

Here, the entire record reveals that the Commission's findings are supported by "such relevant evidence as a reasonable mind might accept as adequate" to support its conclusion that petitioner met his burden. *Coach Co.*, 19 N.C. App. at 601, 199 S.E.2d at 733.

ARLENE ROSARIO, PLAINTIFF v. LUIS M. ROSARIO, DEFENDANT

No. COA99-1183

(Filed 1 August 2000)

Divorce— equitable distribution—unequal division—ultimate facts not considered

The trial court's judgment awarding plaintiff an unequal division of the marital estate in an equitable distribution action is reversed, because the trial court's statement in the order that it considered all statutory factors under N.C.G.S. § 50-20(c) and its specific listing of some of those factors is not sufficient to allow appellate review when the findings do not include ultimate facts considered by the trial court in applying those factors, such as findings regarding the actual income and liabilities of the parties, the amount of plaintiff's contribution of separate funds to the marital home, and the tax consequences to the parties.

Judge GREENE concurring.

Appeal by defendant from judgment entered 28 May 1999 by Judge William M. Cameron in Onslow County District Court. Heard in the Court of Appeals 5 June 2000.

Jennifer R. Pope for plaintiff-appellee.

Lanier and Fountain, by Timothy R. Oswalt, for defendant-appellant.

EDMUNDS, Judge.

Defendant appeals from a judgment awarding plaintiff an unequal division of their marital estate. We reverse.

The parties were married on 2 May 1986 and separated on 12 September 1997. On 2 October 1997, plaintiff filed this action seeking a divorce from bed and board, child custody, alimony, and equitable distribution of the marital estate. Defendant answered on 14 November 1997 and counterclaimed, seeking divorce from bed and board, child custody, and equitable distribution. On 11 August 1998, the trial court entered an order awarding plaintiff a divorce from bed and board, post-separation support, twenty-eight percent of defendant's net retirement income, and possession of the marital home.

On 19 March 1999, signed *nunc pro tunc* 28 May 1999, the trial court entered judgment incorporating the prior order and awarding plaintiff an unequal division of the marital estate. Disregarding retirement income (which had been distributed in the August 1998 order) and the marital home (which defendant already had deeded to plaintiff at the time of the March hearing), the March 1999 judgment distributed to plaintiff approximately $12,000 in assets and $2,100 in debts and distributed to defendant approximately $26,250 in assets and $26,700 in debts. The trial court also denied plaintiff permanent alimony and awarded plaintiff attorney's fees. Defendant appeals the unequal distribution.

Defendant argues that the findings of fact and evidence in the record are insufficient to support an unequal division of the marital estate. N.C. Gen. Stat. § 50-20(c) (1999) provides: "There shall be an equal division by using net value of marital property . . . unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property . . . equitably." The statute then sets forth twelve distributional factors for the court to consider when making its determination. *See id.*

In the case at bar, the trial court made the following pertinent findings of fact:

> 4. That the Court has previously ruled on the issues of post-separation support, interim allocation of marital assets, divorce from bed and board, and determination of child support owed, in an Order entered August 11, 1998, and said Order is adopted herein.
>
> 5. That the issues before the Court at this time are alimony, attorney fees, equitable distribution of the remaining marital property and debts, and payment of child support arrearages.
>
> . . . .
>
> 7. That the defendant is an able bodied person, still gainfully employed, and earning seventy-two (72%) per cent in monthly military retirement income; that the plaintiff is an able bodied person, still gainfully employed as an office assistant and now receiving twenty-eight (28%) per cent of the defendant's disposable military retirement income.

8. That it is not necessary for the Court to value the defendant's military retirement because the Court has chosen to make an in kind distribution of said asset as set forth in the previous Order of this Court.

9. That since the entry of the Order on August 11, 1998, the defendant has deeded his interest in and to the real estate and the marital home . . . to the plaintiff.

. . . .

11. That the plaintiff seeks an unequal distribution in the division of marital assets and debts. In considering whether an equal division is equitable, the Court has considered all of the statutory factors raised by both parties, including:

a. The marriage's eleven year four month duration.

b. The income and liabilities of each party.

c. The plaintiff's contention that she helped the career potential of the defendant.

d. The plaintiff's contribution of separate funds to the marital home.

e. The tax consequences to the parties.

f. The post separation use and maintenance of the marital home and payment of mortgage payments.

Additionally, in both its findings of fact and conclusions of law, the trial court described and provided a fair market value of the parties' assets. The court then listed and distributed the marital debt of the parties, again providing descriptions and amounts due.

Our courts have established several basic principles pertaining to equitable distribution. In *Armstrong v. Armstrong*, our Supreme Court discussed the requirement that a trial court make specific findings as to the *ultimate* facts (rather than the *evidentiary* facts) found by the trial court to support its conclusion regarding equitable distribution:

> Although the trial court was not required to recite in detail the evidence considered in determining what division of the property would be equitable, it was required to make findings sufficient to address the statutory factors and support the division ordered.

> "The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review 'to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law.' " When the findings and conclusions are inadequate, appellate review is effectively precluded. We do not imply that a trial court must make exhaustive findings regarding the evidence presented at the hearing; rather "the trial court should be guided by the same rules applicable to actions for alimony *pendente lite* and to actions for child support, thus *limiting the findings of fact to ultimate, rather than evidentiary facts.*"

322 N.C. 396, 405-06, 368 S.E.2d 595, 600 (1988) (emphasis added) (internal citations omitted). Ultimate and evidentiary facts have been defined as follows:

> "Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. . . .
>
> . . . .
>
> . . . An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts."

Peoples v. Peoples, 10 N.C. App. 402, 409, 179 S.E.2d 138, 142 (1971) (first two omissions in original) (quoting *Woodard v. Mordecai*, 234 N.C. 463, 470, 472, 67 S.E.2d 639, 644, 645 (1951) (citations omitted)).

If evidence is presented only as to one of the section 50-20 statutory factors and that evidence weighs toward an unequal distribution, a finding as to that single factor will support the trial court's conclusion of unequal distribution. *See, e.g., Jones v. Jones*, 121 N.C. App. 523, 466 S.E.2d 342 (1996); *Patterson v. Patterson*, 81 N.C. App. 255, 343 S.E.2d 595 (1986); *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E.2d 809 (1986), *disapproved of on other grounds by Armstrong*, 322 N.C. 396, 368 S.E.2d 595. However, if evidence is presented as to several statutory factors, the trial court must make findings as to each factor for which evidence was presented. *See, e.g., Collins v. Collins*, 125 N.C. App. 113, 479 S.E.2d 240 (1997); *Surrette v. Surrette*, 114 N.C. App. 368, 442 S.E.2d 123 (1994); *Little v. Little*, 74 N.C. App.

12, 327 S.E.2d 283 (1985); *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E.2d 772 (1984). Finally, a finding stating that the trial court has merely given "due regard" to the section 50-20 factors is insufficient as a matter of law. *See, e.g., Daetwyler v. Daetwyler*, 130 N.C. App. 246, 502 S.E.2d 662 (1998), *aff'd per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999); *Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998); *Collins*, 125 N.C. App. 113, 479 S.E.2d 240.

Apart from these basic principles, opinions have diverged as to the necessary specificity of a trial court's findings. For example, in *Judkins v. Judkins*, the following findings were held sufficient to support an unequal distribution:

> "That the Court has considered all of the factors as set forth in G.S. 50-20(c) to include the following:
>
> 1. The earning ability of each party;
>
> 2. The need of the custodial parent for the use and possession of the marital residence and furniture located therein;
>
> 3. The value of defendant's separate property;
>
> 4. The defendant's expectation of additional pension.
>
> That based on the foregoing, the Court is of the opinion and finds as a fact that an unequal division of the marital assets and liabilities is equitable . . . ."

113 N.C. App. 734, 741, 441 S.E.2d 139, 142-43 (1994) (omission in original).

Similarly, in *Atkinson v. Chandler*, the Court examined the sufficiency of the following findings:

> 6. At the time the Parties were married, the Defendant was employed by the United States Navy and retired on December 1, 1995 with twenty (20) years and one month of service and retired at the rank of an E5.
>
> 7. The Defendant receives military retirement and disability retirement of approximately $800.00 (eight hundred dollars) per month.
>
> 8. The Parties had approximately six (6) years of marriage and overlapping military service but pursuant to George v. George the Defendant's military pension was not vested until after the parties separated, therefore, this is the Defendant's separate property.

9. At the time the Parties were married, the Plaintiff was employed as a civilian at AAFES and was residing in a home located at 1314 Folger Avenue, Fayetteville, NC which had been awarded to her pursuant to a previous separation and divorce.

10. During the course of the marriage, the mortgage was retired by payment of $5,028.53.

11. The Plaintiff is retired from AAFES and the marital interest of her pension is $11,540.00 and this amount is vested because it was accumulated during the marriage.

12. During the course of the marriage, the Parties acquired First Union Accounts, accounts at UCB, IRAs and the Plaintiff had a prior IRA of $1,570.00 prior to the marriage of the Parties and the Plaintiff's non-marital interest in her retirement is $33,000.00.

13. Prior to the marriage the Defendant had acquired a Buick Century in October, 1988 and payments were made during the marriage; this automobile had been previously wrecked and had a reduced value and high mileage on the date of separation and has a value of $3,742.00.

14. The Parties acquired a 1993 Buick during the marriage with a value of $11,725.00 including a debt of $2,383.

15. The Plaintiff has separate property totaling $54,589.49 which includes a UCB IRA account, the house located at 1314 Folger Street, Fayetteville, North Carolina and her AAFES retirement of approximately $33,000.00.

16. The Defendant has as his separate property his entire military retirement valued at $153.236.00 [sic].

17. Pursuant to all the factors set forth in N.C.G.S. § 50-20(c) the Court has considered the age, the health of the Parties, the current retirement status, the part-time income of the Defendant, separate property and a portion of the pension that was earned during the marriage and has determined that an unequal division in favor of the Plaintiff is appropriate and there should be no distributive award in this matter.

130 N.C. App. 561, 567, 504 S.E.2d 94, 97-98 (1998). With regard to these findings, the *Atkinson* Court stated:

> We find that these findings of fact sufficiently set forth those statutory factors the court considered in its decision not to

> equally divide the parties' property. While finding of fact #17 does not detail the specific evidence the court considered regarding the parties' income, health and liabilities, we do not believe such a specific recitation was necessary in this case since the court's finding, when read in conjunction with the other findings in its order, adequately apprises us of the evidence ultimately considered by the court. Accordingly, we hold that the trial court made adequate findings of fact as to the evidence presented by both parties and that it did so in accordance with N.C.G.S. § 50-20(c).

Id. at 567-68, 504 S.E.2d at 98.

The holdings in *Judkins* and *Atkinson* are consistent with an earlier statement by this Court: "[A] trial judge is not required, in the findings of fact, to recite each factor and state the reasons for considering it or rejecting it. Rather, all that is required is for the trial judge to *list* the factors, statutory and non-statutory, that are supported by the evidence and which justify an unequal distribution." *Patterson*, 81 N.C. App. at 259-60, 343 S.E.2d at 599 (citation omitted) (emphasis added).

In contrast, our Supreme Court has held that the following finding was insufficient:

> 34. That in evaluating the defendant's/husband's share of Patco, Inc., the Court has considered the estimate of the defendant himself as given in an insurance application approximately six months prior to the separation of the parties (plaintiff's exhibit 10), the book value of the business in 1980 through November, 1984, the relative ownerships of the stock in the company in 1980 through 1984 (it being noted that defendant is the sole (or 96%) stockholder of the company having purchased the interest of his brother with the company redeeming his stock by treasury stock), has considered the capitalization of earnings of the company, has considered the earning capacity of the company as demonstrated in the last four-to-five year period of time, the present economic outlook for the business and industry, the good will that has accumulated to the business through the hard work and competent efforts of the defendant, and the financial position of Patco, Inc., as demonstrated by its unaudited statements for 1980 through April 30, 1984. The value of the defendant's interest in Patco, after consideration of all these factors, at the relevant time for evaluation for equitable distribution in this matter was at least $85,000.

Patton v. Patton, 318 N.C. 404, 405-06, 348 S.E.2d 593, 594-95 (1986). The Court stated:

In providing for distribution of marital property, N.C.G.S. § 50-20(j) states, "[T]he court shall make written findings of fact that support the determination that marital property has been equitably divided." In the recent case of *Poore v. Poore*, the Court of Appeals stated that in its order of distribution of marital property, the trial court "should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied." Certainly the requirement of specific findings is no less applicable in an equitable distribution order involving a spouse's interest in a closely-held corporation.

The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review "to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law." Furthermore, this requirement "is not designed to encourage ritualistic recitations by the trial court," but "is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system."

. . . .

Applying these principles to the case before us, finding of fact No. 34 appears to be merely an enumeration of the factors considered by the trial court in determining the value of defendant's interest in Patco, lacking any indication of what value, if any, the trial court may have attributed to each of the enumerated factors. The trial court's conclusion that the value of defendant's interest in Patco "was at least $85,000" is nebulous, if not meaningless. The finding of fact is not clear as to how much more than $85,000 the interest may be worth. Distributions of this nature require more precise findings and determinations of ultimate facts. Therefore, in our view, finding of fact No. 34 is too vague and conclusory to permit appellate review.

Id. at 406-07, 348 S.E.2d at 595 (alteration in original) (internal citations omitted).

Similarly, in *Collins*, this Court reviewed the following:

18. The parties presented evidence on numerous contentions for an unequal division. After giving due regard to the contentions

of the parties and all the factors set forth in G.S. § 50-20(c), an equal division of the marital property would be inequitable based on the following factors (G.S. § 50-20(c)(6), (11a) and (12)):

> (a) The plaintiff contributed approximately $34,000.00 to his deferred compensation plan during the marriage from income which was earned prior to the marriage but deferred. These funds were his separate property, and were spent during the marriage for the support of the family.
>
> (b) The plaintiff used his separate funds to make the downpayment on the . . . residence of $20,000.00, and he expended in excess of $77,000.00 of his separate funds to complete the residence . . . .
>
> (c) The plaintiff is assuming responsibility for repaying the equity line obtained by the defendant against the . . . residence which, at the date of trial, had a balance of $14,963.65. The plaintiff should be awarded credit for one-half the repayment of this marital debt because not all of these funds were used for marital purposes.
>
> (d) The Court does not find the failure of the plaintiff to return [defendant's] property to be willful and will not find him to be in contempt of court, but finds that the defendant is entitled to a credit of $4,500.00 for the damage done to certain of her personalty and for the loss of use of the property since the expiration of the 50B order.

125 N.C. App. at 115, 479 S.E.2d at 241-42 (alterations in original). In remanding the case to the trial court, this Court stated:

> When evidence is presented in support of any of the section 50-20(c) factors tending to show that an equal division of the marital property would be inequitable, the trial court must consider that evidence in determining an equitable division. To insure that this evidence has been considered by the trial court, there must be findings reflecting their consideration. It is not necessary that the findings "recite in detail the evidence considered" but they must include the ultimate facts considered by the trial court.
>
> In this case there is evidence in the record that the plaintiff is in good health and the defendant is not in good health. There is also evidence that the plaintiff is employed and the defendant is not employed. The health and incomes of the parties are factors

> that must be considered, when evidence is presented, by the trial court in making a distribution of the marital property. The judgments in this case do not include any findings that this evidence was considered in making the distribution and this was error. The finding that "due regard [was given] to the contentions of the parties and all the factors set forth in G.S. § 50-20(c)" is not sufficient. This case must, therefore, be remanded to the trial court for the entry of a new equitable distribution judgment after consideration of the parties' incomes and health. The new judgment must be entered on the record before this Court and findings included revealing a consideration of the evidence relevant to the parties' incomes and health.

Id. at 117, 479 S.E.2d at 242-43 (alteration in original) (internal citations omitted).

These cases demonstrate that the degree of specificity required in a court order pertaining to equitable distribution cannot be established with scientific precision. Nevertheless, we are guided by our Supreme Court's holding in *Patton* requiring that findings be sufficiently specific to allow appellate review. Viewed in this light, we hold that the findings in the case at bar are insufficient. The trial court stated in Paragraph 11 that it considered all statutory factors and specifically listed some of those factors. However, the findings do not include ultimate facts considered by the trial court in applying those factors. For example, the trial court did not make any findings regarding the actual income and liabilities of the parties, the amount of plaintiff's contribution of separate funds to the marital home, and what the tax consequences to the parties would be. In addition, although the trial court found as a fact that "plaintiff[] conten[ded] that she helped the career potential of the defendant," the trial court did not determine whether plaintiff's contentions were accurate and, if so, the extent of plaintiff's contribution.

We are not unmindful of the heavy caseload in the state's district courts and realize that the district court judges do not have the luxury of spending unlimited time on each case. We are also aware that, almost without exception, district court judges provide considered expertise in a demanding and complex area of the law where the litigants' feelings often are inflamed. We are, however, unable to discharge our appellate responsibilities unless the trial courts reach reviewable conclusions of law based upon findings of fact supported in the record. *See Patton*, 318 N.C. 404, 348 S.E.2d 593.

This case is remanded to the trial court for further proceedings consistent with this opinion.

Reversed.

Judge SMITH concurs.

Judge GREENE concurs with separate opinion.

Judge GREENE concurring.

I fully concur with the majority but write separately to emphasize that the findings of facts regarding the section 50-20(c) factors must do more than simply list the statutory factors considered by the trial court. The findings must reveal "due consideration of the evidence presented by the parties in support of the factors." *Daetwyler v. Daetwyler*, 130 N.C. App. 246, 249, 502 S.E.2d 662, 665, *disc. review denied in part*, 349 N.C. 528, 526 S.E.2d 174 (1998), *aff'd per curiam in part*, 350 N.C. 375, 514 S.E.2d 89 (1999). This mandate does not require the trial court to make findings of the evidentiary facts, as findings of the ultimate facts considered by the trial court are sufficient. *Id.* at 249 n.1, 502 S.E.2d at 665 (providing, as an example, that evidentiary facts may include testimony from doctor regarding medical condition of plaintiff and plaintiff's medical bills; while ultimate facts may include that plaintiff is in poor health and has incurred particular expenses as a result).

In this case, for the reasons given by the majority, the judgment does not contain sufficient ultimate findings of fact in support of the factors listed in the judgment. Furthermore, the judgment is deficient because it suggests the trial court may have considered factors not included in its judgment. The trial court, in finding of fact number 11, listed six items it considered and noted they were among those it had considered.[1] The judgment must include ultimate findings on *all* the evidence presented in support of *any* factor.

The judgment of the trial court must, therefore, be reversed and remanded to the trial court for entry of a new equitable distribution order containing findings of the ultimate facts for each of the section 50-20(c) factors upon which the parties presented evidence.

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1. The trial court stated it had "considered all of the statutory factors raised by both parties, *including*" those specifically listed. (Emphasis added.)

SUN SUITES HOLDINGS, LLC v. BOARD OF ALDERMEN OF TOWN OF GARNER

[139 N.C. App. 269 (2000)]

SUN SUITES HOLDINGS, LLC, AND W.W.T., A NORTH CAROLINA GENERAL PARTNERSHIP, PETITIONERS V. THE BOARD OF ALDERMEN OF THE TOWN OF GARNER, RESPONDENTS, AND JEAN ADAMS; RICK BUNN AND ELENI BUNN; JANE CALDWELL; ANTHONY CAMERANO AND BARBARA CAMERANO; RUTH GOSS; EDWARD GUERRIERO AND KRISTA GUERRIERO; DAN LEONARD; PINEWINDS APARTMENT ASSOCIATES, INC.; GLORIA TARKENTON; AND ANDREW VINAL AND CATHY VINAL, INTERVENORS/RESPONDENTS

No. COA99-450

(Filed 1 August 2000)

1. Zoning— conditional use permit—hotel—scope of review

Although the Court of Appeals is unable to conclude the trial court exercised the appropriate scope of review based on the clear language of the order reflecting that it applied both the whole record review and de novo review simultaneously to the issues raised in a case where petitioners filed an application for a conditional use permit for the development of an extended-stay hotel, a remand of the case is unnecessary since petitioners raise only the issue of whether the Board's denial of the application was supported by the record, and the whole record fails to reflect that the Board's decision was sustained by substantial evidence.

2. Zoning— conditional use permit—hotel—material danger to public health or safety

The Board's decision to deny petitioners' application for a conditional use permit for the development of an extended-stay hotel based on a statement in the notice of denial that the project would materially endanger the public health or safety is not supported by substantial evidence in the record, because: (1) the limited statistical information comparing a similar extended-stay hotel in the area failed to exclude alternative potential causes of increased calls to police in that sector; (2) speculative comments of neighborhood residents relating their generalized fears and impressions that traffic and crime would be affected by the project cannot be characterized as substantial evidence; and (3) a mere increase in traffic does not necessarily mean an intensification of traffic congestion or a traffic hazard.

3. Zoning— conditional use permit—hotel—value of adjoining or abutting property

The Board's decision to deny petitioners' application for a conditional use permit for the development of an extended-stay

hotel based on a statement in the notice of denial that the value of adjoining or abutting property would be substantially injured is not supported by substantial evidence in the record, because speculative opinions by residents indicating that their willingness to purchase homes in the area would have been affected had the project been completed at the time of their purchases are incompetent evidence in the absence of any factual data or background such as certified appraisals or market studies.

Appeal by petitioners from order filed 16 March 1999 by Judge A. Leon Stanback, Jr., in Wake County Superior Court. Heard in the Court of Appeals 13 January 2000.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by Lacy H. Reaves, A. Lee Hogewood, III, and Margaret R. Westbrook, for petitioners-appellants.

McDaniel, Anderson & Stephenson, L.L.P., by William E. Anderson, for respondents-appellees Board of Alderman of the Town of Garner.

Holt, York, McDarris, L.L.P., by Clyde Holt, III, and Jeffrey P. Gray, for intervenors/respondents-appellees.

JOHN, Judge.

Petitioners Sun Suites Holdings, LLC (Sun Suites), and W.W.T., a North Carolina General Partnership, appeal the trial court's order affirming the denial by respondent Board of Aldermen of the Town of Garner (the Board) of petitioners' application (the application) for a conditional use permit (the permit). We reverse and remand with instructions.

Pertinent facts and procedural history include the following: Petitioners desired to build a Sun Suites hotel (the project), an extended-stay facility, on property located near the intersection of Highway 401 and Pine Winds Drive (the project site) in Garner. To gain approval for the project from the Town of Garner (the Town), petitioners were required, pursuant to the Town's Land Use Ordinance (the Ordinance), to obtain the permit, and petitioners filed the application 2 September 1998. On 12 October 1998, the Town Planning and Appearance Commission reviewed the application and voted to recommend its approval, subject to a condition irrelevant to the instant appeal.

A public hearing on the application was conducted 2 November 1998 (the public hearing). The Board heard from a member of the Town's staff; from petitioners' attorney, Lacy Reaves; from the President of Sun Suites, Robert Henritze; and from twenty residents of neighborhoods located near the project site. At the conclusion of the hearing, the Board voted to deny the application. Petitioners were thereafter formally served with notice (the Notice) the application had been denied

> because, if completed as proposed, the development more probably than not:
>
> 1) Will materially endanger the public health or safety.
>
> 2) Will substantially injure the value of adjoining or abutting property.

Petitioners timely sought issuance of a writ of certiorari allowing judicial review by the superior court, *see* N.C.G.S. § 160A-381(c) (1999), which writ issued 30 November 1998. On 22 February 1999, Jean Adams, Rick and Eleni Bunn, Jane Caldwell, Anthony and Barbara Camerano, Ruth Goss, Edward and Krista Guerriero, Dan Leonard, Gloria Tarkenton, and Andrew and Cathy Vinal (collectively intervenors) filed a "Motion to Intervene as Respondents" (the Motion). After receiving briefs, hearing argument from all parties, and finding that intervenors were "aggrieved parties with special damages," the trial court granted the Motion 2 March 1999, and also ordered that Pinewinds Apartment Associates, Inc., be included as an intervenor.

Thereafter, by order filed 16 March 1999 (the Order), the trial court affirmed the Board's decision to deny the application. Petitioners timely appealed to this Court, contending in pertinent part that the trial court erred by applying an improper standard of judicial review and in finding that the decision of the Board was supported by competent, substantial and material evidence in the record.

A legislative body such as the Board, when granting or denying a conditional use permit, sits as a quasi-judicial body. *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 469, 202 S.E.2d 129, 136-37 (1974). In such capacity, its decisions "shall be subject to review by the superior court by proceedings in the nature of certiorari," G.S. § 160A-381(c), in which "the superior court sits as an appellate court, and not as a trier of facts," *Tate Terrace Realty Investors, Inc. v.*

Currituck County, 127 N.C. App. 212, 217, 488 S.E.2d 845, 848, *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997).

Although not specifically applicable, the provisions of the Administrative Procedure Act (APA) are "highly pertinent" to the process described above. *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 625, 265 S.E.2d 379, 382 (1980). Accordingly, the task of the trial court in reviewing action upon a conditional use permit by a local board functioning as a quasi-judicial body includes:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Id. at 626, 265 S.E.2d at 383.

> If a petitioner contends the Board's decision was based on an error of law, "de novo" review is proper. However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the "whole record" test.

JWL Invs., Inc. v Guilford County Bd. of Adjust., 133 N.C. App. 426, 429, 515 S.E.2d 715, 717 (citation omitted), *disc. review denied*, 351 N.C. 357, — S.E.2d — (1999). Moreover,

> [t]he trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.

Sutton v. N.C. Dep't of Labor, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 (1999).

Upon further appeal to this Court, we

> must examine "the trial court's order for error of law" just as with any other civil case.

Tate Terrace, 127 N.C. App. at 219, 488 S.E.2d at 849 (quoting *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994)).

> The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.

Amanini, 114 N.C. App. at 675, 443 S.E.2d at 118-119, *cited with approval in ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997).

[1] Petitioners contended in the trial court and primarily complain to this Court that the Board's denial of the application was not supported by record evidence.

> A review of whether the [quasi-judicial body's] decision is supported by sufficient evidence . . . requires the court to employ the whole record test.
>
> . . . .
>
> The "whole record" test requires the reviewing court to examine all the competent evidence . . . which comprise[s] the "whole record" to determine if there is substantial evidence in the record to support the [quasi-judicial body's] findings and conclusions.

Ellis v. N.C. Crime Victims Compensation Comm., 111 N.C. App. 157, 162, 432 S.E.2d 160, 163-64 (1993). Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion," *Tate Terrace*, 127 N.C. App. at 218, 488 S.E.2d at 849, and "is more than a scintilla or a permissible inference," *Wiggins v. N.C. Dept. of Human Resources*, 105 N.C. App. 302, 306, 413 S.E.2d 3, 5 (1992).

> The Order contains the statement
>
> [t]hat this [c]ourt conducted a *de novo* review of this matter and applied the "whole record" test . . . .

It therefore appears, as described in the Order, that the standard of review utilized by the trial court encompassed concurrent application of both *de novo* review and the "whole record" test. A court may properly employ both standards of review in a specific case, *see In Re*

Appeal by McCrary, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (more than one standard of review may be used if required by issues raised), but the standards are to be applied separately to discrete issues, *see Ellis*, 111 N.C. App. at 162, 432 S.E.2d at 164 (applying "whole record" review to two issues raised by petitioner and *de novo* review to remaining issue).

Although the trial court likely intended to comply with the foregoing rules, the clear language of the Order reflects that it applied both standards of review simultaneously to the issues raised in the instant case. We thus are unable to conclude the court "exercised the appropriate scope of review." *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118-119.

Such determination might well require remand of the case to the trial court for its application of the proper standard of review. *See Sutton*, 132 N.C. App. at 389, 511 S.E.2d at 342 (order vacated and case remanded where order failed to specify standards of review and trial court's application thereof). In the case *sub judice*, however, petitioners raise only the issue of whether the Board's denial of the application was supported by the record, the entirety of which is before us. In the interests of judicial economy, therefore, we conclude remand in the case *sub judice* is unnecessary because the "whole record" fails to reflect that the Board's decision was sustained by "substantial evidence," *see Ellis*, 111 N.C. App. at 162, 432 S.E.2d at 164.

The Notice recited that petitioners' application was "complete" and complied "with all applicable requirements" of the Ordinance. Upon such determination, § 58(3) of the Ordinance was triggered, requiring the Board to issue the permit absent "specific findings, based upon the evidence submitted, justifying" denial of the application. Section 54(d) of the Ordinance sets out permissible bases upon which a permit might be denied, and the Notice recited verbatim two reasons listed therein as grounds for the Board's decision, *i.e.*, "material endanger[ment of] the public health or safety" and "substantial[] injur[y to] the value of adjoining or abutting property."

Preliminarily, we observe that

> in allowing or denying the application, [the quasi-judicial body must] state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision.

Refining Co., 284 N.C. at 471, 202 S.E.2d at 138. Assuming *arguendo* the sparse recitation in the Notice complied with this requirement, we contrast the contents of the record with the grounds for denial of the application designated in the Notice.

The "whole record" before the Board consisted of the application and the comments directed to the Board at the public hearing. The only information contained therein relating to the first basis for denial, *i.e.*, that the project would "materially endanger the public health or safety," consisted of assertions by certain individuals of a possible increase in traffic or crime in the area surrounding the project site.

[2] Reviewing the statements to the Board, we first observe that petitioners' attorney and its president indicated that the three hundred to three hundred and fifty daily vehicle trips the project was expected to generate were "substantially less . . . than any other type of retail operation that could be put" on the site; that a security guard would be present at the facility each night from 11:00 p.m. until 7:00 a.m.; that security cameras would be operated twenty-four hours a day; and that the hotel would not have a lounge or restaurant facility. Jenny Saldi (Saldi) of the Town's planning staff pointed out that petitioners' plan was "consistent with . . . the [Town's] Thoroughfare Plan" and all other applicable requirements.

In opposing the project, twenty Garner residents generally expressed their fear of heightened traffic and increased crime in their neighborhoods. The residents maintained that traffic was an existing problem in the area. Several complained that motorists often attempted to cut through the surrounding neighborhoods to travel from Highway 401 to Highway 70 and often exceeded the posted speed limit.

Comments made by David Dicken (Dicken) are illustrative. After expressing his belief that the project would only exacerbate present traffic problems, Dicken suggested that patrons of the hotel might purchase alcohol at a local store,

> [t]ake it on down there [to the hotel] and drink it, get drunk in that room, get out and take a walk in the neighborhood. . . . What is to keep them from walking around in the apartment complex? . . . Drunk and disorderly, you never know. . . . [T]hese individuals are transients, they have no vested interest in our community . . . . [As for petitioners' plans for security cameras,

such cameras] record[] crimes that have occurred. It does not stop the crime.

The extended-stay nature of the proposed hotel and the type of clientele it was anticipated to attract also drew comment. Several speakers, including Dicken, made reference to another extended-stay hotel facility in Garner named "Suburban Lodge" and urged the Board not to approve petitioners' facility in light of problems alleged to have occurred at Suburban Lodge.

For example, Carol Harris asserted she had observed "transients" currently walking "through [her] neighborhood at all hours" and that "another low rent extended stay hotel . . . would be very detrimental to [the] community." Intervenor Ed Guerriero (Guerriero) stated he had "collected some information from the Garner Police Department" indicating five hundred and two (502) calls to police during the first six months of 1998 from the "sector" containing Suburban Lodge, and during the same period in 1996, which was prior to construction of Suburban Lodge, only three hundred thirty-two (332) calls emanating from the same sector. Guerriero further cited data delineating that one of the four total 1998 assault calls came from Suburban Lodge. Similarly, of four calls for drug possession and of four calls for domestic disturbance in 1998, one in each category was initiated at Suburban Lodge. Finally, the only two calls regarding harassment came from Suburban Lodge as well as the solitary prostitution complaint.

This Court has recently emphasized that speculative assertions or mere expression of opinion about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body. *C.C. & J. Enter., Inc. v. City of Asheville*, 132 N.C. App. 550, 553, 512 S.E.2d 766, 769, *disc. review improvidently allowed*, 351 N.C. 97, 521 S.E.2d 117 (1999). Further, the expression of "generalized fears" does not constitute a competent basis for denial of a permit. *See Clark v. City of Asheboro*, 136 N.C. App. 114, 122, 524 S.E.2d 46, 51-52 (1999).

Petitioners at this point also interject that Guerriero's testimony was not material. *See Concrete Co.*, 299 N.C. at 625, 265 S.E.2d at 383 (evidence supporting decision of local board must be "competent, material, and substantial"); *see also* Black's Law Dictionary 991 (7th ed. 1999) (material defined as "[h]aving some logical connection with the consequential facts"). We agree that other than the alleged circumstance that both the project and Suburban Lodge constitute

"extended-stay" hotels, no evidence was presented suggesting any relevant similarities between the two. Consideration of any perceived projected increase in crime resulting from the construction of Suburban Lodge was thus at best of highly limited assistance to a determination of the impact of a Sun Suites hotel on the community. *See id.* (material also defined as being "[o]f such a nature that knowledge of the item would affect a person's decision making process; significant"). In addition, Guerriero's data failed to exclude, nor did other commentary before the Board address, alternative potential causes of increased calls to police in the Suburban Lodge "sector," such as commercial or residential growth.

Given the limitations on Guerriero's statistical information noted above, therefore, we cannot conclude it qualifies as "substantial evidence," such that "a reasonable mind" could accept it "as adequate to support a conclusion," *Tate Terrace*, 127 N.C. App. at 218, 488 S.E.2d at 849, that the project would result in increased crime such that, in the words of the Notice, "the public health or safety" would be "materially endanger[ed]." Similarly, the speculative comments of neighborhood residents relating their "generalized fears," *Clark*, 136 N.C. App. at 122, 524 S.E.2d at 51-52, and impressions that traffic and crime would be affected by the project cannot be characterized as "substantial" evidence and were insufficient to support the Board's decision, *see C.C. & J. Enter.*, 132 N.C. App. at 553, 512 S.E.2d at 769.

In addition, although petitioners acknowledged to the Board that the project would likely result in three hundred to three hundred and fifty additional trips per day, Saldi noted the project nonetheless complied with the Town's "Thoroughfare Plan." Further, a mere

> increase in traffic does not necessarily mean an intensification of traffic congestion or a traffic hazard,

Refining Co., 284 N.C. at 469, 202 S.E.2d at 136, that would "materially endanger the public . . . safety" under § 54(d) of the Ordinance.

In short, the statement in the Notice that the project would "materially endanger the public health or safety" is not supported by "substantial" evidence in the record. Consequently, the Board's decision to deny the application may not be upheld on that basis. *See Ellis*, 111 N.C. App. at 163, 432 S.E.2d at 164.

[3] We next consider whether the record sustains the statement in the Notice that the project would "substantially injure the value of

adjoining or abutting property." During the hearing, two speakers touched on the issue of property values. Intervenor Andrew Vinal (Vinal) related that if he had known a hotel was going to be built at the project site,

> [t]hat would have influenced my decision of living in this area. Therefore I would assume that it would affect other homeowners in the future that would want to buy my home . . . . Therefore, I feel this would devalue my property . . . .

Paul Capps (Capps), a real estate agent, although not a resident of the area immediately surrounding the project site, stated that

> I have been selling in Garner . . . for several years. I have a lot of friends and . . . clients in the neighborhood and I am concerned . . . . I feel like the property values are going to go down [in the neighborhood].

Again, speculative opinions such as the foregoing fail to constitute substantial evidence. *See C.C. & J. Enter.*, 132 N.C. App. at 553, 512 S.E.2d at 769. Moreover, testimony by residents indicating that "their willingness to purchase homes in the area would have been affected had the . . . project been completed at the time of their purchases," *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 63 N.C. App. 244, 252, 304 S.E.2d 251, 256 (1983), and

> opinions by residents of the area that the value of neighboring property would be adversely affected by the . . . project, . . . insofar as they are "conclusions unsupported by factual data or background, are incompetent and insufficient to support the [quasi-judicial body's] findings,"

id. at 252-53, 304 S.E.2d at 256 (citing *Refining Co.*, 284 N.C. at 469, 202 S.E.2d at 136). While Capps may have been qualified by virtue of his profession, neither he nor Vinal presented any "factual data or background," such as certified appraisals or market studies, supporting their naked opinions. *Refining Co.*, 284 N.C. at 469, 202 S.E.2d at 136.

We note also that the Ordinance predicates denial of a permit application upon evidence that "the value of *adjoining or abutting* property" would be "substantially injure[d]." Ordinance, § 54(d) (emphasis added). Thorough review of the record on appeal reveals that neither Capps' property nor Vinal's property adjoins or abuts the

project site. Capps' single generalized statement about values in the unspecified "neighborhood," and Vinal's comments that presence of the project would have influenced his decision to purchase property, thus were not "material," *see* Black's Law Dictionary at 991, to the issue of the effect of the project upon the value of adjoining and abutting property, and in any event did not constitute "substantial" evidence. Finally, although two residents of Pine Winds Drive who live across from the project site spoke at the hearing, they did not address property values.

In short, the statement in the Notice that the "value of adjoining or abutting property" would be "substantially injure[d]" is not supported by substantial evidence appearing in the record, *Ellis*, 111 N.C. App. at 162, 432 S.E.2d at 164, and the Board's denial of the application may not be upheld on that basis.

In the absence of "substantial evidence" in the "whole record," *id.*, to support either of the Board's bases for denial of petitioners' application as indicated in the Notice, and given the unchallenged determination that petitioners had complied with "all applicable requirements" of the Ordinance,

> the reviewing body must grant the [conditional] use permit; failure to do so when the applicant fully complies with specified standards is arbitrary as a matter of law,

C.C. & J. Enter., 132 N.C. App. at 553, 512 S.E.2d at 769; *see also* Ordinance, § 58(3) (if Board finds application is complete and complies with Ordinance, it "shall issue the permit").

Prior to concluding, we note the Board apparently anticipated that lack of appropriate evidence in the instant record might indeed require the result reached herein. Comments of several residents contained in the record reveal they had been advised of the necessity of making a presentation to the Board grounded upon factual evidence, but that they had declined to obtain appraisals or other documentation in support of their assertions. Although a few residents urged the Board to delay its decision to allow more evidence to be gathered, the vote was taken immediately. At the close of the public hearing, Alderman Graham Singleton warned residents who opposed the project and desired an immediate vote to "be careful what you ask for because you might get it." When asked to clarify his statement, he replied, "if the courts overturn our decision . . . [petitioners] will be allowed to build as presented in this package tonight."

To summarize, the Board improperly denied petitioners' application and the trial court erred in affirming that decision. The trial court's judgment is therefore reversed and this matter remanded to that court for subsequent remand to the Board with direction to issue the requested conditional use permit to petitioners. *See Clark*, 136 N.C. App. at 124, 524 S.E.2d at 52-53 (reversing Board's decision to deny application for special use permit and directing city to issue permit). Because of this disposition of petitioners' appeal, it is unnecessary to examine their remaining assignments of error.

Reversed and remanded with instructions.

Judges McGEE and HUNTER concur.

UNION TRANSFER AND STORAGE CO., INC., SMITH DRAY LINE & STORAGE CO., INC., EUGENE V. NIX AND DIXIE C. NIX D/B/A FOUR SEASONS MOVING COMPANY, AND WILE TRANSFER AND STORAGE CO., INC., INTERVENORS-PROTESTANTS-APPELLANTS v. NICOLAS WILLIAM LEFEBER D/B/A SELECT MOVING, PETITIONER-APPELLEE AND STATE OF NORTH CAROLINA EX REL. UTILITIES COMM'N, RESPONDENT-APPELLEE

No. COA99-1085

(Filed 1 August 2000)

Carriers— moving company—certificate of public convenience and necessity—service to Hispanic community

The Utilities Commission erred by granting a certificate of public convenience and necessity for petitioner to transport household goods throughout North Carolina where the conclusion that public convenience and necessity require the proposed service was unsupported by competent evidence in view of the entire record and the record was devoid of any findings that the proposed operation would not impair the operations of existing carriers contrary to the public interest. Petitioner's desire to serve the Hispanic community is commendable, but he failed to show that the moving needs of the Hispanic community were not being met by existing intrastate moving services.

Judge WALKER dissenting.

Appeal by intervenors from judgment entered 30 June 1999 by the North Carolina Utilities Commission. Heard in the Court of Appeals 18 May 2000.

Parker, Poe, Adams & Bernstein, L.L.P., by James C. Thornton and Jason J. Kaus, for intervenors-protestants-appellants.

No brief for petitioner-appellee.

No brief for respondent-appellee.

TIMMONS-GOODSON, Judge.

On 19 January 1999, Nicolas William Lefeber d/b/a Select Moving ("petitioner") filed an application for a certificate of public convenience and necessity with the North Carolina Utilities Commission ("the Commission"), seeking common carrier authority to transport Group 18-A household goods throughout the State of North Carolina.

Moving companies who had previously been authorized by the Commission to provide intrastate, long-distance moving services, namely Union Transfer and Storage Co., Inc., Smith Dray Line & Storage Co., Inc., Eugene V. Nix and Dixie C. Nix d/b/a Four Seasons Moving Company, and Wile Transfer and Storage Co., Inc. ("intervenors"), filed a joint protest and petition to intervene in the matter. The Commission granted their motion to intervene.

The following evidence was presented at the hearing before Hearing Examiner Barbara A. Sharpe. Petitioner worked as a florist for approximately forty-five years. While petitioner had provided local moving services in Florida in the mid-1970's for several years, he had no experience in providing statewide moving services in North Carolina or in any other state. At the time petitioner applied for a certificate, his moving equipment consisted of a 1979 Dodge van and moving dollies. Petitioner had no employees, office or storage facilities when he applied for the certificate, but he intended to acquire them.

Intervenors are sometimes idle due to a lack of demand for movers. They are capable of accommodating the demand for intrastate moving services in the Hendersonville area and have never turned away a customer as a result of communication problems.

The Hearing Examiner issued a recommended order denying petitioner's application on 28 April 1999. Petitioner filed exceptions and

the Commission heard oral arguments on the exceptions. On 30 June 1999, the Commission entered its final order, which included the following pertinent findings of fact:

> 4. [Petitioner] owns a 14½ foot van suitable for the movement of household goods along with dollies. He plans to purchase additional equipment and vehicles as needed. If this application is granted, [petitioner] will purchase the required liability and cargo insurance for his vehicle and file the required tariff of rates and charges. [Petitioner's] assets exceed liabilities.
>
> . . . .
>
> 6. [Petitioner] speaks Spanish and four other languages and will be of service, especially in the Hispanic community, as well as to any other citizen. [Petitioner] plans to advertise over the Spanish-speaking radio and in the Spanish newspaper.
>
> 7. Glen Ray Cantrell has been employed by the Hendersonville County Chamber of Commerce for 39 years. He is the Executive Director of the Committee 100, which is the economic development arm for the county. Because of Mr. Cantrell's position with the Chamber of Commerce, he is familiar with the general population and industry trends in Henderson County. Since 1990, the population in Henderson County has increased by approximately 13.5%, which would be in the top five counties in Western North Carolina in percentage of increase in population. Statistics indicate that retirees account for the greatest percentage of increase with the majority of retirees coming from out of state. The Hispanic population is the fastest growing population in the nonwhite category.
>
> 8. Alfredo M. Oviedo is Pastor of the Hispanic Baptist Mission and lives in Edneyville in Henderson County. The church is a Spanish speaking church, and he has pastored the church since December 1992. The church has 45 members with an average Sunday attendance of 100. Pastor Oviedo testified that the Spanish speaking population has increased in Henderson County and that people move from one side of the county to the other on a fairly frequent basis. He further testified that usually at the beginning the people who come to the county are mostly single men who come to work. After a few years, the men have stable work and bring their families to the county which requires a move to a different place where they would like to live. Sometimes

these people also move outside the county to other parts of the state, usually the Triangle (Raleigh, Durham, Chapel Hill) area. Besides the cultural shock which Hispanics who come to the county experience, language is also a barrier. On cross-examination, Pastor Oviedo stated that he was not aware of anyone being turned away by an existing mover in the area because of communication problems.

9. Daniel C. Gibson is retired and lives in Hendersonville. Prior to retirement he worked for First Union National Bank in Hendersonville for 38 years. Mr. Gibson first met [petitioner] in the early 1950's. [Petitioner] was one of his bank's customers, and [petitioner] regularly received large seasonal loans for his wholesale flower business. Mr. Gibson testified that [petitioner] always repaid the loans and always maintained good balances at the bank which indicated that he was a successful businessman.

10. Marie J. C. Lefeber is [petitioner's] wife and of Hispanic origin. If this application is granted, she plans to work in the office answering the telephone and taking orders for moves. Mrs. Lefeber speaks Spanish and socializes and interacts with other Hispanic [sic] speaking people in the area. This is one reason she and her husband want to offer moving services primarily to the Hispanic community.

11. Wayne Campbell is President of Union Transfer located in Asheville. . . . Mr. Campbell testified that the moving business is seasonal with the peak season being May to September in addition to certain times of each month. Conversely, there are off-peak times in which his company experiences idle equipment and employees.

12. In 1998, Union Transfer performed 85 intrastate moves, six of these moves were in the Hendersonville area. Mr. Campbell stated that he believes that another mover is not needed in the Hendersonville area. He also testified that he has never turned away a Hispanic customer because of communication problems and that most times the cost of the move is the problem. He also stated that his company is an agent for United Van Lines, and he has access to people at United Van Lines who speak different languages. Therefore, he does have access to someone when the need arises. On cross-examination, Mr. Campbell testified that he does not have any Hispanic employees but that he has actively been seeking some Hispanic employees for the past six months.

He further testified that approximately 10-15% of Union Transfer's moving business is intrastate, 50-60% is interstate, and the remainder is local intracity moves.

13. Patricia Nelson Schnyder is Sales Manager for Wile Transfer located in Hendersonville. . . . Wile Transfer is an authorized statewide goods mover . . . . Ms. Schnyder testified that Wile Transfer has moved people of Hispanic origin on a national basis to the Hendersonville area. She further testified that she has talked with people of Hispanic origin in the Hendersonville area who desire a local move. She experienced no communication problems mainly because the people either used an interpreter or knew enough English to communicate. Wile Transfer is an agent for Allied Van Lines and has access to an interpreter through them as needed. Ms. Schnyder did state, however, that it would be a time-consuming process to obtain an interpreter from Allied Van Lines.

Based on its findings of fact, the Commission made the following relevant conclusions of law:

[Petitioner], in addition to his own testimony, presented four witnesses who testified in support of his application. None of the witnesses, however, testified to a personal need for a present or future movement of household goods. . . .

. . . .

Endorsement and support of [petitioner] by supporting witnesses **does** assist the Commission in making its discretionary decision as to whether there is a sufficient nexus to establish public demand and need for [petitioner's] services. In a "free enterprise system" of doing business, if the Commission in its discretion, can establish such a nexus based on the facts, testimony, and evidence presented, then [petitioner] is deserving of a grant of authority and the opportunity to conduct his business. Also, there was no evidence offered of any merit upon questioning by the Commissioners during oral argument that by granting this [petitioner] authority **"would endanger or impair the operations of existing carriers contrary to the public interest."** Therefore, based upon the testimony as a whole, the Commission concludes that [petitioner] has sustained his burden of proof that public convenience and necessity require the proposed service in addition to existing authorized transportation service.

> The Commission concludes that [petitioner] has sustained his burden of proof and that public convenience and necessity require the proposed service in addition to existing authorized transportation service.

Based on its conclusions of law, the Commission rejected the recommended order and granted petitioner's application. Intervenors appeal.

On 30 September 1999, the North Carolina Court of Appeals ordered this matter consolidated with No. COA99-1020 pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

By their only assignment of error, intervenors argue that the Commission erred in granting petitioner's application for a certificate of public convenience and necessity. Specifically, intervenors argue that petitioner failed to show that public convenience and necessity required his proposed service for purposes of North Carolina General Statutes section 62-262(e). We agree.

Judicial review of an order of the Commission is governed by North Carolina General Statutes section 62-94(b), which provides:

> So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 62-94(b) (1999). The reviewing court must determine whether there is substantial evidence, in view of the entire record, in support of the position which the Commission adopted, regardless of whether evidence to the contrary exists. *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 355, 358 S.E.2d 339, 347 (1987). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Utilities Comm. v. Coach Co.*, 19 N.C. App. 597, 601, 199 S.E.2d 731, 733 (1973) (quoting *Consolidated Edison Co. v. National L. R. Bd.*, 305 U.S. 197, 229, 83 L. Ed. 126, 140 (1938)). As the Commission's decision is considered *prima facie* just and reasonable, N.C. Gen. Stat. § 62-94(e) (1999), it should be affirmed if supported by substantial evidence.

To obtain authorization to provide intrastate, long-distance moving services, an applicant must prove to the satisfaction of the Commission:

(1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service, and

(2) That the applicant is fit, willing and able to properly perform the proposed service, and

(3) That the applicant is solvent and financially able to furnish adequate service on a continuing basis.

N.C. Gen. Stat. § 62-262(e) (1999). In order to meet the burden imposed by North Carolina General Statutes section 62-262(e)(1), an applicant must establish that there is a "substantial public need" for their proposed service in addition to existing authorized services. *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 690, 28 S.E.2d 201, 203 (1943) (holding that the Commission properly denied the petitioner's application where the present intrastate carriers over the proposed route reasonably met existing transportation needs).

> [W]hat constitutes "public convenience and necessity" is primarily an administrative question with a number of imponderables to be taken into consideration, *e.g.*, whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest.

Id. While the approval of an application is not prohibited by the fact that competing carriers would be adversely affected by competition,

Utilities Comm. v. American Courier Corp., 8 N.C. App. 358, 366-67, 174 S.E.2d 814, 820 (1970), "if the proposed operation under the certificate sought would seriously endanger or impair the operations of existing carriers contrary to the public interest, the certificate should not be issued," *Utilities Comm. v. Coach Co.*, 4 N.C. App. 116, 124, 166 S.E.2d 441, 446 (1969) (remanding to the Commission for findings of fact regarding whether the granting of the application would endanger or impair the operations of existing carriers and whether the existing carriers could reasonably meet the public need). "The convenience and necessity required are those of the public and not of an individual or individuals." *Utilities Comm. v. Coach Co. and Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 52, 132 S.E.2d 249, 255 (1963) (citations omitted).

In the present case, petitioner presented the following evidence that there was a substantial public need for his proposed service. Petitioner and his wife speak Spanish and will be of service, especially in the Hispanic community. The population of Henderson County has increased since 1990, mainly due to retirees moving to the area from out of state. The Hispanic population is the fastest growing nonwhite population. Hispanic people move within the county on a fairly frequent basis and sometimes they move to other parts of the state. Language barriers and cultural shock present challenges to Hispanic people who have recently moved to this country.

We hold that the Commission's conclusion that public convenience and necessity require the proposed service is unsupported by competent evidence in view of the entire record. Petitioner failed to show that any individual required his service for a non-local, intrastate move. Indeed, the Commission stated in its conclusions of law that "[n]one of the witnesses . . . testified to a personal need for a present or future movement of household goods."

Additionally, while petitioner's desire to serve the Hispanic community is commendable, he failed to show that the moving needs of the Hispanic community were not being met by existing intrastate moving services. Petitioner's witness, Pastor Oviedo, stated that he was not aware of anyone being rejected by an existing mover because of communication barriers. Intervenors presented uncontroverted evidence that they had never refused a customer as a result of a language or cultural barrier and that they had access to an interpreter.

A showing that there has been a population increase with nothing more does not establish sufficient evidence of a substantial public need for petitioner's proposed service. This is especially true where the growth rate is largely due to retirees moving interstate, a population that petitioner could not serve even if his application were granted. Petitioner failed to present evidence regarding whether the existing authorized movers could accommodate any increase in demand for intrastate moving services which may have resulted from the population increase in Henderson County.

Finally, petitioner failed to present evidence on the issues of whether existing carriers could reasonably meet the need for intrastate moving services and whether granting his application would impair the operations of existing carriers contrary to the public interest. While intervenors did not have the burden of showing that the proposed service would seriously impair their operation, they presented undisputed evidence that they are sometimes idle due to a lack of demand for movers and that they are capable of accommodating the demand for intrastate moving services in the Hendersonville area.

We hold that the Commission's conclusions are not supported by the competent evidence in light of the whole record. The Commission's conclusions must be based on material and substantial evidence. As the record is devoid of any findings that the proposed operation would not impair the operations of existing carriers contrary to the public interest, the conclusion of the Commission is in error.

For the reasons stated herein, we find that the Commission erred in granting petitioner's application for a certificate of public convenience and necessity. The order of the Commission is therefore reversed.

Reversed.

Judge SMITH concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent from the majority opinion holding the Commission erred in granting petitioner's application. The appel-

lants-intervenors are existing carriers seeking to prevent the petitioner from obtaining common carrier authority to transport Group 18-A household goods throughout the State.

The majority cites to the three requirements an applicant must prove to the satisfaction of the Commission pursuant to N.C. Gen. Stat. § 62-262(e). The only one of the three at issue here is the following:

> (1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service.

N.C. Gen. Stat. § 62-262(e) (1999).

In reviewing a decision of the Utilities Commission, this Court's role is to determine whether the entire record supports the Commission's decision; and where there are two reasonably conflicting views of the evidence, this Court may not substitute its judgment for that of the Commission. *See State ex rel. Util. Comm'n v. Carolina Indus. Group*, 130 N.C. App. 636, 639, 503 S.E.2d 697, 699-700, *disc. review denied*, 349 N.C. 377, 525 S.E.2d 465 (1998). The determination is whether the Utilities Commission's findings and conclusion are supported by substantial, competent, and material evidence. *See State ex rel. Utilities Comm'n v. N.C. Gas Service*, 128 N.C. App. 288, 291, 494 S.E.2d 621, 624 (1998). Substantial evidence is defined as "more than a scintilla or a permissible inference," and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Utilities Comm. v. Coach Co.*, 19 N.C. App. 597, 601, 199 S.E.2d 731, 733 (1973), *cert. denied*, 284 N.C. 623, 201 S.E.2d 693 (1974). In determining whether a petitioner has presented substantial evidence in support of his position, our Supreme Court has stated the Commission may agree with the evidence of a single witness even though there may be opposing witnesses. *See State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987) (stating "the Commission may agree with a single witness—if the evidence supports his position—no matter how many opposing witnesses might come forward").

In *Utilities Comm. v. Coach Co. and Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 132 S.E.2d 249 (1963), cited by the majority, our Supreme Court addressed the issue of public convenience and necessity and stated:

> Whether there shall be competition in any given field and to what extent is largely a matter of policy committed to the sound judg-

> ment and discretion of the Commission. The Commission must maintain a reasonable balance to see that the public is adequately served and at the same time to see that the public and the public utilities involved are not prejudiced by the efforts which flow from excessive competition brought about by excessive services.

Id. at 51, 132 S.E.2d at 254-55 (citation omitted). Additionally, our Supreme Court held that "the facts in each case must be separately considered and from those facts it must be determined whether public convenience and necessity requires [sic] a given service to be performed or dispensed with." *Id.* at 52, 132 S.E.2d at 255. Furthermore, our Supreme Court stated:

> Upon the same facts we might have reached a different result. But it is not for this Court to find the facts or to regulate utilities. "The decisions of the Utilities Commission must be within the authority conferred by the Act, yet the weighing of the evidence and the exercise of judgment thereon as to transportation problems within the scope of its powers are matters for the Commission."

Id. at 54, 132 S.E.2d at 257 (citations omitted).

Here, the entire record reveals that the Commission's findings are supported by "such relevant evidence as a reasonable mind might accept as adequate" to support its conclusion that petitioner met his burden. *Coach Co.*, 19 N.C. App. at 601, 199 S.E.2d at 733.

HENRY J. MURPHY, PLAINTIFF-APPELLEE v. COASTAL PHYSICIAN GROUP, INC., DEFENDANT-APPELLANT

No. COA99-925

(Filed 1 August 2000)

Appeal and Error— appealability—interlocutory order—no substantial right

Defendant-employer's appeal from the trial court's grant of partial summary judgment in favor of plaintiff-employee as to each of defendant's counterclaims for breach of contract, breach of fiduciary duty, negligence, and wrongful attachment, is dismissed since: (1) it is an interlocutory order that does not address the claims in plaintiff's complaint regarding defendant's alleged

consummation of a transaction with another company entitling plaintiff to a transaction fee under the employment agreement; (2) there are no overlapping factual issues; (3) the order has not been certified by the trial court; and (4) the order does not affect a substantial right.

Judge GREENE dissenting.

Appeal by defendant from order entered 7 April 1999 by Judge E. Lynn Johnson in Durham County Superior Court. Heard in the Court of Appeals 25 April 2000.

Kilpatrick Stockton LLP, by W. Mark Conger, for plaintiff-appellee.

Moore & Van Allen, by Andrew B. Cohen, for defendant-appellant.

McGEE, Judge.

Henry J. Murphy (Murphy) worked with the international accounting firm of Arthur Anderson LLP for thirty-six years, including twenty-four years as a partner, before he retired in March 1996. At the time Murphy retired, he was the partner in charge of corporate recovery, primarily working with bankrupt and otherwise insolvent or distressed corporations. Between 1995 and 1996, Coastal Physician Group, Inc. (Coastal) lost approximately $258.3 million in revenues according to Murphy, and Coastal's board of directors (the board) sought Murphy's guidance. Murphy accepted a position on Coastal's board of directors in October 1996. Less than one month later, Murphy was asked to join Coastal as its interim president and chief executive officer (CEO), which he accepted.

Murphy and his attorney negotiated a fourteen-page employment agreement (the agreement) with Coastal's board of directors. The agreement, made effective on 1 November 1996, provided for an initial term of employment ending on 28 February 1997, which could be renewed. The agreement provided that Murphy "shall manage and operate Company as President and Chief Executive Officer pursuant to the By-Laws of Company and in accordance with the contractual obligations of Company as they existed on the Employment Date." More specific duties were to select and employ senior management and professionals, furnish information to the board, and search for a permanent CEO. Murphy's compensation was to be a $30,000 monthly

salary during the initial term, a $100,000 signing bonus, and a choice between either stock appreciation rights or any applicable fee bonus. A subparagraph defining a possible "Transaction Fee" payable to Murphy provides that

> [i]n the event Company consummates a Transaction (as herein defined) during the term of this Agreement or within six (6) months from the date of termination of this Agreement . . . Company shall pay, or cause to be paid, to Executive, at the time the Transaction is consummated, a payment equal to one-half of one percent (0.5%) of the fair market value of the acquisition price paid by the acquiring entity or entities in connection with the Transaction. As used herein, "Transaction" means any one or more transactions or series of transactions which are conditioned on each other or which occur or are planned or are committed to occur at substantially the same time and which, taken together result in either (i) merger or consolidation where Company is not the consolidated or surviving company or where the shareholders of Company prior to the merger or consolidation do not own a majority of the shares of the consolidated or merged company, (ii) a transfer of over fifty percent (50%) of the assets of Company, or (iii) a transfer or issuance of over fifty percent (50%) of the Common Stock of Company.

Murphy filed a verified complaint against Coastal on 30 July 1997. Murphy contends that during his tenure as president and CEO he "was continually involved in negotiating the restructure of Coastal's debt with the company's existing bank lending institutions, and negotiating potential transactions between various financing sources and Coastal." He further contends that the board authorized him "to be involved on an on-going basis in marketing Coastal's business assets for sale[,]" whereby Murphy "pursued practical and available avenues for restructuring, refinancing, selling or otherwise improving the cash flow position and resolving the cash flow crisis then existing at Coastal."

Murphy alleges that during April, May and June 1997, Coastal "consummated a transaction" with National Century Financial Enterprises, Inc. (National) in which National purchased all of Coastal's accounts receivable for an acquisition price of $151 million. The alleged transaction between Coastal and National occurred within six months of the agreement expiration date of 28 February 1997 and constituted "significantly more than fifty percent of Coastal's assets" according to Murphy, thereby entitling him to a

transaction fee of $755,000. On 25 April 1997, Murphy gave notice to Coastal of his election to receive the transaction fee. Coastal did not respond. Coastal denies that it sold $151 million of accounts receivable at the time of the transaction with National, or that the amount actually sold constituted fifty percent of its assets.

Along with his verified complaint, Murphy also filed a motion for attachment of funds in a bank account held by Coastal in an amount of $755,000. The trial court signed an order of attachment on 17 June 1997, but dissolved the attachment on 30 July 1997 upon motion by Coastal. On 31 July 1997, Coastal filed an amended answer and counterclaims asserting breach of contract, breach of fiduciary duty, negligence and wrongful attachment. The trial court granted partial summary judgment in favor of Murphy as to each of Coastal's counterclaims on 7 April 1999. Coastal appeals.

Murphy filed a motion to dismiss Coastal's appeal as interlocutory on 25 August 1999, and Coastal filed a responsive motion on 22 December 1999. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Because the trial court's order dismissed Coastal's counterclaims against Murphy but did not address the claims in Murphy's complaint, the order is interlocutory.

Generally, there is no right of immediate appeal from an interlocutory order. N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990); *see also Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. The reason for this rule is "to prevent fragmentary, premature and unnecessary appeals" by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts. *Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). Indeed, "[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382.

There are two circumstances, however, in which a party may appeal an interlocutory order. *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 490, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). The first requires certification by the trial judge that there is not just reason to delay the appeal. N.C.R. Civ. P.

54(b). The second is where the order appealed from (1) affects a substantial right, (2) in effect determines the action and prevents a judgment from which appeal might be taken, (3) discontinues the action, or (4) grants or denies a new trial. N.C. Gen. Stat. §§ 1-277 (1996) and 7A-27(d) (1995). Coastal argues in favor of the latter exception, specifically that the trial court's order deprives Coastal of a substantial right. The substantial right must be lost, prejudiced, or less than adequately protected absent immediate review. *See J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6-9, 362 S.E.2d 812, 816-17 (1987) (providing thorough discussion emphasizing this condition and noting cases that erroneously omitted it).

Our Courts have found a substantial right would be lost absent immediate review when the dismissed claims and the remaining claims are dependent upon the same set of facts or have "overlapping factual issues," *Davidson*, 93 N.C. App. at 26, 376 S.E.2d at 492. If the appellant is not allowed to appeal the dismissal of a claim until after trial, and that dismissal is then found to have been in error, then the appellant could assert the claim again in a separate action. *See Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). This would allow the appellant to potentially obtain a judicial result different from that obtained on the claims tried in the prior case, which shared the same factual issues, and this would be unfair to the other party. *See id.* By this reasoning, Coastal claims the issues in its counterclaims factually overlap the issues in Murphy's complaint, creating a substantial right that might be lost if Coastal is not allowed to immediately appeal the dismissal of its counterclaims.

The claim in Murphy's complaint is that Coastal consummated a transaction with National in an amount and at a time that entitled Murphy to a transaction fee pursuant to the clear provisions of the employment agreement. *See McDowell v. McDowell*, 61 N.C. App. 700, 705, 301 S.E.2d 729, 732 (1983) (as a party consents to bind itself, so shall it be bound). In order to prevail on this claim, Murphy must prove that a transaction occurred within six months of the day his employment ended, and that the transaction resulted in the transfer of more than fifty percent of Coastal's assets. The performance of his duties as an employee is irrelevant.

Coastal's counterclaims are that Murphy wrongfully attached funds belonging to Coastal and during his employment acted in such a way as to make him liable for negligence, breach of contract, and breach of fiduciary duty. To prove wrongful attachment, Coastal must demonstrate among other facts, that Murphy did not have probable

cause to believe he had grounds for attaching Coastal's property and did so maliciously. *See Brown v. Estates Corp.*, 239 N.C. 595, 601, 80 S.E.2d 645, 650-51 (1954). To prevail on its claim for negligence, Coastal must prove Murphy breached a legal duty to Coastal which proximately caused injury. *See Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 18, 423 S.E.2d 444, 452 (1992). As for breach of contract, Coastal must show Murphy failed to perform duties assigned to him under the employment agreement. *See Gore v. Ball, Inc.*, 279 N.C. 192, 199, 182 S.E.2d 389, 393 (1971). Finally, Coastal must prove Murphy failed to act in the best interest of Coastal during his employment in order to prove a breach of fiduciary duty. *See Bumgarner v. Tomblin*, 92 N.C. App. 571, 576, 375 S.E.2d 520, 523, *disc. review denied*, 324 N.C. 333, 378 S.E.2d 789 (1989).

In Coastal's responsive motion, it proffers seven "overlapping factual issues," *see Davidson*, 93 N.C. App. at 26, 376 S.E.2d 488 at 492, in its counterclaims and Murphy's claims: (1) issues arising out of Murphy's employment contract, (2) the parties' performance of their respective obligations under that contract, (3) the consummation of the National financing transaction, (4) the intention of the parties when entering into the employment agreement, (5) the extent to which the parties satisfied their contractual obligations, (6) Murphy's claim that he is entitled to a transaction fee, and (7) Coastal's claim that Murphy breached his contractual, fiduciary and common law obligations. Reviewing Murphy's claim for a transaction fee and Coastal's counterclaims, we find none of these issues to be dependent on the same set of facts or to have "overlapping factual issues."

The first "overlapping factual issue" argued by Coastal does not identify any certain issue but rather the source of several issues. The second is relevant only to Coastal's counterclaims, and the third is relevant only to Murphy's claim. The fourth is irrelevant to Murphy's claim because the transaction fee language in the agreement is not ambiguous. *See, e.g., Grocery Co. v. R.R.*, 215 N.C. 223, 225, 1 S.E.2d 535, 536 (1938) (where terms of contract are unambiguous, its meaning must be determined from the writing itself). The fifth issue is a restatement of the second, the sixth is relevant only to Murphy's claim, and the seventh is relevant only to Coastal's counterclaims.

Nevertheless, Coastal argues that *Narron v. Hardee's Food Systems, Inc.*, 75 N.C. App. 579, 331 S.E.2d 205, *disc. review denied*, 314 N.C. 542, 335 S.E.2d 316 (1985) is "most analogous" to the case before us and controls the determination of this case. In *Narron*, the defendant employer discovered that $3,500 was missing from the

restaurant that was managed by the plaintiff, who was suspended for more than six months and then discharged for cause. The plaintiff had accumulated vacation pay under a personnel policy that did not expressly state he forfeited such pay upon discharge, as required by the Wage and Hour Act, to enforce such forfeiture. The policy, however, was discontinued during the month plaintiff was discharged and was replaced by a policy expressly stating that termination for cause would result in forfeiture of unused vacation pay. *Narron*, 75 N.C. App. at 582, 331 S.E.2d at 207. The plaintiff sued for his unused vacation pay under the Wage and Hour Act.

In its answer, the defendant argued it had complied with the Act, and then asserted a counterclaim for wrongful conversion of company funds or the negligent loss of such funds. The trial court entered summary judgment in favor of the defendant on the plaintiff's claim and stated in its order that the remaining counterclaim was unaffected by such ruling. The plaintiff appealed from the interlocutory summary judgment order, which our Court did not dismiss because "a 'substantial right' of the plaintiff [was] affected[.]" *Narron*, 75 N.C. App. at 581, 331 S.E.2d at 206 (citing *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976)). Our Court held that the trial court had erred in granting summary judgment because a genuine issue of material fact existed as to whether the plaintiff was due vacation pay earned under the earlier policy. *Id.* at 583, 331 S.E.2d at 208.

Not only are there important factual distinctions between the present case and *Narron*, but also, without any discussion, *Narron* cited for support *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976), which "apparently merged two separate grounds for appealing interlocutory orders" in stating that the summary judgment order " '*in effect, determine[d] the claim* [and] *thus* affect[ed] a substantial right[.]' " *J & B Slurry*, 88 N.C. App. at 8, 362 S.E.2d at 816-17 (emphasis in original) (disapproving of the merging of independent grounds for appeal under G.S. §§ 1-277(a) and 7A-27(d)). This suggests the *Narron* Court heard the appeal on the ground that the summary judgment in effect determined the plaintiff's claim, but used the term "substantial right" to describe that separate ground.

Second, and more significant, the *Nasco* Court relied on the case of *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976). The *Oestreicher* Court determined that regardless of the nature of the issues involved, a plaintiff had a substantial right to have all his causes against the same defendant tried at the same time by the same

judge and jury. *See Oestreicher*, 290 N.C. at 130, 225 S.E.2d at 805; *see also Moose v. Nissan of Statesville*, 115 N.C. App. 423, 426, 444 S.E.2d 694, 696 (1994) (analyzing *Oestreicher*). However, two years later in *Waters*, 294 N.C. at 207, 240 S.E.2d at 343, our Supreme Court repeated the requirement that the right in question would be lost absent immediate review. *See also Moose*, 115 N.C. App. at 426-27, 444 S.E.2d at 697. The Court then rejected an appealability argument based solely on the *Oestreicher* right to determine all claims in the same proceeding, *see Green*, 305 N.C. at 606, 290 S.E.2d at 595, and reaffirmed that decision in *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408-09 (1982). *See J & B Slurry*, 88 N.C. App. at 6-7, 362 S.E.2d at 816 (analyzing the cases).

Our Court in *J & B Slurry* recognized an "apparent doctrinal inconsistency concerning the requirements for appealing interlocutory orders [which] may produce irreconcilable results in cases which . . . include counterclaims." *Id.* at 8, 362 S.E.2d at 817. We added that "the *Oestreicher/Nasco* and *Green/Bernick* lines of authority produce opposite results" and decided to "adopt the latter decisions' longer established, and more recently affirmed, rationale[.]" *Id.* at 8-9, 362 S.E.2d at 817. Later in *Moose*, our Court stated that "it is time to establish the requirements contained in *Green* as controlling in its redefining of *Oestreicher* [and its progeny]." *Moose*, 115 N.C. App. at 427, 444 S.E.2d at 697. Therefore, we reject Coastal's argument relying on *Narron*.

Rather, we find support for our Court's determination in the present case in *T'ai Co. v. Market Square Limited Partnership*, 92 N.C. App. 234, 373 S.E.2d 885 (1988), a case cited by Murphy in his motion. In *T'ai*, the plaintiff sued the defendants for compensatory and punitive damages alleging breach of contract, wrongful interference with contract, fraud, conversion and unfair trade practices. The defendants who answered denied these claims and counterclaimed for attorney's fees, alleging the plaintiff's claims were frivolous, malicious and without merit. *T'ai*, 92 N.C. App. at 234, 373 S.E.2d at 885-86. They also moved for summary judgment, which the trial court granted. The plaintiff appealed, and our Court held that the order granting summary judgment for the defendants was not appealable before the counterclaim for attorney's fees had been adjudicated by the trial court. *Id.* at 236-37, 373 S.E.2d at 886-87 (relying on *Green*, *Bernick* and *J & B Slurry*).

Our sole question in *T'ai* was whether the interlocutory order affected a substantial right, for we said clearly it did not "[i]n effect

determine[] the action[,]" or satisfy any other statutory ground under N.C. Gen. Stat. § 7A-27(d) (1986). *Id.* at 235, 373 S.E.2d at 886. *Compare Nasco*, 291 N.C. at 148, 229 S.E.2d at 281 (improperly blending these two concepts). Our Court then noted that the substantial right "most often addressed is the right to avoid two separate trials on the same issues." *T'ai*, 92 N.C. App. at 236, 373 S.E.2d at 886. " '[T]here is ordinarily no possibility of inconsistent verdicts or other lasting prejudice where trial of defendant's counterclaim before appeal will not determine any issues controlling the potential trial of plaintiff's claims after appeal.' " *Id.* (citation omitted). By analogy to *T'ai*, in which the plaintiff could not appeal the order of summary judgment until adjudication of the defendants' counterclaims, in this case Coastal may not appeal the order of partial summary judgment against its counterclaims until adjudication of Murphy's cause of action.

We find no overlapping factual issues between Murphy's complaint and Coastal's counterclaims, and we do not believe the order appealed from deprives Coastal of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. The trial court's order for partial summary judgment in favor of Murphy as to Coastal's four counterclaims is not excepted from the general rule that an interlocutory order is not immediately appealable, and therefore we grant Murphy's motion to dismiss Coastal's appeal.

Dismissed.

Judge EDMUNDS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The law with respect to whether an interlocutory appeal affects a substantial right is best summarily stated as follows: "so long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined." *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989).

In this case, the summary judgment finally determined Coastal's counterclaims. I also believe the complaint and counterclaims present "overlapping factual issues" in that the claims all revolve around the construction and performance of the 1 November 1996 "EMPLOYMENT AGREEMENT" (the Agreement). For example, the complaint sought and Murphy received an attachment of certain proceeds pursuant to the Agreement;[1] whereas Coastal's answer asserts a counterclaim alleging the attachment of those proceeds was wrongful.

Accordingly, Coastal's current appeal of the trial court's order granting Murphy's summary judgment motions, although interlocutory, affects a substantial right. I, therefore, would allow the appeal.

STATE OF NORTH CAROLINA v. TIMOTHY OBER THOMPSON AKA TENNIS THOMPSON

No. COA99-687

(Filed 1 August 2000)

1. Evidence— child sexual abuse—prior acts against victim—common plan or ongoing scheme—remoteness

The trial court did not err in a prosecution for first-degree statutory rape, taking indecent liberties, and other offenses by admitting alleged sexual acts committed against the victim 7 and 2 years before the first offense in this action. The evidence was admissible to show a common plan or ongoing scheme whereby defendant would wait until the victim's mother was gone, send the siblings upstairs, and perform sexual acts against the victim. The acts were not too remote in time in that the evidence reflected a continuous pattern from the time the victim was 5 until the offenses alleged in this action; a five-year gap in continuity occurred because defendant had no opportunity to be alone with the victim during this time, not because the common plan or scheme had ceased.

2. Evidence— child sexual abuse—physical abuse of siblings and pet—victim's state of mind

The trial court did not err in a prosecution for first-degree statutory rape, indecent liberties, and other offenses by admitting

1. This order of attachment was subsequently dissolved.

evidence of defendant's prior physical abuse of the victim's siblings and the family cat, but only because the abuse was in the victim's presence and defendant specifically made her state of mind relevant. Evidence of physical abuse or abuse of animals in cases involving only sexual abuse should be scrutinized carefully by the trial judge.

3. Discovery— exculpatory evidence not disclosed—DSS and medical records—in camera review by trial court

The trial court did not violate *Brady v. Maryland*, 373 U.S. 83, in a prosecution for first-degree statutory rape, indecent liberties, and other offenses by failing to require the State to disclose to defendant DSS and medical records as exculpatory evidence where the trial court followed procedural mandates for in camera review and sealing the DSS records, the only potentially exculpatory information in those records had already been introduced, and, with respect to the medical records, defendant did not show a substantial basis for claiming materiality so as to warrant an in camera review. Asking a defendant to affirmatively establish that a piece of evidence not in his possession is material might be a circular impossibility, but a substantial basis for believing such evidence is material is required to prevent unwarranted fishing expeditions.

4. Criminal Law— judge's comments—trial not rushed

A defendant in a prosecution for first-degree statutory rape, indecent liberties, and other offenses was not deprived of a fair trial by the judge rushing the proceedings where the prosecutor had a personal commitment on the following Monday and any effort to finish the trial by Friday was to accommodate her, defense counsel agreed that the trial would finish by then, and the trial judge emphasized to both defendant and the jury on at least two occasions that the Friday deadline was not rigid and set in stone.

5. Evidence— recross examination denied—reading previously admitted evidence

The trial court did not err in a prosecution for first-degree statutory rape, indecent liberties, and other offenses by not permitting defendant to cross-examine the victim a second time after she read on redirect a story she had written for her therapist about her abuse where the story had been admitted during the initial direct examination and defense counsel had cross-examined

her about the story. Simply having her read the evidence on redirect did not elicit new matter.

6. Evidence— rape shield statute—medical DSS records—sexual act involved in offense—accusations

There was no prejudicial error in a prosecution for first-degree statutory rape, indecent liberties, and other offenses where the trial court erroneously invoked the rape shield statute to prevent defendant from introducing the victim's medical records, which indicated that defendant's "partner" had been treated for gonorrhea, and to prevent defendant from questioning whether the victim's DSS records included any accusations of people other than defendant or false accusations. The medical records concerned the direct sexual act for which defendant was on trial, not some other act in defendant's history, and the line of questioning about the DSS records dealt with accusations, not sexual activity, so that Rule 412 did not operate as a shield; however, the questions were irrelevant because the medical records did not identify the "partner" and it was obvious that the victim had a sexual connection, and no evidence at trial suggested that she had ever made false accusations.

7. Sentencing— consecutive sentences—findings not required

The trial court did not err when sentencing defendant for first-degree statutory rape, indecent liberties, and other offenses by imposing consecutive sentences without findings as to why he was using consecutive sentences. The imposition of consecutive sentences is neither violative of the Eight Amendment nor the state's Fair Sentencing Act, and there was no abuse of the court's discretion in light of the sheer brutality of the sexual acts committed here. Changing the statutes to require findings would be a question for the legislature.

Appeal by defendant from judgments entered 2 March 1998 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 8 May 2000.

Attorney General Michael F. Easley, by Assistant Attorney General, Sylvia Thibaut, for the State.

Eagan & Eagan, by Thomas H. Eagan, for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 23 February 1998 session of Durham County Superior Court on two counts of first-degree statutory rape, one count of statutory rape of a person fourteen years of age, one count of first-degree statutory sex offense, and three counts of taking indecent liberties with a minor. The alleged offenses occurred in December 1993, January 1994, and February 1996. The jury returned a verdict of guilty as to all charges, and defendant now appeals.

At trial, the State presented several witnesses who testified defendant sexually abused N beginning when she was five years old. N herself specifically testified that defendant sometimes forced her to perform fellatio upon him up to three times a week. At that time, defendant was living in the same household with N, N's mother, and N's siblings. Sometime shortly thereafter, N moved to live with defendant's mother. When N was ten years old, she moved back in with her mother, her siblings, and defendant. N testified that, upon her moving back, defendant immediately began physically abusing her; his sexual abuse of her resumed a few months later. Other witnesses for the State testified defendant beat N with boxing gloves, twisted and broke her arm, fractured her ribs, put a knife to her throat, put a gun to her head, and even threatened to kill her. When the Department of Social Services initially investigated, N did not report defendant for fear of being beaten.

The State's evidence further established that, in December of 1993, when N was twelve years old, defendant showed her a pornographic video, assaulted her with a dildo, and then engaged in intercourse with her. Defendant and N again had intercourse in January of 1994. N ran away from home in February of 1996, but later got into defendant's cab, went to a hotel, and had intercourse with him, after which he gave her money. A Durham police officer located a receipt, introduced at trial, that indicated defendant and N had stayed at the hotel on 16 February 1996.

Several witnesses at trial, including N and one of her brothers, testified that defendant also physically abused N's siblings and the family cat. Specifically, the evidence showed that defendant hit the siblings with boxing gloves, forced them to fight each other with boxing gloves, beat one brother with a cane, burned the leg of another brother by igniting lighter fluid on it, and strangled and drowned the family cat. This abuse occurred in N's presence.

[1] In his first four assignments of error, defendant contends the trial court admitted improper evidence in violation of Rule 404(b). Specifically, he contests admission of the alleged sexual acts committed on N when she was five years old, some seven years before the first charged offense here, and sexual acts committed on N when she was ten years old, some two years before the first charged offense. Defendant also contests the evidentiary basis for admitting his alleged physical abuse of N's siblings and his alleged abuse of the family cat.

Our Supreme Court has clarified that Rule 404(b) is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). We conclude the contested evidence here was admissible for purposes other than merely to show defendant's propensity to commit sex crimes of the type charged.

We begin with the evidence of defendant's prior sexual abuse of N. Our state is quite liberal with respect to the admission of evidence of other sex offenses when those offenses involve the same victim as the victim of the offense for which defendant is being charged. *State v. Miller*, 321 N.C. 445, 454, 364 S.E.2d 387, 392 (1988). Here, we hold that the evidence was admissible to show a common plan or ongoing scheme by defendant of sexually abusing N.

"When evidence of the defendant's prior sex offenses is offered for the proper purpose of showing plan, scheme, system, or design . . . the 'ultimate test' for admissibility has two parts: First, whether the incidents are sufficiently similar; and second, whether the incidents are too remote in time." *State v. Davis*, 101 N.C. App. 12, 18-19, 398 S.E.2d 645, 649 (1990). As to the first part of that test, the evidence at trial demonstrated an ongoing pattern whereby defendant would wait until N's mother was gone, send N's siblings upstairs, and then proceed to perform sexual acts on N, or force her to perform sexual acts upon him. N even testified that she recognized this pattern:

Q: Did you have any sense or feeling, did you know before the sexual abuse would happen that it was about to happen?

A: Yes, I did.

Q: Was there a pattern or some signals?

A: Yes.

Q: What were the patterns or indications that would let you know that you were about to have to perform oral sex with him again?

A: Would send my mother away and if the children were downstairs he'd send them upstairs, vice versa.

(1 Tr. at 78-79.) *See also State v. Spaugh*, 321 N.C. 550, 556, 364 S.E.2d 368, 372 (1988) ("[T]he victim's testimony clearly tended to establish the relevant fact that the defendant took sexual advantage of the availability and susceptibility of his young victim at times when she was left in his care."); *State v. Arnold*, 314 N.C. 301, 305, 333 S.E.2d 34, 37 (1985) ("This testimony clearly tended to prove that the defendant engaged in a scheme whereby he took sexual advantage of the availability and susceptibility of his young nephews each time they were left in his custody."); *State v. Summers*, 92 N.C. App. 453, 460, 374 S.E.2d 631, 635 (1988) ("[The evidence] tends to establish a plan or scheme by defendant to sexually abuse the victim when the victim's mother went to work . . . .").

With regard to the second part of the test, defendant contends the alleged prior acts were too remote in time. We disagree. "When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." *State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989). The evidence at trial reflects a continuous pattern of sexual abuse, beginning when N was five years old and continuing until the date of the alleged offenses here. Although there was a five-year gap in this continuity (from the time N was five years old until the time she was ten years old), the evidence at trial suggests this gap was not because defendant's common plan or scheme had ceased, but because he had no opportunity to be alone with N during this period of time. As this Court has previously stated, "When there is a period of time during which there is no evidence of sexual abuse, the lapse does not require exclusion of the evidence if the defendant did not have access to the victim[] during the lapse." *State v. Frazier*, 121 N.C. App. 1, 11, 464 S.E.2d 490, 495 (1995), *aff'd*, 344 N.C. 611, 476 S.E.2d 297 (1996). Once N moved back in with defendant, the pattern of sexual abuse upon her almost immediately resumed. Accordingly, we hold that the evidence of prior sexual abuse was not too remote in time as to warrant its exclusion. *See also State v. Riddick*, 316 N.C.

127, 134, 340 S.E.2d 422, 427 (1986) (allowing evidence despite six-year gap because the gap was due to defendant's incarceration); *State v. Jacobs*, 113 N.C. App. 605, 611-12, 439 S.E.2d 812, 815-16 (1994) (allowing evidence despite gap when the gap was due to defendant's lack of access to the victims); *State v. Davis*, 101 N.C. App. 12, 20, 398 S.E.2d 645, 650 (1990) (allowing evidence despite ten-and-a-half year gap because defendant spent most of this time in prison).

[2] We next consider whether the trial court improperly admitted the evidence of defendant's prior physical abuse of N's siblings and his physical violence against the cat. We again emphasize that "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). Significantly, although this alleged abuse was committed on N's siblings and pet (as opposed to N herself), it occurred *in N's presence.* N testified that she saw defendant beat her siblings several times with a cane and with boxing gloves. She also testified that defendant strangled and drowned their cat in her presence.

In sex abuse cases, the victim's state of mind can be relevant. *State v. Bynum*, 111 N.C. App. 845, 849, 433 S.E.2d 778, 780-81 (1993). When it is relevant, any evidence tending to show the victim is afraid of her abuser, or evidence explaining why the victim never reported the sexual incidents to anyone, is admissible. *Id.* at 849, 778 S.E.2d at 781; *State v. Barnes*, 77 N.C. App. 212, 216, 334 S.E.2d 456, 458 (1985). At trial, defendant relied heavily on N's failure to report the sexual abuse in suggesting that such abuse never in fact occurred. By bringing forth this defense, defendant thereby specifically made N's state of mind relevant. The State could therefore introduce any evidence tending to explain N's state of mind. The evidence of physical abuse and animal abuse here did just that: it tended to explain N's fear of defendant and why she never reported all the incidents of sexual abuse. N even specifically testified that she never reported the sexual abuse because, in light of all the other abuse that she witnessed, she knew he would beat her if she did report it.

We do express caution with a trial court's admitting evidence of animal abuse and/or physical abuse in cases only involving sex abuse. Such evidence must be relevant, and being lewd and despicable does not necessarily make it relevant. Furthermore, such evidence has the potential of being highly prejudicial to a defendant and thus should be scrutinized carefully by the trial judge. We emphasize that the *only* reason the evidence is admissible here is because the physical and

animal abuse was done in N's presence and because defendant specifically made N's state of mind relevant. To the extent evidence of physical and/or animal abuse not done in N's presence was admitted, such admission was error, but would not have changed the outcome so as to require a new trial. We therefore reject defendant's first argument.

[3] In his next assignment of error, defendant claims the State failed to turn over certain exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). In particular, he points to a portion of N's medical records and her Department of Social Service ("DSS") records. We find no error.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Id.* at 87, 10 L. Ed. 2d at 218. Evidence is material if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *U.S. v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985). When a defendant makes a specific request for certain evidence that is material and exculpatory, the trial judge must perform an *in camera* inspection of this evidence to determine whether it in fact should be turned over to the defendant. *State v. Hardy*, 293 N.C. 105, 127-28, 235 S.E.2d 828, 842 (1977). If the trial judge rules against defendant after making this inspection, he should then seal the evidence so it can be placed in the record for appellate review. *Id.* at 128, 235 S.E.2d at 842.

Here, the trial judge viewed N's DSS records *in camera* and concluded they contained no exculpatory evidence that was material to defendant at trial. He then sealed these records for our appellate review. He thus complied with the procedural mandates of *Hardy*. We have reviewed the DSS records ourselves and agree with the trial judge. The only potentially exculpatory information contained in the records involves N's mother's denial that her children were being abused by defendant and N's own initial denial that she was being abused by him. As evidence of these denials was already introduced by defendant at trial, the DSS records contained no "new" material evidence that warranted their being turned over to defendant.

With respect to N's medical records, however, the trial judge never performed an *in camera* inspection nor sealed the records for

appellate review. But just because defendant asks for an *in camera* inspection does not automatically entitle him to one. Defendant still must demonstrate that the evidence sought to be disclosed might be material and favorable to his defense. *See State v. Phillips*, 328 N.C. 1, 18, 399 S.E.2d 293, 301 (1991) ("A judge is required to order an *in camera* inspection and make findings of fact concerning the evidence at issue only if there is a possibility that such evidence might be material to guilt or punishment and favorable to the defense."); *see also U.S. v. Agurs*, 427 U.S. 97, 106, 49 L. Ed. 2d 342, 351 (1976) (stating that an *in camera* inspection is required if the evidence is material, or "if a substantial basis for claiming materiality exists"). Thus, although asking defendant to affirmatively establish that a piece of evidence not in his possession is material might be a circular impossibility, we at least require him to have a substantial basis for believing such evidence is material. Otherwise, defendant would be able to waste the time and resources of our judicial system by forcing unwarranted fishing expeditions. Here, in referring to the medical records sought, defense counsel admitted to the trial judge, "[W]e are not specifically aware of any basis to say that there is exculpatory information there." (1 Tr. at 10.) Given this admission, defendant has not shown a substantial basis for claiming materiality so as to warrant *in camera* review of N's medical records.

[4] Next, defendant argues he was deprived of his right to a fair trial because the judge unnecessarily rushed the proceedings. "Court proceedings should not be hurried in such a manner as to deprive a litigant of his rights, but the court should see that the public time is not uselessly consumed." *State v. Davis*, 294 N.C. 397, 402, 241 S.E.2d 656, 659 (1978). Here, defendant points to three remarks made by the trial judge allegedly illustrating his intent to finish the trial by Friday of the first week at all costs. First, immediately after the jury was empaneled, the judge stated, "I'm going to try to get this case done by Friday. I don't know if I can, do the best I can." (1 Tr. at 49.) Second, the following dialogue occurred between the trial judge and the alternate juror regarding being able to finish by Friday:

> JUROR: With all due respect my concern is if we're all planning our Fridays I'm not sure that the defendant is going to get a fair discussion and that concerns me.
>
> COURT: He will. He will. That's what my job is.
>
> JUROR: I'm concerned we're all planning Friday out. That just concerns me.

COURT: Believe me, [defendant] was the first person I talked to. Somebody else have a concern?

(No response.)

(2 Tr. at 52-53.) Third, during the charge conference (and thus outside the presence of the jury), the trial judge stated, "I want a reason why we're doing it [giving the jury a certain instruction]. We've got to finish this trial sometime today. I got to go through and pull all these instructions and put them together." (3 Tr. at 66).

We do not believe the above comments illustrate any intent on the part of the trial judge to unfairly rush through defendant's trial. The prosecutor had a personal commitment on the following Monday; any effort to finish the trial by that Friday were seemingly to accommodate her. Defense counsel even agreed that the trial would finish by then. More important, however, the trial judge emphasized to both defendant and the jury on at least two occasions that the Friday deadline was not rigid and set in stone, but would depend on several factors. We therefore conclude that the trial judge did not act inappropriately in his time management of the trial.

[5] Defendant also contends the trial court erred by refusing to allow him to cross-examine N a second time. On re-direct, N read to the jury "My Nightmare," a story she wrote for her therapist that recounted the sexual abuse she had experienced. Defendant then sought to re-cross-examine N about some particulars of this story. The trial court denied defendant's request.

Once a witness has been cross-examined and reexamined, counsel does not have the right to a second cross-examination unless the re-direct examination brings forth new matter. *State v. Moorman*, 82 N.C. App. 594, 600, 347 S.E.2d 857, 860 (1986). Here, although "My Nightmare" was not actually read by N until re-direct, it was introduced by the State into evidence during N's initial direct examination. By simply having her read already-admitted evidence on re-direct, the State thus did not elicit any "new matter." When no new matters have been introduced, allowance for any re-cross-examination is left to the sound discretion of the trial court. *Id.* Here, defense counsel had the opportunity to, and did in fact, cross-examine N about several things in her story, as well as certain things noticeably absent from it. By refusing to allow a second such cross-examination, we cannot say the trial court abused its discretion.

[6] Next, defendant claims the trial court erred by invoking the rape shield statute to prevent him from attacking N's credibility. N testified that defendant gave her gonorrhea through unprotected sex. On cross-examination, defendant sought to introduce certain medical records of N that stated her "partner" had been treated for gonorrhea as well. Defendant tried to use these records to suggest N's "partner" was someone other than defendant. The trial court refused this request, concluding that the records were inadmissible under Rule 412. Defendant also tried to question Willie Gibson, a DSS social worker, as to whether N's DSS records included any accusations by her of people other than defendant abusing her, or included any accusations that turned out to be false. The trial court prohibited this line of questioning as well, again invoking Rule 412.

The rape shield statute, codified in Rule 412 of our Rules of Evidence, is only concerned with the *sexual activity* of the complainant. *State v. Guthrie*, 110 N.C. App. 91, 93, 428 S.E.2d 853, 854 (1993). Accordingly, the rule only excludes evidence of the actual sexual history of the complainant; it does not apply to false accusations, *State v. McCarroll*, 109 N.C. App. 574, 578, 428 S.E.2d 229, 231 (1993), or to language or conversations whose topic might be sexual behavior, *State v. Durham*, 74 N.C. App. 159, 167, 327 S.E.2d 920, 926 (1985). Furthermore, the sexual activity contemplated by the rule is that activity of the victim "other than the sexual act which is at issue in the indictment on trial." N.C.R. Evid. 412(a). Neither of the lines of questioning sought by defendant involved the type of "sexual activity" governed by Rule 412. The medical records of N's gonorrhea related to the exact sexual act for which defendant was on trial. Throughout, defendant has maintained that the sexual acts, if any, committed on N (and the resultant gonorrhea) were done by someone else. Accordingly, the medical records concerned the direct sexual act for which defendant was on trial, not some other act in N's sexual history. And the line of questioning with respect to the DSS records only dealt with accusations—not actual sexual activity. Accordingly, Rule 412 did not operate as a shield to these questions.

But just because Rule 412 is inapplicable does not mean defendant may examine or cross-examine at will. His questioning still must be relevant for the purpose for which it was offered, i.e. to impeach N's credibility. *See id.* at 167, 327 S.E.2d at 926 ("While we agree that in the present case the child's accusation of her father, to the extent it is evidence of conversation or language, is not excluded by the Rape Shield Statute, we still face the problem of whether this accu-

sation is relevant to the child's credibility."). We find no such relevance here. The reference to "partner" in the medical records did not contribute anything to defendant's case: it did not contradict anything testified to by N, nor did it suggest anything else that could be used to impeach her. The medical records simply stated that N's "partner" had gonorrhea and nothing more. It was apparent that N had a sexual connection and therefore a "partner"; but said partner was not identified in the records.

The questions regarding N's DSS records were equally irrelevant. No evidence at trial was introduced to suggest that N had ever made any false accusations, and defendant's proffer of evidence here made no such showing either. Essentially, defendant was on a fishing expedition. Absent some definitive evidence that N had previously made false accusations, we cannot say the trial court committed prejudicial error by preventing this line of questioning. *See generally State v. Anthony*, 89 N.C. App. 93, 96-97, 365 S.E.2d 195, 197 (1988) (distinguishing cases that allowed evidence of prior accusations with the present case because those cases involved actual evidence suggesting the accusations were false, whereas the present case did not).

[7] Finally, defendant asserts error in his sentence. Following his conviction, the trial court sentenced defendant to three life sentences plus a term of 288-355 months, all to be served consecutively. The judge made no findings as to why he was ordering consecutive, as opposed to concurrent, sentences. Defendant contends the imposition of consecutive sentences here was unwarranted. We disagree.

The imposition of consecutive sentences is neither violative of the Eighth Amendment, *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983), nor of our state's Fair Sentencing Act, *State v. Barts*, 316 N.C. 666, 697, 343 S.E.2d 828, 847 (1986). In fact, our legislature has vested the trial judge with broad discretion in deciding whether multiple sentences should be served consecutively or concurrently. N.C. Gen. Stat. § 15A-1354(a) (1999). In light of the sheer brutality of the sexual acts committed here, we find no abuse of that discretion.

Nonetheless, defendant contends that our statutes give the trial judge too much discretion and should at least require the judge to make specific findings with respect to the issue of consecutive or concurrent sentences. We respond to defendant's argument the same way we responded to a similar argument recently made to this Court: "This is, at best, a question for the legislature to resolve, but for our

purposes it is an argument without merit on appeal." *State v. Love*, 131 N.C. App. 350, 359, 507 S.E.2d 577, 584 (1998).

No error.

Chief Judge EAGLES and Judge EDMUNDS concur.

LINDA NADDEO, ADMINISTRATRIX FOR THE ESTATE OF PATRICIA ANN TEEL, PLAINTIFF-APPELLANT v. ALLSTATE INSURANCE COMPANY, DEFENDANT-APPELLEE

ALLSTATE INSURANCE COMPANY, PLAINTIFF-APPELLEE v. LISTON S. DARBY, ADMINISTRATOR OF THE ESTATE OF DWAINE LYDELL DARBY; LINDA M NADDEO, ADMINISTRATOR FOR THE ESTATE OF PATRICIA ANN TEEL; AND KATHY DIXON, ADMINISTRATOR OF THE ESTATE OF JACQUELINE MELISSA MULLIS, DEFENDANT-APPELLANTS

No. COA99-629

(Filed 1 August 2000)

1. **Appeal and Error— appealability—denial of summary judgment—interlocutory order—no substantial right**

Plaintiff-administratrix's appeal from the trial court's denial of her motion for summary judgment in case 98-CvS-931 where she sought a declaratory judgment requiring an automobile liability insurance company to pay plaintiff for damages granted, costs, interest, compensatory and punitive damages, and attorney fees pursuant to the default judgment entered against the insured's estate in 94-CvS-1333 arising out of a single-car automobile accident is dismissed since it has not been certified by the trial court and plaintiff has not shown she will be deprived of a substantial right.

2. **Appeal and Error— appealability—interlocutory order—substantial right**

Defendant's appeal from the trial court's denial of her motion for summary judgment in case 98-CvS-1400 where an automobile liability insurance company sought a declaratory judgment in its effort to deny coverage of the claims and set forth defenses involving a single-car accident after entry of a default judgment against the insured's estate affects a substantial right and can be immediately appealed because of the possibility of inconsistent verdicts.

3. Appeal and Error— appealability—interlocutory order—no substantial right

An insurance company's cross-assignment of error regarding denial of its motion to dismiss and/or abate in case 98-CvS-931 involving a single-car accident where plaintiff-administratrix sought a declaratory judgment requiring the insurance company to pay plaintiff for damages granted, costs, interest, compensatory and punitive damages, and attorney fees pursuant to a default judgment previously entered against the insured's estate is an interlocutory order which does not affect a substantial right and is thus not immediately appealable.

4. Collateral Estoppel and Res Judicata— issues precluded—policy defenses—unjustifiable refusal to defend

Collateral estoppel precludes an insurance company from asserting its policy defenses based on its refusal to defend in case 94-CvS-1333 involving a one-car accident where a default judgment was entered against the insured's estate because when the insurance company unjustifiably refused to provide a defense to its insured after receiving notice that the claim possibly would be covered by the policy, the insurance company obligated itself to pay the amount and costs of a reasonable settlement.

5. Judgments— default—failure to challenge finding—law of case

The trial court erred by denying defendant-administratrix's motion for summary judgment in an action where an insurance company sought a declaratory judgment in its effort to deny coverage of claims and to set forth defenses involving a single-car accident after entry of default judgment against the insured's estate, based on the issue of whether the car accident occurred within the policy term, because: (1) the default judgment in case 94-CvS-1333 found as fact that the accident occurred during the policy term; (2) a motion to set aside the default judgment was denied; and (3) the appeal to the Court of Appeals did not challenge the finding in the judgment regarding the time and date of the accident, making it the law of the case.

6. Collateral Estoppel and Res Judicata— issues precluded—insured driver—covered automobile—unjustifiable refusal to defend

The trial court erred by denying defendant-administratrix's motion for summary judgment in an action where an insurance

company sought a declaratory judgment in its effort to deny coverage of claims and to set forth defenses involving a single-car accident after entry of default judgment against the insured's estate, based on the issue of whether the driver of the automobile was an "insured" and the auto was "covered" under the insurance policy, because these defenses could have been raised in the adjudication of case 94-CvS-1333 where the default judgment was entered against the insured's estate, and therefore, the defenses have been waived by the insurance company's decision not to defend that case.

7. Collateral Estoppel and Res Judicata— issues precluded— financial responsibility—unjustifiable refusal to defend

The trial court erred by denying defendant-administratrix's motion for summary judgment in an action where an insurance company sought a declaratory judgment in its effort to deny coverage of claims and to set forth defenses involving a single-car accident after entry of default judgment against the insured's estate, based on the issue of the insurance company's attempt to limit its liability to the amounts of financial responsibility set forth in the Financial Responsibility Act under N.C.G.S. § 20-279.1(11), because the insurance company has obligated itself to pay the amount and costs of a reasonable settlement based on its unjustifiable refusal to provide a defense in the prior action.

8. Insurance— automobile—notice to insurer

The trial court erred by denying defendant-administratrix's motion for summary judgment in an action where an insurance company sought a declaratory judgment in its effort to deny coverage of claims and to set forth defenses involving a single-car accident after entry of default judgment against the insured's estate, based on the issue of the insurance company's failure to receive notice of the amended complaint directly from its insured, because the insurance company was not prejudiced based on the facts that: (1) the other party's attorney advised the insurance company by letter concerning when the accident occurred; and (2) the insurance company had actual notice and was aware of sufficient information tending to indicate that the insurance policy covered the suit.

Appeal by plaintiff Linda Naddeo from judgment entered in 98-CvS-931 on 1 February 1999 and by defendant Linda Naddeo from

judgment entered in 98-CvS-1400 on 16 February 1999 by Judge Russell Walker in Union County Superior Court. Heard in the Court of Appeals 28 March 2000.

Weaver, Bennett & Bland, P.A., by Michael David Bland, Howard M. Labiner, and Christopher M. Vann, for plaintiff/defendant-appellant Naddeo.

Morris York Williams Surles & Barringer, L.L.P., by John P. Barringer and Christa C. Pratt, for defendant/plaintiff-appellee Allstate.

EDMUNDS, Judge.

This dispute arises out of a single-car accident. During the evening of 30 April 1993, Dwaine Lydell Darby, Patricia Ann Teel, and Jacqueline Melissa Mullis were passengers in a vehicle driven by Otis Blount, who had consumed two pints of alcohol. After leaving a night club and heading toward a friend's house, at some time around midnight between 30 April and 1 May, the automobile left the roadway and struck a tree, killing all four occupants. Police received a report of the accident at 12:15 a.m. on 1 May 1993.

On 7 October 1994, Linda M. Naddeo (Naddeo), administratrix of the estate of passenger Teel, filed a complaint against, *inter alia*, Liston S. Darby (Darby), the administrator of the estate of Dwaine Darby, who owned the automobile. That suit, brought in Union County, was assigned civil number 94-CvS-1333.

Naddeo's original complaint had alleged that the accident occurred at 12:15 a.m. on 1 May 1993. However, on 9 March 1995, Naddeo filed a motion to amend her complaint. This motion was granted, and Naddeo filed an amended complaint alleging that the time of the accident was "approximately 11:00 p.m." on 30 April 1993.

Having received no response from Darby, Naddeo filed a motion for entry of default, and later for default judgment, which was entered on 21 August 1996. Upon entering default judgment, the trial court found that the allegations in the amended complaint were deemed admitted as a matter of law. Darby and his insurance carrier Allstate Insurance Company (Allstate) moved to set aside the entry of default and default judgment on 11 November 1996. Although Allstate was not a named party to the suit, its actions as Darby's insurer were critical to the case. Allstate denied coverage, contending that the

automobile policy issued to Darby (which plaintiff contended also covered Dwaine Darby) had been canceled at 12:01 a.m. on 1 May 1993.

Darby's motion to set aside the default judgment was denied by order entered 28 February 1997. Darby appealed to this Court, which affirmed the ruling of the trial court, holding that (1) Allstate was aware of information that indicated that Darby's policy covered the accident, (2) Allstate's decision not to answer the complaint or defend the action constituted inexcusable neglect, and (3) Darby's own failure to follow up on the complaint after he turned it over to his attorney also constituted inexcusable neglect. *See Estate of Teel v. Darby*, 129 N.C. App. 604, 500 S.E.2d 759 (1998). No further appeal was taken.

Subsequently, on 10 June 1998, Allstate brought suit against the estates of all the individuals killed in the accident. The complaint originally was filed in Mecklenburg County and assigned the civil number 98-CvS-8292, but later was transferred to Union County and assigned the number 98-CvS-1400. In this action, Allstate denied coverage of the claims and sought a declaratory judgment. On 21 December 1998, Naddeo filed a "Motion to Dismiss, Answer, Special Defenses and Counterclaims," wherein she asserted "[p]laintiff's claims fail to state a claim upon which relief can be granted under North Carolina Rules of Court 12(b)(2), 12(b)(3) and 12(b)(6)." Additionally, she denied all material allegations made by Allstate and asserted the defenses of issue preclusion, claim preclusion, and abatement. Finally, she counterclaimed seeking a "declaratory judgment and adjudication concerning the rights and liabilities of Allstate to pay damages as entered in 94 CVS 01333," and asserting a claim of unfair and deceptive trade practices. Allstate answered Naddeo's counterclaim and made a motion to dismiss for failure to state a claim. Thereafter, Naddeo made a motion for summary judgment. On the day of the summary judgment hearing, Allstate submitted an affidavit by a witness who purportedly observed Darby's vehicle being driven shortly before the accident at a time after midnight. After considering the affidavit over Naddeo's objection, the trial court denied Naddeo's motion in an amended order entered 16 February 1999.

Meanwhile, because she had not received service and therefore was not immediately aware that Allstate had brought the action numbered 98-CvS-1400, Naddeo filed suit against Allstate on 24 June 1998 in an action assigned number 98-CvS-931, seeking a declaratory judgment ordering Allstate to pay pursuant to the judgment entered in 94-

CvS-1333, as well as compensatory damages, punitive damages, costs, interest, and attorneys fees. Allstate answered and made a motion to dismiss pursuant to Rules 12(b)(6), 12(b)(1), and 12(b)(3). On 7 December 1998, Naddeo made a motion for summary judgment, and on 14 December 1998, Allstate made a motion to dismiss and/or abate, referencing its pending action in 98-CvS-1400. The trial court denied both parties' motions on 1 February 1999. Naddeo filed notices of appeal in both 98-CvS-1400 and 98-CvS-931 on 25 February 1999.

I.

We note at the outset that the record on appeal fails to comply with N.C. R. App. P. 10(c)(1), which requires that assignments (and cross-assignments) of error include "clear and specific record or transcript references." Appellate judges find such references invaluable in directing the court's attention to the pertinent portions of the record demonstrating alleged error. Although failure to comply with the appellate rules subjects an appeal to dismissal, *see Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999), for reasons of judicial economy, we elect to consider the appeal pursuant to N.C. R. App. P. 2.

II.

Due to the interlocutory nature of the orders appealed, we must determine whether to consider the issues asserted on appeal. The orders from which Naddeo appeals are denials of motions for summary judgment in both 98-CvS-1400 and 98-CvS-931. "As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a 'substantial right.' " *Bockweg v. Anderson*, 333 N.C. 486, 490, 428 S.E.2d 157, 160 (1993) (citation omitted). In fact, "[w]ithholding appeal of denial of summary relief at the early stages of litigation in the trial court is generally favored." *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 161, 519 S.E.2d 540, 542 (1999) (citation omitted), *disc. review denied*, 351 N.C. 352, — S.E.2d — (2000). However, interlocutory orders may be appealed in two instances:

> *first*, where there has been a final determination of at least one claim, and the trial court certifies there is no just reason to delay the appeal; and *second*, if delaying the appeal would prejudice a "substantial right."

Liggett Group v. Sunas, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993) (internal citations omitted).

[1] In 98-CvS-931, the denial of Naddeo's motion for summary judgment is interlocutory, no claim has been determined, and the trial court has made no certification. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (1999). Additionally, in that case, Naddeo is seeking "[a] declaratory judgment ordering Allstate to pay Plaintiff for the damages granted, costs and interest in 94-CVS-01333" as well as compensatory and punitive damages, costs, interest, and attorney's fees. Because no substantial right will be prejudiced by delaying the appeal until a final adjudication of the merits, Naddeo's appeal in this case is dismissed.

[2] In 98-CvS-1400, Allstate seeks a declaratory judgment, raising policy defenses to liability. Naddeo answered, raised defenses, and counterclaimed, seeking declaratory judgment requiring Allstate to pay pursuant to the earlier suit (94-CvS-1333) and asserting a claim of unfair and deceptive trade practices. Although Naddeo moved unsuccessfully for summary judgment on all issues, her arguments on appeal relate solely to Allstate's claims and defenses. Accordingly, we do not address the denial of Naddeo's motion as it relates to her counterclaims. As to Allstate's claims and defenses, Naddeo asserts that they are barred by reason of issue or claim preclusion.

Our Supreme Court has stated that the possibility of having to retry an issue already litigated can be a substantial right. *See Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982). Accordingly, "the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable." *Bockweg*, 333 N.C. at 491, 429 S.E.2d at 161 (citations omitted); *cf. Community Bank v. Whitley*, 116 N.C. App. 731, 449 S.E.2d 226 (1994) (dismissing appeal as interlocutory because facts of case would not lead to "possibility of inconsistent verdicts"). With regard to Naddeo's motion for summary judgment as it pertains to Allstate's claims and defenses in 98-CvS-1400, because of the possibility of inconsistent verdicts, a substantial right may be affected. Accordingly, we will consider Naddeo's appeal in that case.

[3] Finally, as to Allstate's cross-assignment of error regarding denial of its motion to dismiss and/or abate in 98-CvS-931, the order appealed is interlocutory and does not affect a substantial right. *See Myers v. Myers*, 61 N.C. App. 748, 301 S.E.2d 522 (1983) (dismissing appeal of denial of "plea in abatement" as interlocutory).

III.

[4] Turning to the merits of Naddeo's appeal in 98-CvS-1400, Naddeo contends that "Allstate, by refusing to defend the 1994 action and/or by appearing and raising coverage defenses, has waived its defenses in the current action," and that she was entitled to summary judgment because Allstate's claims and defenses were barred by the doctrines of claim and issue preclusion. Because all three arguments necessarily involve similar basic principles, we address them together.

Under the doctrine of *res judicata* or claim preclusion, "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). Similarly, " '[c]ollateral estoppel precludes relitigation of an issue decided previously in judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding.' " *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 268, 488 S.E.2d 838, 840 (1997) (quoting *In re McNallen*, 62 F.3d 619, 624 (4th Cir. 1995) (citations omitted)). "Thus, while *res judicata* precludes a subsequent action between the same parties or their privies based on the same *claim*, collateral estoppel precludes the subsequent adjudication of a previously determined *issue*, even if the subsequent action is premised upon a different claim." *Hales v. N.C. Insurance Guaranty Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994) (citations omitted).

With regard to claims against an insured in which a default judgment is obtained in favor of the claimant,

> if an insurer had a right to defend the injury action against the insured, had timely notice of such action, and defends or elects not to defend, the judgment, in the absence of fraud or collusion, is binding upon the insurer as to issues which were or might have been litigated therein.

Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 106:50 (1997) (citing *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968)). The issue of Allstate's notice of the action has been settled, *see Estate of Teel*, 129 N.C. App. 604, 500 S.E.2d 759; therefore, the only question that remains is whether Allstate had a duty to defend Darby.

Because there is no statutory requirement that an insurance company provide its insured with a defense, *see* N.C. Gen. Stat. § 20-279.21 (1999) (stating requirements for a motor vehicle liability policy), we must look to the policy language to determine Allstate's obligation. Part A of Allstate's policy states:

> We will settle or defend, as we consider appropriate, any claim or suit asking for [bodily injury or property] damages. . . . Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for **bodily injury** or **property damage** not covered under this policy.

Thus, Allstate assumed the responsibility of settling or defending any claim against its insured, unless the claim is "not covered under this policy."

Nonetheless, Allstate contends "[i]t has raised legitimate policy defenses . . . which take the payment of the underlying judgment outside of the terms of its policy." However, "pleadings that disclose a *mere possibility* that the insured is liable (and that the potential liability is covered) suffice to impose a duty to defend upon the insurer." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691 fn. 2, 340 S.E.2d 374, 377 (1986) (emphasis added); *see also Nationwide Mut. Fire Ins. Co. v. Grady*, 130 N.C. App. 292, 502 S.E.2d 648 (1998) ("An insurance company has a duty to defend its insured against suit, although the suit is groundless, if viewing the facts as alleged in the complaint and taking them as true, liability may be imposed upon the insured within the coverage of the insurance policy in question."); *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 80 N.C. App. 370, 343 S.E.2d 15 (1986) ("The obligation of a liability insurer to defend an action brought by an injured third party against the insured is *absolute* when the allegations of the complaint bring the claim within the coverage of the policy."). Additionally, "[a]ny doubt as to coverage is to be resolved in favor of the insured." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 735, 504 S.E.2d 574, 578 (1998) (citation omitted).

Based on evidence that (1) the original complaint provided general notice of the time of the accident involving the automobile owned by Dwaine Darby, (2) the amended complaint alleged that the fatal accident occurred "at approximately 11:00 p.m. Eastern Standard Time on April 30, 1993," and (3) Naddeo's attorney advised Allstate that the accident occurred on 30 April 1993, this Court held:

"Allstate was aware of information which would tend to indicate that the policy . . . provided coverage for the subject one-car accident." *Estate of Teel*, 129 N.C. App. at 610, 500 S.E.2d at 764. Therefore, the claim arguably was within the coverage of the policy, thus imposing upon Allstate a duty to defend. Due to the "possibility" that the claim would be covered by the policy, Allstate's refusal to defend was unjustified. When it unjustifiably refused to provide a defense, Allstate "obligated itself to pay the amount and costs of a reasonable settlement." *Duke University v. St. Paul Fire and Marine Ins. Co.*, 96 N.C. App. 635, 637, 386 S.E.2d 762, 763 (1990) (citations omitted). Accordingly, we hold that Allstate is precluded from asserting its policy defenses by its refusal to defend in 94-CvS-1333. *See Ames v. Continental Casualty Co.*, 79 N.C. App. 530, 538, 340 S.E.2d 479, 485 (1986) ("By denying liability and refusing to defend claims covered by the insurance policy, the insurance company commits a breach of the policy contract and thereby waives the provisions defining the duties and obligations of the insured.").

[5] We next consider *seriatim* the individual claims asserted by Allstate in its complaint in 98-CvS-1400. Allstate first sought a declaratory judgment regarding the issue of whether the accident occurred within the Allstate policy term. The default judgment in 94-CvS-1333 found as fact that the accident occurred "on the evening of April 30, 1993." Darby and Allstate's motion to set aside the default judgment was denied; Darby appealed to this Court but did not challenge the finding in the judgment regarding the time and date of the accident. Accordingly, that finding was conclusive on appeal and became the law of the case. Allstate, which is in privity with Darby, is foreclosed from relitigating the issue in any subsequent proceeding. *See Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 438 S.E.2d 751 (1994).

[6] Next, Allstate sought a declaratory judgment to determine whether under the policy the driver of the automobile was an "insured" and the auto was "covered." Again, these defenses could have been raised in the adjudication of 94-CvS-1333 and have been waived by Allstate's decision not to defend that case. *See Ames*, 79 N.C. App. at 538, 340 S.E.2d at 485.

[7] Allstate also sought a declaratory judgment limiting its liability to the amounts of financial responsibility set forth in the Financial Responsibility Act ($25,000 per person/$50,000 per accident), *see* N.C. Gen. Stat. § 20-279.1(11) (1999), because of Darby's failure to comply

with the policy terms and conditions. However, as we determined above, because it unjustifiably refused to provide a defense, Allstate has "obligated itself to pay the amount and costs of a reasonable settlement." *Duke University*, 96 N.C. App. at 637, 386 S.E.2d at 763. The trial court set a reasonable settlement at $250,000.

[8] Finally, Allstate contended that Darby "failed to comply with the terms and conditions of the Allstate policy by failing to promptly notify [Allstate] of any notices or legal papers received in connection with the subject accident and to cooperate with the investigation, settlement, or defense of any claim or suit arising from the accident." Although the record indicates that Darby's attorney did not forward the amended complaint to Allstate, this Court noted that Naddeo's attorney advised Allstate by letter that the accident occurred on 30 April 1993 and held that Allstate had actual notice and was aware of sufficient information tending to indicate that the policy covered the suit. *See Estate of Teel*, 129 N.C. App. at 610, 500 S.E.2d at 764. Consequently, the requirement that Allstate be notified of the suit was met. *See Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E.2d 769 (1981); *Couch on Insurance 3d* § 106:18. Allstate was not prejudiced by failing to receive notice of the amended complaint directly from Darby.

Accordingly, the trial court erred when it denied Naddeo's motion for summary judgment on all claims raised by Allstate.

Because we hold that the trial court should have granted Naddeo's motion for summary judgment as it pertained to claims and defenses raised by Allstate, we need not address her argument that the trial court improperly considered an affidavit presented by Allstate at the hearing.

Dismissed in part, reversed in part.

Judges GREENE and McGEE concur.

SHEILA JEAN ROYCE, EMPLOYEE-PLAINTIFF v. RUSHCO FOOD STORES, INC., CASUALTY RECIPROCAL EXCHANGE AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIERS-DEFENDANTS

No. COA99-932

(Filed 1 August 2000)

1. Workers' Compensation— ankle ulcer—result of injury

The Industrial Commission did not err in a workers' compensation action by finding that bleeding from an ulcer on plaintiff's ankle in 1995 was the direct and natural result of her 1994 injury where the Commission relied upon the testimony of plaintiff's primary care physician, Dr. Thompson, that plaintiff's three ankle injuries aggravated her pre-existing condition and were significant contributing factors in her continuing problems with her ulcer. Although there was conflicting medical testimony, the Commission was entitled to give greater weight to Dr. Thompson's testimony.

2. Workers' Compensation— temporary total disability—sufficiency of evidence

There was competent evidence in the record to support the Industrial Commission's conclusion in a workers' compensation action that plaintiff was temporarily and totally disabled from 16 February 1995 until 7 July 1995 where plaintiff testified that she went to see her doctor on 16 February 1995 and was ordered to stay completely off her foot, the doctor continued to treat plaintiff, and the Commission found that plaintiff had reached maximum medical improvement as of 7 July 1995, based on an insurance form.

3. Workers' Compensation— two insurance companies—credit for payment by one

The Industrial Commission did not err by refusing defendant Casualty a $3,500 credit in a workers' compensation action where plaintiff had executed a $3,500 settlement with Liberty Mutual Insurance Company. Defendants failed to cite any authority which entitled them to a credit under the Workers' Compensation Act; even assuming the settlement constituted a payment by the employer under N.C.G.S. § 97-42, defendants are not entitled to a credit under that statute because the $3,500 was "due and payable" when paid.

4. Workers' Compensation— maximum medical improvement—evidence

The Industrial Commission did not err by finding in a workers' compensation action that plaintiff reached maximum medical improvement on 7 July 1995 where plaintiff's doctor completed an insurance form on that date in which he stated that plaintiff's ankle ulcer had healed but that her chronic venous stasis was permanent.

5. Workers' Compensation— permanent disability—burden of proof

The Industrial Commission did not err by placing the burden on plaintiff to prove permanent disability after 7 July 1995 where her Form 21 presumption of disability ended because she returned to work for defendant at her prior rate of pay, and her presumption of temporary total disability ended when she reached maximum medical improvement on 7 July 1995.

6. Workers' Compensation— inability to find alternative employment—insufficient evidence

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff did not meet her burden of proving that it would be futile for her to seek other employment where the Commission found, based on the testimony of plaintiff's doctor, that she was not capable of working in a job that required standing eight to ten hours a day but that she could perform a seated job with her leg elevated, that plaintiff made no effort to find alternative employment within her restrictions after she reached maximum medical improvement, and that she failed to present any medical or vocational evidence that it would be futile for her to seek other employment.

Appeal by plaintiff and defendants Rushco Food Stores, Inc. (Rushco) and Casualty Reciprocal Exchange (Casualty) from judgment entered 18 February 1999 by the North Carolina Industrial Commission (Commission). Heard in the Court of Appeals 11 May 2000.

Jackson & Jackson, by Phillip T. Jackson, for employee-plaintiff.

Young Moore and Henderson P.A., by Joe E. Austin, Jr. and Dawn M. Dillon, for employer-defendant Rushco and carrier-defendant Casualty.

WALKER, Judge.

Plaintiff sustained compensable injuries to her left ankle on 15 May 1993, 5 February 1994, and 23 April 1994, resulting in an ulcer. Defendant Liberty Mutual Insurance Co. (Liberty) was the carrier on risk for the first compensable injury, and defendant Casualty was the carrier for the second and third compensable injuries. On 16 February 1995, plaintiff's ankle "re-ulcerated, spontaneously rupturing and bleeding." Plaintiff sought benefits which were denied by defendants. After a hearing, the deputy commissioner found that plaintiff was entitled to temporary total disability from 16 February 1995 until 7 July 1995. The deputy commissioner then concluded that the "two defendant-carriers are jointly and severally liable" and that each "shall pay at least fifty percent of the compensation due under this Opinion and Award."

Each party appealed to the Commission. Prior to the hearing before the Commission, plaintiff and defendant Liberty executed a compromise settlement agreement which was approved by the Commission on 18 July 1997. On 18 February 1999, the Commission affirmed the deputy commissioner's decision, with "minor modifications."

The Commission's findings include the following:

> 10. On 16 February 1995, plaintiff was standing at the cash register at work when a co-worker noticed that plaintiff was bleeding from the site of the previous injuries on her left ankle. Plaintiff does not recall having bumped into anything. Plaintiff again sought treatment from Dr. Thompson. The same ulcer site involved in the three prior injuries had re-ulcerated, spontaneously rupturing and bleeding.
>
> 11. Plaintiff did not sustain an injury by accident arising out of or in the course of her employment with defendant-employer on 16 February 1995.
>
> 12. Dr. Thompson testified that due to plaintiff's pre-existing severe chronic venostasis problem with varicosities, even bumping could and did cause a difficult or non-healing ulceration that resulted in spontaneous bleeding. The veins just underneath the surface of the skin over the ulceration were dilated and placed under tremendous pressure when plaintiff stood all day. At very high venous pressure, plaintiff's veins would break and bleed. All

three injuries by accident aggravated plaintiff's pre-existing condition and were significant factors in the development and continuing problems of the non-healing ulcer on the left ankle that spontaneously erupted in February 1995.

13. Dr. Douglas Adams reviewed plaintiff's medical records at the request of the defendant-carrier Casualty . . ., although he never examined plaintiff. Based upon his review of the medical records, Dr. Adams opined that, assuming the ulcer developed after the first injury, the subsequent two injuries in 1994 did not substantially contribute to the condition plaintiff incurred in 1995. However, Dr. Adams further testified that he could not make a good estimate as to the cause of the 1995 condition because he did not examine plaintiff, and that Dr. Thompson was in a better position to evaluate plaintiff's condition. The Full Commission gives more weight to Dr. Thompson's causation opinions.

14. The non-healing ulcer on plaintiff's left ankle was a direct and natural result of all three compensable injuries by accident, each of which significantly contributed to the development and continuing problems of the non-healing ulcer which spontaneously erupted in February 1995. Any attempt to apportion causation among the three injuries or to apportion liability between the two carriers on the risk would be purely speculative.

15. The spontaneous bleed in 1995 was the direct and natural result of the admittedly compensable injury by accident which occurred on 23 April 1994. The 23 April 1994 injury significantly contributed to plaintiff's continuing problems with the non-healing ulcer.

16. After the spontaneous eruption of the non-healing ulcer on 16 February 1995, plaintiff was unable to perform her normal job duties with defendant-employer because she was required to stand for prolonged periods. She was, however, capable of working in a job that allowed her to sit with her legs elevated. Defendant-employer did not offer her work that was suitable to her capacity.

17. On 7 July 1995, Dr. Thompson completed an insurance form relating to plaintiff in which he stated that the ulcer had healed, but that the severe chronic venous stasis changes in both legs were permanent. Plaintiff reached maximum medical improvement on 7 July 1995.

18. Because defendant-employer did not offer plaintiff work that was suitable to her capacity, she was unable to work from 16 February 1995 until she reached maximum medical improvement on 7 July 1995.

. . .

20. Both plaintiff's pre-existing problems and the non-healing ulcer were significant factors contributing to her disability. As a result of these factors, plaintiff is not capable of working in a job that requires standing from eight to ten hours a day. She can perform a seated job if she can keep her left leg elevated most of the time. As a result of the non-healing ulcer, . . ., plaintiff has not been capable of performing the job she held with defendant-employer since 16 February 1995.

21. Plaintiff made no effort to find alternative employment within her restrictions after she reached maximum medical improvement. The greater weight of the evidence does not show that it would be futile for plaintiff to seek other employment.

22. The evidence fails to show that, after 7 July 1995, plaintiff was unable to earn the same wages she earned before the spontaneous bleed.

Based on these findings, the Commission concluded:

2. . . . Defendant-employer and defendant Casualty . . . are liable for the disability that arose following the February 1995 spontaneous bleed.

3. As a result of her continuing problems with the non-healing ulcer, plaintiff was temporarily and totally disabled from 16 February 1995 until 7 July 1995 and is entitled to compensation at the rate of $145.20 per week for that period. G.S. 97-29.

4. The greater weight of the evidence fails to show that, after she reached maximum medical improvement, plaintiff was unable to earn the same wages she earned before her third injury by accident. Therefore, plaintiff is not entitled to total disability payments after that date. G.S. 97-29.

. . .

6. The issue of whether plaintiff retained any permanent partial disability once she reached maximum medical improvement is left open for further hearing. G.S. 97-31.

Defendants assign as error the Commission's: (1) finding that the 1995 ankle bleed was the direct and natural result of the 23 April 1994 injury and that defendant Casualty is liable for any benefits after the 1995 bleeding incident; (2) finding that plaintiff was disabled from 16 February 1995 until 7 July 1995; and (3) failing to conclude that defendant Casualty is entitled to a $3,500.00 credit for plaintiff's settlement with defendant Liberty. Plaintiff assigns that the Commission erred in: (1) finding that she had reached maximum medical improvement on 7 July 1995; (2) placing the burden on her to prove disability after 7 July 1995; and (3) finding that she did not meet her burden of proving that it would be futile for her to seek other employment.

When considering an appeal from the Commission, this Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings, and (2) whether the Commission's findings justify its conclusions and decision. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 496 S.E.2d 790 (1998). Findings of fact by the Commission, if supported by competent evidence, are conclusive on appeal even though there is evidence which would support a contrary finding. *Bullman v. Highway Comm.*, 18 N.C. App. 94, 195 S.E.2d 803 (1973).

[1] We first address defendants' contention that the Commission erred in finding that the 1995 ankle bleed was the direct and natural result of the 23 April 1994 injury and that defendant Casualty was liable for any benefits after the 1995 bleeding incident. Defendants argue that since there was no evidence that the "23 April 1994 accident contributed in any greater degree to the 1995 spontaneous bleed or plaintiff's continuing problems than the other two injuries," apportionment of the award was proper. In the recent decision of *Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999), *citing Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 465-466, 470 S.E.2d 357, 359 (1996), this Court held:

> The work-related injury need not be the sole cause of the problems to render an injury compensable. If the work-related accident contributed in some reasonable degree to plaintiff's disability, she is entitled to compensation.

Furthermore, in *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 390-391, 465 S.E.2d 343, 346, *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996) (citations omitted), this Court addressed the issue of apportionment, stating:

> . . . apportionment is not proper where the evidence before the Commission renders an attempt at apportionment between work-related and non-work related causes speculative or where there is no evidence attributing a percentage of the claimant's total incapacity to her compensable injury, and a percentage to the non-compensable condition.

Here, the Commission relied on the testimony of Dr. Willard Thompson regarding causation. In his deposition, Dr. Thompson, plaintiff's primary care physician since 1989, testified that each of plaintiff's three prior ankle injuries aggravated her pre-existing condition and were significant contributing factors in her continuing problems with her non-healing ulcer. After reviewing plaintiff's medical records, Dr. Adams testified that, in his opinion, "the two subsequent injuries in 1994 did not substantially contribute to the condition plaintiff incurred in 1995." However, Dr. Adams admitted that "he could not make a good estimate as to the cause of the 1995 condition because he did not examine plaintiff, and that Dr. Thompson was in a better position" to evaluate plaintiff.

Since the Commission was entitled to give greater weight to the testimony of Dr. Thompson, we conclude that there was competent evidence in the record to support the Commission's finding that the "spontaneous bleed in 1995 was the direct and natural result" of the 23 April 1994 injury. Additionally, the Commission found that "any attempt to apportion causation among the three injuries or to apportion liability between the two carriers on the risk would be purely speculative;" therefore, the Commission properly concluded that defendants Rushco and Casualty were "liable for the disability that arose following the February 1995 spontaneous bleed."

[2] Defendants next contend the Commission erred in finding that plaintiff was temporarily and totally disabled from 16 February 1995 until 7 July 1995. Temporary total disability is payable only during the healing period, which ends when the employee reaches maximum medical improvement. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). "The healing period . . . is the time when the claimant is unable to work because of his injury, is submitting to treatment, . . ., or is convalescing." *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 288-289, 229 S.E.2d 325, 328 (1976), *disc. review denied*, 292 N.C. 467, 234 S.E.2d 2 (1977).

In the case at bar, plaintiff testified that she went to see Dr. Thompson on 16 February 1995, after discovering that her ankle had re-ulcerated and was bleeding. According to plaintiff, Dr. Thompson cleaned her wound, "ordered [unna boots], antibiotics, and a painkiller," and gave her written instructions "to stay off of my foot, completely off, just propped up, nothing but going to the bathroom." Plaintiff further testified that Dr. Thompson continued to treat her until February 1996 and that during that time, she saw Dr. Thompson "[e]very week for about two months, and then he took it for every month and then three months, and then I'll see him again in July." As discussed below, based on an insurance form completed by Dr. Thompson, the Commission found that plaintiff had reached maximum medical improvement as of 7 July 1995. Thus, there is competent evidence in the record to support the Commission's finding that plaintiff was temporarily and totally disabled from 16 February 1995 until 7 July 1995.

[3] Defendants lastly assign as error the Commission's failure to allow defendant Casualty a $3,500.00 credit since plaintiff executed a $3,500.00 settlement with defendant Liberty. On 18 July 1997, prior to hearing this case, the Commission approved the settlement agreement. Plaintiff argues that the issue of a credit is not properly before this Court. Although the deputy commissioner concluded that the "two defendant-carriers are jointly and severally liable," there is nothing in the record to indicate that defendant Casualty presented this issue to the Commission. Assuming the credit issue was presented to and decided by the Commission, plaintiff further contends that defendant Casualty is not entitled to a credit since there is "no basis in the [Workers' Compensation] Act for such a credit."

While there is no specific statutory provision addressing contribution between insurance carriers, we note that N.C. Gen. Stat. § 97-42 (1999) provides:

> 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.

Even assuming the $3,500.00 payment by defendant Liberty to plaintiff pursuant to the settlement constituted a payment by the "employer" under N.C. Gen. Stat. § 97-42, we conclude that defendants Rushco and Casualty are not entitled to a credit since the deputy

commissioner's opinion required defendant Liberty to pay "at least fifty percent of the compensation due" and rendered such payment "due and payable" before the $3,500.00 was paid to plaintiff. Thus, since defendants have failed to cite to any authority which entitles them to a credit under the Workers' Compensation Act, defendants' assignment of error is overruled.

[4] We next address plaintiff's argument that the Commission erred in finding that she had reached maximum medical improvement on 7 July 1995. Maximum medical improvement is reached when the impaired bodily condition is stabilized or determined to be permanent. *Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 326 S.E.2d 328 (1985). The Commission found that "[o]n 7 July 1995, Dr. Thompson completed an insurance form relating to plaintiff in which he stated that the ulcer had healed, but that the severe chronic venous stasis changes in both legs were permanent." Dr. Thompson testified that plaintiff's condition had "healed" or returned to the "baseline" after the 16 February 1995 incident, but that her chronic venous stasis is permanent. Therefore, the Commission properly concluded that plaintiff reached maximum medical improvement on 7 July 1995.

[5] Plaintiff also contends the Commission erred in placing the burden on her to prove her disability after 7 July 1995. Specifically, plaintiff argues that she is entitled to a presumption of continuing disability under the Form 21 agreements, which the Commission approved on 14 November 1994 regarding the 5 February 1994 and 23 April 1994 injuries. However, since plaintiff returned to work for defendant Rushco at the same rate of pay she earned prior to these two injuries, plaintiff's presumption of disability under the Form 21 agreement ended. *See Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E.2d 588 (1971).

Plaintiff further contends that she is entitled to a presumption of continuing disability after 7 July 1995 since the Commission determined she was temporarily and totally disabled as of 16 February 1995 and defendants failed to rebut this presumption. Defendants counter that plaintiff is not entitled to a presumption of continuing disability after 7 July 1995, the date she reached maximum medical improvement.

Although a plaintiff has established that she is entitled to temporary total disability, she must also prove her entitlement to permanent disability. *Brice v. Sheraton Inn*, 137 N.C. App. 131, 527 S.E.2d 323

(COA99-418, filed 21 March 2000). In *Brice v. Sheraton Inn, supra*, this Court held that although the plaintiff had met her burden of proving temporary total disability, she failed to prove that she was permanently and totally disabled after the date she was released to return to work without restriction, and no burden shifted to the defendant to refute a claim of permanent and total disability. Therefore, under *Brice*, plaintiff's presumption of temporary total disability ended on 7 July 1995 when she reached maximum medical improvement, and plaintiff had the burden of proving she was entitled to permanent disability.

[6] Finally, plaintiff contends that the Commission erred in finding that she did not meet her burden of proving it would be futile for her to seek other employment because of her pre-existing condition. "In order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986). In *Peoples*, our Supreme Court held:

> Where . . . an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist.

Id. Defendants argue that plaintiff failed to present sufficient evidence to establish that it would be futile for her to seek employment since "[s]he is not near retirement age and has obvious skills working with the public, in inventory assessment, in ordering stock, and in working with money, doing paper work, which she has developed during her 22 years as a convenience store manager." Defendants cite to a recent decision of this Court, *Demery v. Converse, Inc.*, 138 N.C. App. 243, 530 S.E.2d 871 (2000), in which this Court found that the plaintiff did not meet his burden of showing he was "totally incapable" of earning wages where his "physician did not testify that he could not work, only that his work was restricted to certain limitations."

Here, based on the testimony of Dr. Thompson, the Commission found that "plaintiff is not capable of working in a job that requires standing from eight to ten hours a day" but that she could "perform a seated job if she can keep her left leg elevated most of the time." The Commission further found that although defendant Rushco did not offer plaintiff employment that was "suitable to her capacity," plain-

tiff "made no effort to find alternative employment within her restrictions after she reached maximum medical improvement." Additionally, we note that plaintiff failed to present any medical or vocational evidence tending to establish that it would be futile for her to seek other employment. *See Peoples*, 316 N.C. 426, 342 S.E.2d 798. Thus, the Commission properly concluded that plaintiff did not meet her burden of proving it would be futile for her to seek other employment.

Affirmed.

Judges McGEE and HUNTER concur.

STATE OF NORTH CAROLINA v. JERMAINE EARL DIXON

No. COA99-721

(Filed 1 August 2000)

1. Criminal Law— motion to correct or amend judgment in trial court—record on appeal filed—no prejudice

Although a motion to correct or amend a judgment in order to make it speak the truth is properly made to the appellate court rather than the trial court once the record on appeal has been filed with the appellate court, defendant was not prejudiced by the trial court's error in correcting and amending its judgment revoking defendant's probation after the record on appeal had been filed because: (1) a panel of the Court of Appeals subsequently granted the State's motion to amend the record; and (2) where one panel of the Court of Appeals has decided an issue, a subsequent panel is bound by that precedent unless it has been overturned by a higher court.

2. Evidence— hearsay—other testimony

Although defendant alleges that the trial court erred in a probation revocation hearing for an indecent liberties case by admitting unreliable hearsay evidence of the unavailable minor victim's statements to an officer that she was alone with defendant and that the two engaged in sexual relations on 2 January 1999 as basis to conclude that defendant violated the conditions of his probation, defendant was not prejudiced because the court's only

finding that defendant had contact with the minor victim in violation of a condition of his probation was based on the testimony of an officer who made first-hand observations of defendant and the victim in a motel room on 29 December 1998, and no findings concerned the content of the victim's statement.

3. Criminal Law— motion for continuance—absent witness

A defendant who allegedly violated a condition of probation in an indecent liberties case that he not have contact with the minor victim was not entitled to a continuance of his probation revocation hearing to obtain the presence of his brother, who defendant contended was the only witness who could testify whether defendant was actually in the same motel room with the victim and whether defendant's contact with the victim was willful, because: (1) defendant's brother was not an essential witness since the victim was also in the motel room and could testify concerning whether her contact with defendant was willful; (2) defendant presented no evidence as to the victim's unavailability or unwillingness to testify; (3) defendant failed to give the trial court a detailed explanation as to why a delay to secure his brother's testimony was necessary; and (4) an unsworn statement by defendant's attorney that the witness would testify defendant was not involved in the crime was not detailed proof to support a finding of prejudice.

4. Probation and Parole— indecent liberties—willful violation

The trial court did not abuse its discretion by concluding that defendant willfully violated a term of his probation that he have no contact with the minor indecent liberties victim, because: (1) the evidence indicates that defendant had contact with the minor victim in a motel room; and (2) defendant presented no evidence demonstrating why he was unable to comply with the condition of his probation prohibiting such contact.

Appeal by defendant from judgment entered 11 February 1999 by Judge L. Oliver Noble in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 May 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel S. Johnson, for the State.

Assistant Public Defender Dean P. Loven for defendant-appellant.

TIMMONS-GOODSON, Judge.

Jermaine Earl Dixon ("defendant") appeals from the judgment revoking his probation and activating his twenty-one to twenty-six-months prison sentence.

The State presented the following evidence at the revocation hearing. On 1 September 1998, defendant pled guilty pursuant to an *Alford* plea to one felony count of indecent liberties with a minor. The trial court sentenced defendant to a suspended sentence of twenty-one to twenty-six months in prison and imposed thirty-six months of supervised probation with special conditions, which included in pertinent part:

> 19. . . . Have no contact with the victim. Comply with the sex offender conditions of probation. . . .
>
> . . . .
>
> 30. Sex offender conditions[:]
>
> . . . .
>
> (b) The defendant shall not be alone with any minor child below the age of eighteen years of age, unless approved by his probation officer.
>
> (c) The defendant shall not engage in any sexual behavior with any minor child below the age of eighteen years of age.

On 29 December 1998 at 10:00 a.m., in response to an anonymous tip, Officer J. L. Cuddle ("Cuddle") of the Charlotte Mecklenburg Police Department knocked on the door of room 2205 of the Ramada Inn located on Freedom Drive. The victim opened the door. Also present in room 2205 was defendant's brother, Nate Cathcart. When Cuddle asked defendant to show himself, defendant emerged from the bathroom area of room 2205. The victim was fifteen years old at the time.

Cuddle left a message with defendant's probation officer, James Donahue ("Donahue"), regarding a possible violation of the terms of defendant's probation. Donahue met with the victim who told him that she had been with defendant and his brother on 29 December 1998. Based on the 29 December 1998 incident, Donahue submitted a probation violation report dated 6 January 1999 alleging that defendant had violated special conditions 19 and 30(b) of his probation.

Additionally, the victim stated that she had been alone with defendant on 2 January 1999 and had engaged in sexual intercourse with him on that occasion. Donahue submitted an addendum to violation report which was dated 5 February 1999 pertaining to the events of 2 January 1999. In the addendum, Donahue alleged that defendant had violated conditions 30(b) and 30(c) of his probation. Defendant presented no evidence at the revocation hearing.

Following the presentation of evidence and the arguments of counsel, the trial court ruled in open court as follows:

> In this case, **THE COURT FINDS** the defendant was convicted of indecent liberties with a child on September 1, 1998; and, was sentenced to not less than 21 nor more than 26 months.
>
> According to the indictment in the case, the name of the minor child was Lakera Mingo.
>
> Most of the sentence of the defendant was suspended and the defendant was placed on supervised probation.
>
> One of the conditions of his probation was that he have no contact with the victim.
>
> On or about December 29, 1998, the defendant was in a motel room at the Ramada Inn with his brother and Lakera Mingo, age 15. And therefore, had contact with the victim.
>
> The Court makes no other findings with regard to the allegations of either the probation violation or the original probation violation report or the addendum, thereto.
>
> And **THE COURT CONCLUDES AS LAW** that the defendant has, without lawful excuse, violated a lawful condition of his probation.
>
> And I'm going to **ORDER** that his probation be revoked.

The typed "Judgment and Commitment upon Revocation of Probation," dated 11 February 1999, contained the following finding:

> 3. The condition(s) violated and the facts of each violation are as set forth . . . in paragraph(s) 5,6 in the Violation Report or Notice dated 02-05-1999.

Defendant gave notice of appeal to the North Carolina Court of Appeals in open court on 11 February 1999 and the record on appeal was filed on 14 June 1999.

On 2 August 1999, the State filed a motion for a correction of judgment in the Superior Court, Mecklenburg County, alleging that the recorded judgment contained a clerical error. According to the State, the trial court's "Finding 3" in the typed judgment was inconsistent with the ruling of the trial court in open court, in that the typed judgment referred to the allegations of the 5 February 1999 addendum report. In contrast, in open court, the trial court purported to validate the allegations of the 6 January 1999 report.

Defendant petitioned the North Carolina Court of Appeals for a Writ of Prohibition to prevent the trial court from holding a hearing on the State's motion for correction of judgment. Defendant's petition was denied.

Following a telephone hearing involving Judge Noble, appellate counsel for the State, defendant, and an assistant district attorney, the trial court entered an order on the State's motion for correction of judgment dated 4 August 1999. The order stated in pertinent part:

> 2. The transcript of the probation violation hearing establishes that the undersigned revoked Defendant's probation in open Court based on Defendant's contact with the victim in December of 1998.
>
> 3. The ruling announced by the undersigned in open Court was intended to rule, and did rule, that Defendant committed the violation described in item 5 of the January 6, 1999 report.
>
> . . . .
>
> 5. . . . "Finding 3" as set forth on Side Two of the said Judgment is erroneous and does not accurately recite the actual ruling given by the undersigned in open court.
>
> . . . .
>
> 7. It is in the interest of justice that the Judgment and Commitment Upon Revocation of Probation be corrected as set forth herein to accurately record the Court's ruling.

The trial court granted the State's motion for correction of judgment, ordering that the judgment and commitment be corrected and amended to delete the existing "Finding 3" and to insert the following new "Finding 3": "The condition violated and the facts of the violation

are as set forth in paragraph 5 in the Violation Report or Notice dated January 6, 1999."

The State moved in this Court to amend the record on appeal to add the trial court's order. Defendant filed a motion to deny the State's motion to amend the record on appeal and in the alternative to amend the record to include additional assignments of error. This Court granted the State's motion to amend the record on appeal, denied defendant's motion to prevent amendment to the record, and granted defendant's motion to add an additional assignment of error. Defendant's appeal is now ripe for disposition.

The issues on appeal are whether the trial court erred by: (I) amending and correcting its judgment and commitment upon revocation of probation based on the State's motion for correction made after the record on appeal was filed; (II) admitting unreliable hearsay evidence and concluding the defendant violated his probation based on that evidence; (III) denying defendant's continuance request; and (IV) determining that defendant willfully violated his probation.

(I)

[1] While defendant concedes that the 11 February 1999 recorded judgment did not reflect the judgment rendered by the trial court in open court, defendant argues that the trial court lacked jurisdiction to correct its judgment after defendant had given notice of appeal and the record on appeal had been filed with this Court. We agree.

As a general rule, the trial court is divested of jurisdiction when a party gives notice of appeal, and pending the appeal, the trial judge is *functus oficio*. *State v. Davis*, 123 N.C. App. 240, 242, 472 S.E.2d 392, 393 (1996). However, "the trial court retains jurisdiction [over] matters ancillary to the appeal, including settling the record on appeal." *Id.* (citing *inter alia* N.C. Gen. Stat. § 15A-1448(a)(3); N.C. Gen. Stat. § 1453; N.C.R. App. P. 11). Furthermore, "[i]t is universally recognized that a court of record has the inherent power and duty to make its records speak the truth[,] . . . to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record[.]" *State v. Old*, 271 N.C. 341, 343, 156 S.E.2d 756, 757-58 (1967) (citations omitted).

> It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance; and this it

> must do upon the application of any person interested, and without regard to its effect upon the rights of parties, or of third persons; and neither is it open to any other tribunal to call in question the propriety of its action or the verity of its records, as made.

State v. Cannon, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956) (quoting *Walton v. Pearson*, 85 N.C. 34, 48 (1881)). It follows that corrections of the official minutes from the superior court must be made in the superior court. *State v. Accor and State v. Moore*, 276 N.C. 567, 570, 173 S.E.2d 775, 778 (1970).

No lapse of time will divest the trial court of the power to make its record speak the truth, *State v. Cannon*, 244 N.C. at 403, 94 S.E.2d at 342, and it may amend its record for this purpose either in or out of term, *State v. McKinnon*, 35 N.C. App. 741, 743, 242 S.E.2d 545, 547 (1978). When a court amends its records to accurately reflect the proceedings, the amended record "stands as if it had never been defective, or as if the entry had been made at the proper time." *State v. Warren*, 95 N.C. 674, 676 (1886). In other words, the amended order is a *nunc pro tunc* entry.

However, once the case has been docketed in the appellate court, the appellate court acquires jurisdiction over the record. *Lawing v. Lawing*, 81 N.C. App. 159, 171, 344 S.E.2d 100, 109 (1986). As such, after the record on appeal has been filed with the appellate court, the trial court may only amend or correct the record upon a directive from the appellate court:

> On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

N.C.R. App. P. 9(b)(5). Therefore, we hold that a motion to correct or amend a judgment in order to make it speak the truth is properly made to the appellate court rather than the trial court once the record on appeal has been filed with the appellate court.

In the present case, the record on appeal was filed with this Court on 14 June 1999. On 2 August 1999, the State filed its motion for correction of judgment in the Superior Court. We find the State improperly moved the trial court to correct its judgment after the record on

appeal had been filed with the appellate court. The trial court did not therefore have the authority to correct its judgment.

Nonetheless, we conclude that defendant was not prejudiced by the trial court's error, because a panel of this Court subsequently granted the State's motion to amend the record on appeal on 12 August 1999. "[W]here one panel of this Court has decided an issue, a subsequent panel is bound by that precedent . . . unless it has been overturned by a higher court." *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 621, 504 S.E.2d 102, 106 (1998). As such, the order of the trial court which corrected and amended its 11 February 1999 judgment is properly before this panel. Defendant's argument that this panel must rely on the 11 February 1999 judgment alone in rendering its decision must therefore fail.

(II)

[2] Defendant next argues that the trial court erred in admitting unreliable hearsay evidence in violation of his Sixth Amendment rights, and in concluding, based on that evidence, that he violated the conditions of his probation. We are compelled to disagree.

In an interview with Officer Donahue on 29 January 1999, the victim alleged that while alone with defendant on 2 January 1999, the two engaged in sexual relations. Although the victim was absent from trial, Donahue testified concerning the 29 January 1999 interview. Donahue also testified that the victim prepared a written statement containing the substance of her conversation with him and that upon his request, the victim signed the statement. Although the trial court noted that it had "problems, in advance, with the weight of and the reliability" of the victim's statement, the court admitted the evidence over defendant's objection.

In its oral order of 11 February 1999, the court made no findings concerning the content of the statement. Rather the court concluded:

> One of the conditions of [defendant's] probation was that he have no contact with the victim.
>
> On or about December 29, 1998, the defendant was in a motel room at the Ramada Inn with his brother and Lakera Mingo, age 15. And therefore, had contact with the victim.
>
> The Court makes no other findings with regard to the allegations of either the probation violation or the original probation violation report or the addendum, thereto.

Thus, the court's only finding, that defendant had contact with the victim, was based on the testimony of Officer Cuddle. Furthermore, Cuddle's testimony was based on his first-hand observations of 29 December 1998, not the victim's statement. Because the court made no findings concerning the content of the victim's statement, we find defendant's assignment of error meritless.

(III)

[3] By his next assignment of error, defendant contends that the trial court abused its discretion in denying defendant's motion for a continuance. Defendant further contends that the court's denial of a continuance deprived him of his due process right to present evidence on his behalf. We disagree.

A motion for a continuance is within the sole discretion of the trial court, "and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995) (citation omitted). However, if the motion raises a constitutional issue, the court's ruling is reviewable on appeal. *Id.*

"Regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error . . . ." *Id.* (citation omitted). Furthermore, "[a] motion for continuance must be supported by 'detailed proof' which 'fully establish[es]' the reasons for the delay." *State v. Cody*, 135 N.C. App. 722, 726, 522 S.E.2d 777, 780 (1999) (quoting *State v. Jones*, 342 N.C. 523, 531-32, 467 S.E.2d 12, 17-18 (1996)).

Prior to the revocation hearing, defendant moved for a continuance, arguing that his only witness, his brother Cathcart, was not in attendance. Defendant's attorney stated that the defense needed Cathcart "pretty desperately." The attorney further noted that defendant had spoken with Cathcart prior to the hearing and that Cathcart informed defendant that he knew about the hearing and was planning to attend. The attorney offered his unsigned copy of Cathcart's subpoena to the court and requested that the court issue a bench warrant. Following a bench conference off the record, the trial court denied defendant's motion.

On appeal, defendant argues that Cathcart's presence at the hearing was essential. Defendant contends that Cathcart is the only wit-

ness who could testify to whether defendant was actually in the same room with the victim and whether defendant's contact with the victim was willful. Defendant further argues that he was prejudiced by the court's denial of a continuance because it is "possible that Mr. Cathcart's testimony would have [led] the trial court to conclude it was more likely than not that Defendant was never in the same room as [the victim]."

We find unpersuasive defendant's argument that Cathcart was an essential witness. Another witness, the victim, was also in the motel room and could therefore testify concerning whether her contact with defendant was willful. Defendant presented no evidence below as to the victim's unavailability or unwillingness to testify.

Furthermore, we find that defendant failed to give the trial court a detailed explanation as to why a delay to secure Cathcart's testimony was necessary. In fact, defendant's only clarification of record was his attorney's bare assertion that the defense needed Cathcart "pretty desperately." We further find defendant's explanation on appeal insufficient to establish prejudice. *See e.g.*, *Cody*, 135 N.C. App. at 726, 522 S.E.2d at 780 (finding that an unsworn statement by defendant's attorney that witness would testify defendant " 'wasn't involved, basically' " in crime was not "detailed proof" to support finding of prejudice). Accordingly, this assignment of error is overruled.

(IV)

[4] Finally, defendant argues that the trial court erred in concluding that he willfully violated the terms of his probation. With this argument we cannot agree.

"[P]robation revocation hearings are not formal criminal proceedings requiring proof beyond a reasonable doubt." *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). Rather, "[a]ll that is required is that the evidence be sufficient to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation." *State v. White*, 129 N.C. App. 52, 58, 496 S.E.2d 842, 846 (1998) (citation omitted), *aff'd in part*, 350 N.C. 302, 512 S.E.2d 424 (1999).

The State must prove that "defendant's failure to comply was willful or without lawful excuse." *Id.* at 57, 496 S.E.2d at 846 (quoting *State v. Sellars*, 61 N.C. App. 558, 560, 301 S.E.2d 105, 106 (1983)). As

such, defendant's failure to comply alone is not sufficient to support a revocation of probation. *Id.* However, defendant must

> present competent evidence of his inability to comply with the conditions of probation; and that otherwise, evidence of defendant's failure to comply *may* justify a finding that defendant's failure to comply was wilful or without lawful excuse.

Tozzi, 84 N.C. App. at 521, 353 S.E.2d at 253 (emphasis added) (citing *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985)).

In the case *sub judice*, the evidence indicates that defendant had contact with the victim in a motel room. Defendant presented no evidence demonstrating why he was unable to comply with the condition of his probation prohibiting such contact. Accordingly, the trial court did not abuse its discretion in finding that defendant violated the terms of his probation and that defendant's noncompliance was "without lawful excuse."

For the reasons stated herein, we find that defendant received a hearing free from prejudicial error. Therefore, we affirm the corrected judgment and commitment upon revocation of probation.

Affirmed.

Judges GREENE and HORTON concur.

AUDREY E. ALLEN, ADMINISTRATRIX OF THE ESTATE OF NATT ALBERT ALLEN, SR., PLAINTIFF v. CAROLINA PERMANENTE MEDICAL GROUP, P.A., A/K/A KAISER PERMANENTE AND DAN FRANKLIN BURROUGHS, M.D., DEFENDANTS

No. COA99-1038

(Filed 1 August 2000)

1. Medical Malpractice— certification—physician of another speciality—dismissal

The trial court did not err in a medical malpractice action by dismissing the compliant pursuant to N.C.G.S. § 1A-1, Rule 41(b) for failure to comply with N.C.G.S. § 1A-1, Rule 9(j) and N.C.G.S. § 8C-1, Rule 702 where plaintiff asserted the language of Rule 9 but the trial court and the Court of Appeals were not convinced

that plaintiff could have reasonably expected her physician to qualify as an expert witness or that his testimony would have been credible in assisting a jury's understanding of whether defendant complied with the applicable standard of care. Defendant is a family practice physician, while the witness is a general surgeon; plaintiff's contentions that the two are similar specialities and that the two doctors had similar work experiences were not convincing.

2. Civil Procedure— dismissal with prejudice—no motion for amended complaint or voluntary dismissal—argument for involuntary dismissal on appeal—not supported by record

The record did not support the argument that the trial court abused its discretion in a medical malpractice action by dismissing the complaint with prejudice for failure to provided the required Rule 9 (j) certification. Although the trial court had the discretion to dismiss with or without prejudice, plaintiff never moved to amend her complaint and did not take a voluntary dismissal pursuant to Rule 41(a); the granting of defendants' motion with prejudice thus served as res judicata, barring plaintiff from now arguing that the dismissal should have been without prejudice.

Appeal by plaintiff from an order entered 7 June 1999 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 16 May 2000.

Perry & Brown, by Sally Metz Keith, for plaintiff-appellant.

Moore & Van Allen, P.L.L.C., by Loni S. Caudill, for defendant-appellees.

HUNTER, Judge.

Plaintiff-appellant Audrey E. Allen, administratrix of the estate of Natt Albert Allen, Sr. ("plaintiff"), appeals the trial court's order dismissing her action with prejudice on the basis that she failed to comply with Rule 9(j) of the N.C. Rules of Civil Procedure by tendering a witness she could not have reasonably expected to qualify as an expert witness under Rule 702 of the N.C. Rules of Evidence. We agree and thus, affirm the trial court's order.

Facts pertinent to this case are that plaintiff's husband, Natt Albert Allen, Sr. ("Mr. Allen") experienced chest pain in three differ-

ent episodes on 1 July 1996. At some time during or just following his third bout of pain, Mr. Allen took two nitroglycerin tablets. After thirty minutes, having obtained no relief, Mr. Allen arrived at Kaiser Permanente's urgent care clinic, sweating and complaining of chest pain and shortness of breath. The treating physician on duty at the time, defendant-appellee Dan Franklin Burroughs, M.D. ("Dr. Burroughs"), worked for defendant-appellee Carolina Permanente Medical Group (collectively with Dr. Burroughs, "defendants"), and was board certified in family practice medicine. Dr. Burroughs examined Mr. Allen, during which time Mr. Allen advised: that he had a history of coronary artery disease, that he had had a cardiac catherization approximately five years before, that he smoked and drank alcohol, and that he had experienced the three pain attacks while on his job "pulling carpet." Dr. Burroughs then administered an EKG to him which results were normal, prescribed medication for Mr. Allen and referred him to a cardiologist. Dr. Burroughs further recorded in Mr. Allen's medical record that at the time of the examination, Mr. Allen was pain-free. Mr. Allen died the next morning.

On 5 June 1998, plaintiff filed her complaint alleging that Mr. Allen's death was

> the foreseeable result of the negligent acts and omissions of Defendants Kaiser and Burroughs.
>
> [She further alleged that] [i]n the diagnosis, care and treatment, or lack thereof . . . Defendant Burroughs . . . negligently violated the accepted standard of medical care among members of the same healthcare profession with similar training and experience situated in the same or similar communities . . . in failing to comply with the standards of care of the[] profession; in failing to apply [his] knowledge with reasonable diligence; and in failing to use [his] best judgment . . . .

Furthermore as procedurally required under N.C. Gen. Stat. § 1A-1, Rule 9(j), plaintiff specifically pled that Dr. Burrough's medical care of Mr. Allen had been reviewed by general surgeon Dr. B. Michael Smith ("Dr. Smith"), "a person who is reasonably expected to qualify as an expert witness under Rule 702 . . . a person who is willing to testify that said medical care did not comply with the applicable standard of care."

Plaintiff has preserved three assignments of error: (1) that the trial court improperly allowed defendants' motion to dismiss under

Rules 12(b)(6) and 9(j) of the North Carolina Rules of Civil Procedure and Rule 702 of the North Carolina Rules of Evidence; (2) that the trial court improperly dismissed her complaint under Rule 56 of North Carolina Rules of Civil Procedure; and (3) that the trial court improperly dismissed her complaint pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure for failure to comply with Rule 9(j) and Rule 702. Due to our disposition of this case, we only address plaintiff's last argument.

[1] We begin by noting that our Legislature has taken considerable pains to effect a statute that allows meritorious medical malpractice claims to go forward, while shutting down the engine of frivolous or malicious medical malpractice claims. Our statutes require that:

> Any complaint alleging medical malpractice by a health care provider . . . in failing to comply with the applicable standard of care . . . *shall be dismissed UNLESS*:
>
> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under [Evidence] Rule 702 . . . and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under [Evidence] Rule 702(e) . . . and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (1999) (emphasis added).

> Furthermore,
>
> (a) 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.
>
> (b) In a medical malpractice action . . . a person *shall not give expert testimony* on the appropriate standard of

health care . . . *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 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 for clinical research program in the general practice of medicine.

N.C.R. Evid. 702(a), (b), (c) (emphasis added).

The plaintiff in *Keith v. Northern Hosp. Dist. of Surry County*, 129 N.C. App. 402, 499 S.E.2d 200 (1998) raised an issue similar to the present plaintiff before this Court. There, the plaintiff alleged medical malpractice in her complaint, but failed to include the required Rule 9(j) certification. Upon defendant's motion to dismiss under Rule 9(j), plaintiff motioned the court to allow her to amend her pleading to include the required certification. The trial court denied plaintiff's motion to amend and allowed defendant's motion to dismiss with prejudice. Upon this Court's review, Judge Edward Greene opined for the Court:

> This rule [N.C. Gen. Stat. § 1A-1, Rule 9(j)] is **unambiguous in stating that the complaint "shall be dismissed"** if the complaint does not include a certification that the medical care at issue has been reviewed by a person "reasonably expected to qualify as an expert" and "who is willing to testify that the medical care [which is the subject of the pleading] did not comply with the applicable standard of care." When the statutory language is "clear and unambiguous, 'there is 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)). *It follows, therefore, that because the complaint in this case alleged a claim for medical malpractice* against a "health care provider" *and did not include the necessary Rule 9(j) certification*, **the trial court was required to dismiss it.**

Id. at 404-05, 499 S.E.2d at 202 (emphasis added) (footnotes omitted). We are persuaded that *Keith* controls in the present case. Plaintiff here, unlike *Keith's* plaintiff, did assert the proper *language* of Rule 9(j), stating that she had acquired a physician (Dr. Smith) to testify. However, we are unconvinced that she could have "reasonably expected [Dr. Smith] to qualify as an expert witness under Rule 702 of the Rules of Evidence . . . ." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1). Neither are we persuaded plaintiff could have reasonably believed that, even if Dr. Smith had been allowed to testify, his testimony would have been credible in assisting a jury's understanding as to

whether Dr. Burrough's medical care complied with the applicable standard of care. *See also* N.C. Gen. Stat. § 8C-702(a).

We reiterate that statutory law clearly states that where the party against whom expert testimony is offered is a specialist, the expert witness MUST also

> a. Specialize in the same specialty . . . ; 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 . . . have devoted a majority of his or her professional time to either or both of the following:
>
> a. The active clinical practice [in that specialty] . . . ; or
>
> b. The instruction of students [in that specialty] . . . .

N.C. Gen. Stat. § 8C, Rule 702(b)(1), (2) (1999). Furthermore, the statute is even more stringent where the expert testimony is offered against a "general practitioner." In such cases, during the immediately preceding year the expert witness

> 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 the general practice of medicine.

N.C. Gen. Stat. § 8C, Rule 702(c)(1), (2) (1999) (emphasis added). Thus, in order for Dr. Smith to qualify—or for plaintiff to reasonably believe that he would qualify as an expert witness in this case, he would necessarily have to have been in the same or similar practice as Dr. Burroughs and have been spending most of his time either seeing patients in that specialty and/or teaching in an accredited health professional school or residency or research program in the same or a similar specialty. We hold that Dr. Smith did not and could not qualify as an expert witness against Dr. Burroughs in this case because family practice is not within the specialty of general surgery.

In order to become licensed in the State of North Carolina, a physician must have at least one year of post graduate training

beyond medical school. However, that year's training need not be specialized. Nevertheless, in order to be certified in family practice, a physician must have completed the specialized residency training for family practitioners—which usually is a three-year post graduate residency. Additionally, physicians in North Carolina must be periodically re-certified, which requires completion of a minimum of 150 hours of continuing medical education every three years.

From the record, it is undisputed that Dr. Burroughs was North Carolina Board certified as a family practitioner and that he had practiced as such for 35 years—including the year prior to and for two years following the incident in question. It is further uncontested that Dr. Smith, plaintiff's proposed expert witness, was a Board certified general surgeon who, for the year prior to the incident in question (which occurred in June 1996) solely practiced in his area of general surgery. We begin by noting that plaintiff does not—and reasonably so—contend that these two areas of medicine are the same. Instead, plaintiff attempts to argue that family practice and general surgery are "similar specialties" within the meaning of North Carolina Rule of Evidence 702. We are unconvinced.

It is plaintiff's contention that regardless of the fact Dr. Burroughs was certified in family practice, because he was working in an Urgent Care facility, he was actually practicing as either a general practitioner or an emergency medicine doctor. Thus, plaintiff argues, Dr. Smith's experience was similar to Dr. Burroughs. However, we do not agree. Addressing first plaintiff's general practitioner argument, we note that in order for Dr. Smith to qualify under Rule 702(c), he must have also been a general practitioner—the rule leaving *no room* for any other "similar specialty." Never once did Dr. Smith purport to be a general practitioner, and; although he agreed that he had not met the requirements for board certification and neither did he complete the training required for a physician to specialize in family practice, Dr. Smith purported to say that he felt qualified to testify on the standard of care for a family physician. Yet in his own deposition, the only practice Dr. Smith admits to having is one of general surgery. He further admits that he has neither met the requirements for nor does he have any expertise in family practice medicine except "[t]o the extent that it's involved in emergency medicine somewhat . . . ."

Furthermore, although Dr. Smith attempts to claim expertise in emergency medicine when he states "I guess you could consider me board eligible in emergency medicine," he later admits that he has

another three (out of five) years to practice emergency medicine before he can even take the Board exam for that specialty. We further note that Dr. Smith had been in emergency room practice only twice in his career, from January 1993 to May or June 1993, and then again in February 1997 until his deposition. Additionally, Dr. Smith admits and plaintiff does not dispute that the only teaching he has done is in training paramedics in an unaccredited school setting—again, this fails to meet the requirements under Rule 702. Thus, the record reveals that Dr. Smith's only feasible expert testimony would have to come from his own specialty as a general surgeon.

We find Dr. Smith's own testimony dispositive as to whether he had the expertise to argue the standard of care applicable to Dr. Burroughs. In his deposition Dr. Smith testified that "[b]ased on what the record says, I think there's a likelihood [Mr. Allen] should have been admitted" to the hospital. However, when questioned as to the care Mr. Allen should have received, Dr. Smith did not know:

> Q: If [Mr. Allen] had been admitted to the hospital, what would have happened?
>
> A: I don't know.
>
> Q: You wouldn't have made those treatment decisions?
>
> A: No, ma'am.
>
> Q: So you don't know how he would have been treated?
>
> A: I mean, **I have an opinion as to how he possibly could have been treated, but as far as the way he should have been, again it falls in the expertise out of my field.** I know how most patients like this are treated in the general area where I practice.

(Emphasis added.)

Considering Dr. Smith's deposition alone, it is clear that as an "expert" offering testimony against Dr. Burroughs, Dr. Smith did not meet the requirement that he "[s]pecialize in the same specialty as [Dr. Burroughs]" nor did he "[s]pecialize in a similar specialty which include[d] within it[] . . . the procedure that is the subject of the complaint," as required by Rule 702. N.C. Gen. Stat. § 8C, Rule 702(b)(1). Therefore, we hold that plaintiff could not have reasonably believed that Dr. Smith would qualify as an expert witness in this case, thus

"the trial court was required to dismiss" plaintiff's cause of action. *Keith*, 129 N.C. App. at 405, 499 S.E.2d at 202.

[2] Finally, we address plaintiff's oral argument before this Court that the trial court was not obligated to dismiss her cause of action with prejudice, but could have instead dismissed the action without prejudice under N.C. Gen. Stat. § 1A-1, Rule 41(a).

Recently, in *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000), our Supreme Court addressed this very issue. The plaintiffs in that case filed their medical malpractice claim in superior court without the required Rule 9(j) certification. Defendants moved to dismiss for the lack thereof, and plaintiffs subsequently moved to amend their pleadings, or in the alternative, to voluntarily dismiss their complaint without prejudice pursuant to Rule 41(a). The trial court denied plaintiffs' motion to amend and reserved ruling on defendants' motion to dismiss. In the meantime, plaintiffs took their voluntary dismissal under Rule 41(a) and later refiled their claim with the appropriate Rule 9(j) certification. Holding that plaintiffs' voluntary dismissal was proper, the Court opined: "Had the trial court involuntarily dismissed plaintiffs' complaint with prejudice pursuant to defendants' motion *before* plaintiffs had taken the voluntary dismissal, then plaintiffs' claims set forth in the second complaint would be barred . . . . Such was not the case here, however." *Brisson*, 351 N.C. 589, 595, 528 S.E.2d 568, 572 (emphasis in original).

Plaintiff is correct when she says it is within the trial court's discretion whether to dismiss with or without prejudice. However, in the present case, plaintiff never moved to amend her complaint nor did she take a voluntary dismissal pursuant to Rule 41(a). Thus, the granting of defendants' motion to dismiss with prejudice, under the provisions of Rule 9(j), serves as *res judicata*, barring plaintiff from now arguing that her case should have been dismissed without prejudice to her. The record before us does not support an argument that the trial court abused its discretion. Thus, the trial court's judgment is

Affirmed.

Judges GREENE and HORTON concur.

PATRICIA HUNTER, EMPLOYEE, PLAINTIFF v. PERQUIMANS COUNTY BOARD OF EDUCATION, EMPLOYER; SELF-INSURED, DEFENDANT

No. COA99-1039

(Filed 1 August 2000)

1. **Workers' Compensation— additional compensation—claim not timely**

The Industrial Commission did not err in a workers' compensation action by finding and concluding that plaintiff's claim for additional compensation for a change of condition was not timely where plaintiff received a lump sum payment intended to be the last payment in March of 1993, the Commission did not approve the agreement for a lump sum payment until 20 April 1994, and plaintiff filed a claim on 3 April 1996 for additional compensation for a change in condition. The plain language of N.C.G.S. § 97-47 establishes that the limitations period begins to run on the date of the last payment of compensation and the date that triggers the running of the statute of limitations is the date the last payment is received, not the date the Commission approves the award.

2. **Workers' Compensation— additional compensation—time limitations defense—not estopped**

Defendants in a workers' compensation action were not estopped from raising the limitations period as an affirmative defense to a claim for additional compensation for a change of condition where they never filed Form 28B with plaintiff or the Commission. Although defendants should have filed the form, the plain language of N.C.G.S. § 97-18(h) provides a remedy only to the Commission, not to the plaintiff; here, the Commission assessed defendants a $25 fine pursuant to the statute. The Commission found that the March 1994 payment was final and was neither denied its right to determine whether the payment was final nor shirked its duty to do so.

3. **Workers' Compensation— additional compensation—claim untimely filed—no bad faith inducement of delay**

Defendants in a workers' compensation claim were not equitably estopped from raising the limitation period defense to a claim for additional compensation for a change of condition where the Commission explicitly concluded that there was no evidence that plaintiff's delay in filing her claim was induced by defendants and no evidence that defendants acted in bad faith.

Appeal by plaintiff from an opinion and award entered 15 July 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 June 2000.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Don Wright, for defendant-appellee.

HUNTER, Judge.

Plaintiff-appellant, Patricia Hunter ("plaintiff"), appeals from the 15 July 1999 opinion and award of the North Carolina Industrial Commission ("Commission") denying her workers' compensation claim against Perquimans County Board of Education and Self-Insured, North Carolina School Board Association Insurance Trust, Agency (collectively "defendants") for additional compensation for an alleged change in condition. The Commission ruled that the plaintiff's claim for a change of condition was barred by the two-year limitations period set out in N.C. Gen. Stat. § 97-47. Plaintiff appeals to this Court arguing that her claim for additional compensation was timely filed. Alternatively, plaintiff argues that even if her claim was not timely filed, defendants were estopped from asserting the limitation period as an affirmative defense because they failed to: (1) file a Form 28B Notice of Final Payment ("Form 28B") with the Commission or (2) provide the plaintiff with a Form 28B after mailing the last payment of compensation. We find both arguments unpersuasive; therefore, we affirm the Commission's award.

The facts pertinent to this appeal are as follows: On 28 February 1990 plaintiff sustained a back injury arising out of and in the course of her employment with defendants. Plaintiff was compensated for her injury by defendants pursuant to a series of awards by the Commission. Following the 28 May 1992 final agreement and award by the Commission, defendants filed a Form 28B notice of final compensation with the Commission and provided plaintiff with a copy.

In 1993, plaintiff's doctor, Dr. Lorenzo Archer, having determined that plaintiff's condition had significantly deteriorated, increased plaintiff's permanent partial disability rating from thirty percent to forty percent. As a result, plaintiff and defendants entered into a Form 26 agreement for compensation which was approved by the Commission on 4 February 1994. The agreement provided for com-

pensation to plaintiff at a rate of $119.05 per week. Plaintiff's compensation payments were scheduled to commence on 22 September 1993 and continue for thirty weeks. On 24 January 1994, plaintiff applied for a lump sum payment of the compensation provided for in the Form 26 agreement. On 3 March 1994 in response to plaintiff's application, the defendants issued a check to plaintiff for the sum of her benefits; however, the lump sum payment application was not approved by the Commission until 20 April 1994. Defendants did not file a Form 28B notice of final compensation at any time after the lump sum payment was received by the plaintiff in early March 1994. More than two years later on 21 March 1996, plaintiff received an unsatisfactory report from Dr. Archer. Plaintiff then filed a claim on 3 April 1996 for additional compensation for a change in condition pursuant to N.C. Gen. Stat. § 97-47.

After conducting a hearing, Deputy Commissioner Kim Cramer found that plaintiff was no longer capable of gainful employment, had not earned any significant wages since 1994, and that the "final check was [mailed] to the Plaintiff in March, 1994" but the defendants failed to file a Form 28B to close out the case. Therefore, the deputy commissioner concluded that even though the plaintiff's claim was not filed within two years of receipt of her last compensation payment, the two-year limitation period of N.C. Gen. Stat. § 97-47 did not bar the plaintiff's claim because the claim was filed within two years of the date that the Commission approved the lump sum payment award. Defendants appealed to the Full Commission. The Commission rejected the deputy commissioner's conclusion that its approval of the lump sum payment application was the trigger for the limitations period.

In its opinion and award of 15 July 1999, the Full Commission made the same findings as Deputy Commissioner Cramer. However, the Commission further found that the failure of the defendants to provide a copy of Form 28B to plaintiff within sixteen days of the final payment as required by N.C. Gen. Stat. § 97-18(h) did not estop defendants from asserting the two-year limitation period provided for in N.C. Gen. Stat. § 97-47 as an affirmative defense to plaintiff's claim. Therefore, the Commission concluded that because plaintiff's claim was not made within two years of receipt of the last payment of compensation it was untimely. Thus, plaintiff's claim was barred.

Plaintiff preserved six assignments of error for this Court's review; however, plaintiff combines them into two arguments before this Court.

I

[1] Plaintiff's first contention is that the Commission erred by not finding as fact and concluding as a matter of law that her claim for additional compensation for a change in condition pursuant to N.C. Gen. Stat. § 97-47 was timely. We disagree.

It is well established that "the Industrial Commission is the fact finding body and . . . the findings of fact made by the Commission are conclusive on appeal, . . . if supported by competent evidence. . . . This is so even though there is evidence which would support a finding to the contrary." *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981). Therefore, the appropriate standard of review by this Court is to determine only whether the Commission's findings of fact are supported by competent evidence and whether those findings indeed support the Commission's conclusions of law.

With regard to plaintiff's change in condition, N.C. Gen. Stat. § 97-47 provides in relevant part that:

> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, ... [However,] *no such review shall be made after two years from the date of the last payment of compensation* pursuant to an award under this Article, ...

N.C. Gen. Stat. § 97-47 (1999) (emphasis added). Although the Commission did not approve the agreement for a lump sum payment until 20 April 1994, the record shows that plaintiff stipulates that she received the lump sum payment from defendants sometime in early March 1994. The record also reveals that the lump sum payment, intended to be plaintiff's last payment of compensation, was mailed by defendants on 3 March 1994.

We begin by emphasizing that the plain language of the statute establishes that the limitations period begins to run on "the date of the last payment of compensation." N.C. Gen. Stat. § 97-47. It is well established by case law that this section provides a limitations period requiring any claim for additional compensation on the grounds of a change in condition to be made within two years of the date the last payment of compensation was received by the claimant. *Apple v. Guilford County*, 321 N.C. 98, 361 S.E.2d 588 (1987). Further, the limitation period is not jurisdictional, but merely provides a defense that

may be raised by the employer. *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 281 S.E.2d 463 (1981). The date that triggers the running of the statute of limitations is the date that the last payment of compensation is received by the claimant, *not* the date the Commission actually approves the award. *Willis v. Davis Industries*, 280 N.C. 709, 186 S.E.2d 913 (1972). *See also White v. Boat Corporation*, 261 N.C. 495, 135 S.E.2d 216 (1964); *Hill v. Hanes Corp.*, 79 N.C. App. 67, 339 S.E.2d 1 (1986), *aff'd in part, rev'd in part on other grounds*, 319 N.C. 167, 353 S.E.2d 392 (1987). Therefore, because the limitations period began to run when plaintiff received her last payment of compensation in early March 1994, we hold that plaintiff's claim for additional compensation filed with the Commission on 3 April 1996 was untimely.

Nonetheless, plaintiff contends that the filing of Commission Form 28B is necessary to trigger the running of the limitation period and that without such filing, the limitations period never began to run. Plaintiff argues, "[i]f no Form 28B is served upon the employee, then the date the last compensation check was received by the employee has no legal significance. . . . The receipt of the check only has legal significance when a Form 28B is timely served on the employee." However, plaintiff's argument is completely inapposite to case law which provides that, "the time limitation commences to run from the date on which [the employee] receive[s] the last payment of compensation, *not* from the date on which the employee receive[s] a Form 28B." *Cook v. Southern Bonded, Inc.*, 82 N.C. App. 277, 280, 346 S.E.2d 168, 170 (1986) (emphasis added). Further, if the General Assembly had intended for the limitation to be contingent upon the filing of Form 28B it would have so provided. *See Willis*, 280 N.C. at 714-15, 186 S.E.2d at 916. Therefore, since the limitation period began to run when plaintiff received her last payment of compensation in early March 1994, it was not affected by whether plaintiff also received a copy of Form 28B.

II

[2] Plaintiff's next assignment of error is that in the alternative, the Commission erred by failing to hold that even if her claim was untimely, defendants were estopped from raising the limitation period as an affirmative defense because defendants never filed Form 28B with plaintiff or the Commission. Again, we disagree.

We begin by noting that our Supreme Court has held that the purpose of the limitation period in N.C. Gen. Stat. § 97-47 is:

> [T]o give timely notice to employer and insurance carrier that a further claim is being made . . . [t]he employer and the insurance carrier are entitled to treat final payment under a Form 21 agreement as closing the proceeding, absent timely notice that an employee seeks further compensation due to change of condition.

Apple, 321 N.C. at 101, 361 S.E.2d at 590. We reiterate that both our Legislature and Supreme Court have found great importance in providing notice to the employer when the employee seeks further compensation. It is good public policy to bring closure to disputes and an end to liability. *Pennington*, 53 N.C. App. 584, 281 S.E.2d 463.

Contrarily, N.C. Gen. Stat. § 97-18(h) provides for notice of final payment beyond the receipt of benefits to the employee. In relevant part N.C. Gen. Stat. § 97-18(h) provides:

> Within 16 days after final payment of compensation has been made, the employer shall send to the Commission and the employee a notice, in accordance with a form prescribed by the Commission, ... *If the employer fails to so notify the Commission or the employee within such time, the Commission shall assess against such employer a civil penalty in the amount of twenty-five dollars* ($25.00). . . .

N.C. Gen. Stat. § 97-18(h) (1999) (emphasis added). It is true that the purpose of an employer's being required to file a Form 28B is to give the Commission and the employee notice that the final payment has been made. *Hill*, 79 N.C. App. 67, 339 S.E.2d 1. However, reason dictates that because the employee entered into an agreement of compensation, she was aware of the terms of that agreement. Therefore, the Form 28B notice required by N.C. Gen. Stat. § 97-18(h) is actually a reminder and not a notification. Neither our General Assembly nor our case law has interpreted an employer's failure to file such notice as providing an employee with a right to remedy. *Hill*, 79 N.C. App. 67, 339 S.E.2d 1. In fact, the only remedy allowed is for the Commission and that being nominal. *See* N.C. Gen. Stat. § 97-18(h). Therefore, although we agree that defendants *should have* filed a Form 28B with plaintiff and the Commission, the plain language of this section provides a remedy only to the Commission, not to the plaintiff/employee, for the defendant/employer's failure to comply with its express provisions.

In the case at bar, the Commission found that defendants had failed to comply with N.C. Gen. Stat. § 97-18(h)'s requirement that

they file a Form 28B with the Commission and plaintiff. Subsequently, the Commission assessed the defendants with a twenty-five dollar fine pursuant to § 97-18. When the statutory language is "clear and without ambiguity, 'there is 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)). Because the General Assembly provided an express remedy only for the Commission, we are compelled to assume that no private remedy was intended for the employee. Further, the importance, or lack thereof, that the Legislature placed on the filing of the Form 28B for notice is reflected in the nature of the penalty. A twenty-five dollar penalty for non-compliance is nominal. We hold then, that there is no further remedy provided at law for defendants' failure to file Form 28B.

However, we acknowledge that plaintiff bases her argument on this Court's holding in *Sides v. Electric Co.*, 12 N.C. App. 312, 183 S.E.2d 308 (1971). Plaintiff contends that the following statement in *Sides* should be controlling:

> Under the Commission's rule XI(5) promulgated pursuant to statutory authority contained in G.S. 97-80, defendants must execute Form 28(b) and furnish a copy to a claimant with his last compensation check. A failure to do so will estop defendants from pleading the lapse of time in bar of a claim asserted for additional compensation on the grounds of a change in condition. . . .

Id. at 314, 183 S.E.2d at 310 (citations omitted). This argument was based on our Supreme Court's holding in *White*, 261 N.C. 495, 135 S.E.2d 216, requiring that the employer or insurance carrier comply with the Commission rule and give the employee notice. In *White*, our Supreme Court further stated that failure to comply with the rule would result in failure to put the limitation period into operation. *Id.* **However, the Supreme Court's decision in *Willis v. Davis Industries*, directly overruled the relevant portion of *White***, thus plaintiff's reliance is unfounded. *Willis*, 280 N.C. 709, 186 S.E.2d 913. Since the statement from *Sides*, upon which plaintiff relies, is no longer good law, we overrule plaintiff's contention.

A more recent case interpreting the effect of the statutory requirement that Form 28B must be filed provides:

> [F]or purposes of G.S. Sec. 97-47, the statutory one-year period [now two years] for filing a claim for a change of condition begins at the time final payment is accepted, not when Form 28B is filed. Nonetheless, the Commission must be given the opportunity to determine whether a payment labeled "final" is or should be, in fact, the final payment. . . .

Hill, 79 N.C. App. at 75, 339 S.E.2d at 6 (citation omitted). *See also Cook*, 82 N.C. App. 277, 346 S.E.2d 168. Although the *Hill* court's interpretation of section 97-18(h) requires that the Commission be granted the opportunity to determine if the payment is indeed a final payment, the clear demarcation of the limitation period beginning to run is "at the time final payment is accepted, *not* when Form 28B is filed." *Hill*, 79 N.C. App. at 75, 339 S.E.2d at 6 (emphasis added).

We note in the case at bar, that the Commission was neither denied its right to determine whether the payment labeled "final" was indeed final as to this plaintiff; nor did the Commission shirk its duty to do so. Instead, the Commission found as fact that the 3 March 1994 disbursement was the final payment. Because the Commission's findings of fact are conclusive on appeal if supported by any competent evidence in the record and because there is evidence of record to support the Commission's finding in this case, plaintiff's argument that defendants were estopped is overruled. *Hansel*, 304 N.C. 44, 283 S.E.2d 101.

[3] Nonetheless, plaintiff continues to argue that even if defendants were not estopped from pleading the limitation period defense, defendants should have been equitably estopped from pleading the limitation period. We are unpersuaded. Our Supreme Court recognizes a plaintiff's right to assert equitable estoppel in preventing a defendant in a worker's compensation action from asserting the time limitation defense only when the defendant, " '. . . by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith' " has caused harm to plaintiff. *Watkins v. Motor Lines*, 279 N.C. 132, 139-40, 181 S.E.2d 588, 593 (1971) (quoting *Nowell v. Tea Co.*, 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959)). Our Supreme Court opined:

> "The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. 'The doctrine of equitable estoppel is based on an

application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play.' *McNeely v. Walters*, 211 N.C. 112, 189 S.E. 114 [1937]."

Willis, 280 N.C. at 715, 186 S.E.2d at 916-17 (quoting *Nowell v. Tea Co.*, 250 N.C. at 579, 108 S.E.2d at 891). Thus for the present plaintiff to succeed in her argument, she must show that defendants induced her delay in filing her claim by some bad act, representation, or conduct. On the contrary, the Commission explicitly concluded that there was "no evidence of record that plaintiff's delay in filing her claim for a change of condition was induced by any acts, representations or conduct on the part of defendant and [there was] no evidence that defendant acted in bad faith." We hold then that, based on the findings of the Commission which are substantiated by competent evidence, there are no grounds upon which the Commission should have concluded defendants were equitably estopped from pleading the statutory limitation period defense.

We further hold that since defendants were not barred from raising the limitation period as a defense to plaintiff's claim, and since plaintiff's claim was not timely filed, defendants' defense necessarily defeats plaintiff's untimely claim. Because the record provides competent evidence for the Commission's findings of fact and those findings support the Commission's conclusions of law, the Commission's opinion and award is

Affirmed.

Judges GREENE and HORTON concur.

EASTOVER RIDGE, L.L.C., A NORTH CAROLINA LIMITED LIABILITY COMPANY, PLAINTIFF V. METRIC CONSTRUCTORS, INC., DEFENDANT

BYRD'S LAWN & LANDSCAPING, INC., PLAINTIFF V. EASTOVER RIDGE, L.L.C.; METRIC CONSTRUCTORS, INC.; HACKER INDUSTRIES, INC.; NATIONWIDE LIFE INSURANCE COMPANY; AND WILLIAM T. GRAVES, AS TRUSTEE, DEFENDANTS

NIX-UNGER CONSTRUCTION CO., INC., PLAINTIFF V. METRIC CONSTRUCTORS, INC., AND EASTOVER RIDGE LIMITED LIABILITY COMPANY, DEFENDANTS

BASIC ELECTRIC COMPANY, INC., PLAINTIFF v. METRIC CONSTRUCTORS, INC. AND EASTOVER RIDGE, L.L.C., DEFENDANTS

ALLISON FENCE COMPANY, INC., PLAINTIFF v. EASTOVER RIDGE LIMITED LIABILITY COMPANY, METRIC CONSTRUCTORS, INC., NATIONWIDE LIFE INSURANCE AND WILLIAM T. GRAVES, TRUSTEE, DEFENDANTS

No. COA99-960

(Filed 1 August 2000)

1. Appeal and Error— appealability—partial summary judgment

The appeal of a partial summary judgment on a claim arising from the construction of apartment units was properly before the Court of Appeals where the order granting summary judgment on the unfair and deceptive trade practices claim was dispositive of that claim, the trial court certified that there is no just reason for delaying the appeal, and a substantial right would be significantly impaired absent immediate appeal due to the possibility of inconsistent verdicts.

2. Fraud— constructive—no fiduciary relationship

The trial court did not err by granting a partial summary judgment for defendant on an unfair and deceptive trade practices claim in an action arising from the construction of apartments where plaintiff contended that it would necessarily be entitled to recover on its unfair and deceptive trade practices claim if it prevailed on its constructive fraud claim. Constructive fraud requires a relationship of trust and confidence; notwithstanding standard language in the agreement between plaintiff and defendant (the contractor) regarding a relationship of trust and confidence, and deposition testimony that defendant knew that plaintiff expected defendant to "look after" plaintiff's interests, the architect's constant, close involvement in the project belies any claim that a "relation of trust and confidence" existed between plaintiff and defendant giving rise to a fiduciary relationship.

3. Unfair Trade Practices— construction contract—insufficient aggravating circumstances

The trial court did not err by granting partial summary judgment for defendant on an unfair and deceptive trade practices claim arising from the construction of apartments where plaintiff contended that there were sufficient aggravating circumstances to support the claim. Although plaintiff made numerous allega-

tions that defendant breached its agreement regarding the construction project, a certificate of substantial completion was signed by the architect and the project was subject to local government inspection.

Appeal by plaintiff Eastover Ridge from judgment entered 24 May 1999 by Judge L. Oliver Noble, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 May 2000.

Robinson, Bradshaw & Hinson, P.A., by Robert W. Fuller and Lawrence C. Moore, III, for plaintiff-appellant Eastover Ridge.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Timothy G. Barber and Steven D. Gardner; and Spriggs & Hollingsworth, by Douglas L. Patin and Mark Blando, for defendant-appellee Metric Constructors, Inc.

WALKER, Judge.

The above five cases listed in the caption of this opinion were consolidated for trial; however, only plaintiff Eastover Ridge and defendant Metric Constructors, Inc. (case no. 96-CVS-13243) are parties to this appeal.

On 22 July 1994, plaintiff entered into an agreement with defendant for the construction of 216 apartment units in nine buildings, a clubhouse/leasing building, pool, tennis courts, maintenance building, certain landscape features, and associated site work. Plaintiff initiated this action on 22 October 1996 and filed an amended complaint four days later, asserting claims for breach of contract, breach of fiduciary duty and constructive fraud, unfair trade practices, and equitable relief of recoupment and setoff. Defendant filed an answer and counterclaim, alleging breach of contract by plaintiff and seeking recovery in *quantum meruit* as well as enforcement of its lien pursuant to N.C. Gen. Stat. § 44A-13. Plaintiff cross-claimed for *quantum meruit* recovery in its reply filed 19 February 1997.

On 18 September 1998, defendant filed a motion for partial summary judgment, seeking to limit damages in accordance with the liquidated damages provision of the agreement and dismissal of the plaintiff's claim for unfair and deceptive trade practices. After a hearing, the trial court granted defendant's motion for partial summary judgment, dismissing plaintiff's claim for unfair and deceptive trade practices. The trial court then certified the judgment as final pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Plaintiff assigns as error the trial court's awarding summary judgment in favor of defendant on the claim for unfair and deceptive trade practices since: (1) defendant breached its fiduciary duty to plaintiff resulting in constructive fraud; and (2) there were sufficient aggravating circumstances. "Under N.C. Gen. Stat. § 75-1.1, the question of what constitutes an unfair or deceptive trade practice is an issue of law." *L.C. Williams Oil Company, Inc. v. Exxon Corp.*, 625 F.Supp. 477, 482 (M.D. N.C. 1985) (citations omitted). "While a court generally determines whether a practice is an unfair or deceptive act or practice based on the jury's findings, if the facts are not disputed the court should determine whether the defendant's conduct constitutes an unfair trade practice." *Id.* "Summary judgment has been granted when appropriate." *Id.* 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). Defendant, as the moving party, bears the burden of showing that no triable issue exists. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-342 (1992). This burden can be met by showing: (1) that an essential element of plaintiff's claim is nonexistent; (2) that discovery indicates plaintiff cannot produce evidence to support an essential element; or (3) that plaintiff cannot surmount an affirmative defense. *Id.* at 63, 414 S.E.2d at 342. Once a defendant has met that burden, the plaintiff must forecast evidence tending to show a *prima facie* case exists. *Id.*

[1] Although the parties do not raise the issue, we must first consider *sua sponte* whether the plaintiff's appeal is properly before this Court. *See Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). There is generally no right to appeal an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995).

There are only two means by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C.R. Civ. P. 54(b) or (2) "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Bartlett v. Jacobs*, 124 N.C.

App. 521, 524, 477 S.E.2d 693, 695 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997) (citations omitted); *Anderson v. Atlantic Casualty Ins. Co.*, 134 N.C. App. 724, 518 S.E.2d 786 (1999); N.C. Gen. Stat. § 1-277 (1999); N.C. Gen. Stat. § 7A-27 (1999). However, a Rule 54(b) certification is effective to certify an otherwise interlocutory appeal only if the trial court has entered a final judgment with regard to a party or a claim in a case which involves multiple parties or multiple claims. *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 500 S.E.2d 666 (1998). Rule 54(b) certification of an appeal is reviewable by this Court "because the trial court's denomination of its decree 'a final . . . judgment does not make it so,' if it is not such a judgment." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998), *citing Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979). Thus, we must determine whether the order granting defendant partial summary judgment was final or, in the alternative, whether a substantial right of plaintiff will be affected absent immediate appellate review.

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 357, 361-362, 57 S.E.2d 377, 381, *rehearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). In the case at bar, the trial court's order granting defendant partial summary judgment on the unfair and deceptive trade practices claim is dispositive of that claim, and the trial court certified that there is no just reason for delaying the appeal pursuant to Rule 54(b). Furthermore, we conclude that a substantial right of plaintiff would be significantly impaired absent immediate appeal due to the possibility of inconsistent verdicts in later proceedings since plaintiff's claim against defendant for constructive fraud is still pending. *See First Atl. Mgmt. Corp.*, 131 N.C. App. 242, 507 S.E.2d 56; *Webb v. Triad Appraisal and Adjustment Service, Inc.*, 84 N.C. App. 446, 352 S.E.2d 859 (1987). Thus, plaintiff's appeal is properly before this Court.

[2] We next address plaintiff's contention that summary judgment was improperly granted since defendant breached its fiduciary duty to plaintiff resulting in constructive fraud. Plaintiff argues that if it "prevails on its constructive fraud claim, it will necessarily be entitled to recover for an unfair and deceptive trade practice claim." *See Webb*, 84 N.C. App. at 449, 352 S.E.2d at 862. Defendant contends that although plaintiff's claim for constructive fraud was not raised before

nor addressed by the trial court, there is insufficient evidence to establish constructive fraud as a matter of law.

In order to maintain a cause of action for constructive fraud, plaintiff must allege "facts and circumstances" which "created the relation of trust and confidence" and "led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950); *See Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997). "Constructive fraud differs from actual fraud in that it is based on a confidential relationship rather than a specific representation." *Barger*, 346 N.C. at 666, 488 S.E.2d at 224.

Plaintiff contends that Article 3 of the parties' agreement "imposed a fiduciary duty" on defendant. Article 3 provides:

> 3.1 The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and utilize the Contractor's best skill, efforts and judgment in furthering the interests of the Owner. . . .

Plaintiff also points to the deposition of defendant's Senior Project Manager, Carl Frinzi, in which the following exchange occurred:

> Q. . . . you knew that [Mr. Griffith, an owner of Eastover] expected you to look after his interests?
>
> A. Yes.
>
> Q. Because he told you that?
>
> A. Yes.
>
> Q. And you said you were?
>
> A. Uh-huh (yes).

Defendant argues that plaintiff's "constructive fraud claim is premised on a contractually created alleged fiduciary duty" and that plaintiff has failed to cite to any authority which indicates that the "breach of a contractually created fiduciary duty[] equates to a constructive fraud claim under North Carolina law." Defendant further argues that plaintiff has failed to allege the "existence of a relationship between itself and [defendant] that triggers a presumptive constructive fraud claim."

A careful review of the record reveals that defendant had previously participated in a bidding process and submitted the lowest bid for the construction project. Thereafter, the parties negotiated a cost plus contract. While certain terms of this contract were specifically negotiated, there is nothing to indicate that Section 3.1 of Article 3 of the standard AIA Document A201, entitled "General Conditions of the Contract for Construction," was the subject of any specific discussion between the parties. Furthermore, although Mr. Frinzi did generally indicate during his deposition testimony that defendant knew plaintiff expected it to "look after" plaintiff's interests, this evidence must be viewed in light of the surrounding circumstances. We note that after negotiating the contract in question, plaintiff hired an architect, Greg Wood, to administer the parties' agreement and oversee the project. Article 4 of the parties' agreement outlines the extensive duties and responsibilities of the architect and these include:

> 4.2.1 The Architect will provide administration of the Contract . . . and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 12.2. The Architect will advise and consult with the Owner. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents . . . .
>
> 4.2.2 The Architect will visit the site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents . . . . On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work.
>
> . . .
>
> 4.2.5 Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.
>
> 4.2.6 The Architect will have authority to reject Work which does not conform to the Contract Documents. Whenever the

> Architect considers it necessary or advisable for implementation of the intent of the Contract Documents, the Architect will have authority to require additional inspection or testing of the Work . . . whether or not such Work is fabricated, installed or completed. . . .
>
> . . .
>
> 4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion . . ., and will issue a final Certificate for Payment upon compliance with the requirement of the Contract Documents.
>
> . . .
>
> 4.2.11 The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor.

Notwithstanding the standard language of Article 3 and Mr. Frinzi's deposition testimony, we conclude as a matter of law that the architect's constant, close involvement in the project belies any claim that a "relation of trust and confidence" existed between plaintiff and defendant giving rise to a fiduciary relationship. *See Rhodes*, 232 N.C. at 549, 61 S.E.2d at 726; *See Barger*, 346 N.C. at 666, 488 S.E.2d at 224. Thus, plaintiff has failed to establish the existence of a fiduciary duty, the breach of which would give rise to a claim for unfair and deceptive trade practices.

[3] Plaintiff next contends that the trial court erred in granting defendant summary judgment on the unfair and deceptive trade practices claim since there were sufficient aggravating circumstances. "[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." *Warfield v. Hicks*, 91 N.C. App. 1, 8, 370 S.E.2d 689, 693, *disc. review denied*, 323 N.C. 629, 374 S.E.2d 602 (1988) (citations omitted). "In essence, a party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position." *Id.* "The concept of 'unfairness' is broader than and includes the concept of 'deception.' " *Id.*

However, "[i]t is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of con-

tract, and that 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." *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992) (citations omitted). The plaintiff must show "substantial aggravating circumstances attending the breach to recover under the Act, which allows for treble damages." *Id.* It is "unlikely that an independent tort could arise in the course of contractual performance, since those sorts of claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations." *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 347 (4th Cir. 1998), *citing Strum v. Exxon Co.*, 15 F.3d 327, 333 (4th Cir. 1994).

Defendant contends that plaintiff has failed to show sufficient aggravating circumstances to establish a claim for unfair and deceptive trade practices and cites to this Court's decision in *Stone v. Homes, Inc.*, 37 N.C. App. 97, 245 S.E.2d 801, *disc. review denied*, 295 N.C. 653, 248 S.E.2d 257 (1978). In *Stone*, *supra*, the plaintiffs, purchasers of a house, brought an action against the corporate builder vendor, alleging claims for breach of warranties, fraud, and unfair and deceptive trade practices. *Id.* at 98, 245 S.E.2d at 803. The plaintiffs' evidence at trial tended to show that the defendant never completed construction of the house and that there were numerous structural defects, including leaking windows, improper sewage drainage, and faulty electrical work, as well as cracks in the chimney and brick veneer. *Id.* at 99, 245 S.E.2d at 804. The plaintiffs also discovered that the house was constructed on land that had been filled with vegetable debris, causing the house to settle. *Id.*

The jury in *Stone* returned a special verdict in favor of the plaintiffs, finding that they suffered a total of $16,000.00 in damages, but that only $3,500.00 was allocable to damage due to the settling of the land. *Id.* at 105, 245 S.E.2d at 807. The trial court denied the plaintiffs' motion for treble damages. *Id.* On appeal, this Court found:

> There is no authority to support plaintiffs' argument that the remainder of the $16,000, i.e., the portion attributable to damages solely for breach of implied and express warranties, should be trebled.

Id. Thus, the plaintiffs in *Stone* were entitled to treble the $3,500.00 award for the damage due to the settling of the land since it was attributable to fraud but were not entitled to treble the remain-

der of the award attributable to damages for breach of warranties arising out of the construction of the house. *Id.* at 106, 245 S.E.2d at 808.

In *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 344 S.E.2d 68 (1986), *review dismissed*, 319 N.C. 222, 353 S.E.2d 400 (1987), the purchasers of a lot brought an action against the vendor seeking to rescind the contract of sale and seeking damages for unfair and deceptive trade practices. This Court found:

> It is common knowledge that projected completion dates in the construction industry are often missed for a variety of reasons and may be impossible or impractical to fulfill. In light of this common knowledge and the capacity of consumers to contract with reference thereto, we do not believe the legislature intended that the representation of such dates as firm when in fact they are not, standing alone, should rise to the level of immoral, unethical, oppressive, or unscrupulous conduct, or amount to an inequitable assertion of power or position.

Id. at 69-70, 344 S.E.2d at 77. Thus, the plaintiffs' remedy "lies in contract for material breach only." *Id.*

In the case at bar, plaintiff alleges in its complaint that defendant "failed and refused to perform its obligations under the Agreement" and lists examples of defendant's breaches. Although plaintiff has made numerous allegations that defendant breached its agreement regarding the construction project, we note that a certificate of substantial completion was signed by the architect on 27 March 1996 and that the construction project was subject to local government inspection. Therefore, we conclude that plaintiff has failed to show sufficient aggravating circumstances to establish a claim for unfair and deceptive trade practices.

Affirmed.

Judges McGEE and HUNTER concur.

GLORIA M. KINSEY, ADMINISTRATRIX OF THE ESTATE OF NORMAN L. KINSEY, PLAINTIFF v. CLEVELAND SPANN AND JOSEPHINE FRINK, DEFENDANTS

No. COA99-1036

(Filed 1 August 2000)

1. Negligence— inherently dangerous activity—elements

In order to substantiate an inherently dangerous activity claim, a plaintiff must satisfy the four elements that: (1) the activity is inherently dangerous; (2) at the time of the injury, the employer either knew, or should have known, that the activity was inherently dangerous; (3) the employer failed to take the necessary precautions to control the attendant risks; and (4) the employer's failure proximately caused injury to plaintiff.

2. Negligence— inherently dangerous activity—tree removal

The trial court properly refused to submit plaintiff's inherently dangerous activity claim for the jury's consideration in a negligence action where defendant-tree feller was attempting to remove dead tree branches from the property of defendant-landowner after a hurricane and a tree limb hit plaintiff's husband on the head and killed him, because although plaintiff's evidence at trial with regard to the nature of the work and where it was to be performed was sufficient to satisfy the first element of her inherently dangerous activity claim, plaintiff failed to produce evidence demonstrating that defendant-landowner either knew or should have known that tree felling is inherently dangerous.

3. Negligence— negligent selection—elements

In order to substantiate a claim of negligent selection, a plaintiff must prove the four elements that: (1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) plaintiff's injury was the proximate result of this incompetence.

4. Negligence— negligent selection—tree removal

The trial court properly refused to submit plaintiff's negligent selection claim for the jury's consideration in a negligence action where defendant-tree feller was attempting to remove dead tree branches from the property of defendant-landowner after a hurri-

cane and a tree limb hit plaintiff's husband on the head and killed him, because: (1) plaintiff's evidence at best showed that defendant-tree feller had no professional certification or license in tree surgery and never owned or operated a tree removal service, which in an of itself does not rise to the level of incompetence; (2) the evidence revealed that defendant-tree feller had been trained in tree felling and trimming; and (3) plaintiff's own expert testified there is no requirement that tree surgeons be certified or licensed, and that most of them in fact are not.

5. Negligence— landowner liability—tree removal

The trial court did not err by refusing to instruct the jury on plaintiff's landowner liability claim in a negligence action where defendant-tree feller was attempting to remove dead tree branches from the property of defendant-landowner after a hurricane and a tree limb hit plaintiff's husband on the head and killed him, because to the extent that such a claim does exist in North Carolina, it would be subsumed within either plaintiff's agency claim or her inherently dangerous activity claim.

Appeal by plaintiff from order entered 23 April 1999 by Judge William C. Griffin in New Hanover County Superior Court. Heard in the Court of Appeals 15 May 2000.

Nunalee & Nunalee, L.L.P., by Mary Margaret McEachern Nunalee, for plaintiff-appellant.

Johnson & Lambeth, by Maynard M. Brown, for defendant-appellee Josephine Frink.

No brief filed for defendant-appellee Cleveland Spann.

LEWIS, Judge.

Hurricane Fran blew through the North Carolina coast in September 1996. With it, several homes and yards were damaged, including the yard of defendant Josephine Frink. Following the storm, Ms. Frink engaged the services of her great-nephew, defendant Cleveland Spann, to clean up the storm debris. In particular, she asked him to cut down and remove some dead trees. Mr. Spann was not a professional tree feller, but he had received instruction on the subject from a tree trimming school. On 29 October 1996, a branch from one of the trees Mr. Spann was attempting to remove fell onto the property of Ms. Frink's neighbors, Norman and Gloria Kinsey. In

so doing, the tree limb hit Mr. Kinsey on the head. He died two days later from the resultant injuries.

Plaintiff thereafter filed a negligence cause of action against Mr. Spann. She also sought to recover from Ms. Frink under alternative theories of liability. Specifically, she alleged a principal-agent relationship existed between Ms. Frink and Mr. Spann such that Ms. Frink was vicariously liable for Mr. Spann's negligence ("the agency claim"). If no such agency relationship existed (i.e., if Mr. Spann was only an independent contractor), plaintiff contended Ms. Frink was still liable under one of three theories: liability based upon the felling or trimming of trees being an inherently dangerous activity ("the inherently dangerous activity claim"); liability based upon the negligent selection of Mr. Spann for the work ("the negligent selection claim"); and liability based upon Ms. Frink's failure to control the actions of a third party (i.e., Mr. Spann) on her property ("the landowner liability claim").

Following the close of evidence, defendants moved for directed verdict as to all of plaintiff's claims. The trial court denied the motion. However, the trial judge then only submitted plaintiff's agency claim for the jury's consideration, refusing to submit all her claims based upon the alternate premise that Mr. Spann was an independent contractor. The jury concluded that Mr. Spann was negligent in performing his work, but also concluded that he was not Ms. Frink's agent at the time. Accordingly, only Mr. Spann was liable for the $300,000 verdict. Plaintiff thereafter filed a motion for new trial under Rule 59(a), which the trial court denied on 23 April 1999. From this order denying her a new trial, plaintiff appeals.

Generally, a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion. *In re Will of Herring*, 19 N.C. App. 357, 359, 198 S.E.2d 737, 739 (1973). However, where the motion involves a question of law or legal inference, our standard of review is *de novo*. *Id.* at 359-60, 198 S.E.2d at 739-40.

Here, plaintiff based her motion for new trial on three grounds: (1) the trial court's actions caused irregularities that prevented her from receiving a fair trial, N.C.R. Civ. P. 59(a)(1); (2) there was insufficient evidence to support the jury's verdict, N.C.R. Civ. P. 59(a)(7); and (3) the trial court committed various errors of law, N.C.R. Civ. P. 59(a)(8). The first two grounds asserted by plaintiff involve neither questions of law nor legal inferences, thereby necessitating an abuse

of discretion standard. *See Horne v. Trivette*, 58 N.C. App. 77, 82, 293 S.E.2d 290, 293 (setting forth the standard of review for motions pursuant to Rule 59(a)(1)), *disc. review denied*, 306 N.C. 741, 295 S.E.2d 759 (1982); *Britt v. Allen*, 291 N.C. 630, 634-35, 231 S.E.2d 607, 611 (1977) (setting forth the standard for motions pursuant to Rule 59(a)(7)). We find no abuse of discretion on the part of the trial court here. Plaintiff's third ground for new trial, however, asserts various errors of law pursuant to Rule 59(a)(8). Specifically, she argues the trial court erroneously instructed the jury by failing to submit for its consideration three of her claims against Ms. Frink. Because this ground includes alleged errors of law, we review it *de novo*.

At the outset, defendants assert plaintiff has waived any objection with respect to the jury instructions because she failed to make any formal objection at trial. We disagree. Generally, where a party does not object to the omission of a particular instruction before the jury retires to consider a verdict, that party waives any right to appeal the instruction. N.C.R. App. P. 10(b)(2); *Martin v. Hare*, 78 N.C. App. 358, 364, 337 S.E.2d 632, 636 (1985). However, where a party submits a written request for instructions during the charge conference, that party need not object to the instructions as read in order to properly preserve his appeal as to those instructions. *State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984). Here, plaintiff did submit a written request for certain instructions. Although the written request was not signed by plaintiff's counsel as required by N.C.R. Civ. P. 51(b), we feel plaintiff has acted sufficiently in order to preserve her objection to the instructions on appeal and so consider the merits of that objection.

A trial judge *must* submit any alleged claim to the jury for consideration if the evidence at trial, when viewed in the light most favorable to the proponent, supports a reasonable inference as to each element of that alleged claim. *Cockrell v. Transport Co.*, 295 N.C. 444, 449, 245 S.E.2d 497, 500 (1978). We conclude plaintiff failed to present sufficient evidence to warrant submission of either her inherently dangerous activity claim, her negligent selection claim, or her landowner liability claim.

We begin by analyzing plaintiff's inherently dangerous activity claim. At the charge conference, there was evident confusion as to the elements of this claim, whether it is direct or vicarious in nature, and the difference between inherently dangerous activities and ultra-hazardous ones. We therefore undertake to eliminate some of the confusion by summarizing the law in this area.

As previously noted, plaintiff's three claims that were not submitted to the jury were premised upon Mr. Spann being an independent contractor, as opposed to an agent of Ms. Frink. "Generally, one who employs an independent contractor is not liable for the independent contractor's negligence . . . ." *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991). However, if the work to be performed by the independent contractor is either (1) ultrahazardous or (2) inherently dangerous, and the employer either knows or should have known that the work is of that type, liability may attach despite the independent contractor status. *Id.* at 350-51, 356, 407 S.E.2d at 234, 238. This is because, in those two areas, the employer has a nondelegable duty for the safety of others. *Canady v. McLeod*, 116 N.C. App. 82, 88, 446 S.E.2d 879, 883, *disc. review denied*, 338 N.C. 308, 451 S.E.2d 632 (1994). Our Supreme Court has justified this outcome as follows: "By holding both an employer and its independent contractor responsible for injuries that may result from [these] activities, there is a greater likelihood that the safety precautions necessary to substantially eliminate the danger will be followed." *Woodson*, 329 N.C. at 352-53, 407 S.E.2d at 235.

"Ultrahazardous" activities are those that are so dangerous that even the exercise of reasonable care cannot eliminate the risk of serious harm. *Id.* at 350, 407 S.E.2d at 234. In such cases, the employer is *strictly* liable for any harm that proximately results. *Id.* In other words, he is liable even if due care was exercised in the performance of the activity. *Id.* at 351, 407 S.E.2d at 234. In North Carolina, only blasting operations are considered ultrahazardous. *Id.* "Inherently dangerous" activities are those dangerous activities (like ultrahazardous ones) that carry with them certain attendant risks, but whose risks (unlike ultrahazardous ones) can be eliminated by taking certain special precautions. *Id.* When inherently dangerous activities are involved, any liability by the employer is governed by principles of *negligence*, as opposed to strict liability. *Id.*

With respect to negligence claims based upon inherently dangerous activities, there has been some inconsistency within the opinions of our courts as to whose negligence is to be considered. A few earlier decisions looked at the negligence of the *independent contractor* and imputed liability to the employer for any negligence by the contractor. *See, e.g., Hendricks v. Fay, Inc.*, 273 N.C. 59, 63, 159 S.E.2d 362, 366 (1968) ("But the cases of 'non-delegable duty' . . . hold the employer liable for the negligence of the *contractor*, although he has himself done everything that could reasonably be required of him.")

(emphasis added); *Deitz v. Jackson*, 57 N.C. App. 275, 279, 291 S.E.2d 282, 285 (1982) ("This rule imposes liability on an employer for the negligent torts of *independent contractors* performing, for the employer, an activity which would result in harmful consequences unless proper precautions are taken . . . ."). These cases thus suggest the employer's liability is vicarious in nature. *Hendricks*, 273 N.C. at 62, 159 S.E.2d at 366.

In more recent decisions, however, our courts have clarified that it is the negligence of the *employer*, not the independent contractor, that must be considered; liability is direct, not vicarious, in nature. *See, e.g., Woodson*, 329 N.C. at 352, 407 S.E.2d at 235 ("The party that employs an independent contractor has a continuing responsibility to ensure that adequate safety precautions are taken. . . . The employer's liability for breach of this duty 'is direct and not derivative . . . .' "); *see also Lane v. R.N. Rouse & Co.*, 135 N.C. App. 495, 497, 521 S.E.2d 137, 139 (1999) (focusing on the acts or omissions of the *employer*), *disc. review denied*, 351 N.C. 357, — S.E.2d — (2000); *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 312, 511 S.E.2d 313, 317-18 (1999) (same), *disc. review denied*, 350 N.C. 834, — S.E.2d — (2000); *Dunleavy v. Yeats Construction Co.*, 106 N.C. App. 146, 153, 416 S.E.2d 193, 197 (same), *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992). Thus, liability will attach only if *the employer* failed to take the necessary precautions to control the risks associated with the activity. *Woodson*, 329 N.C. at 352, 407 S.E.2d at 235.

[1] To summarize, in order to substantiate an inherently dangerous activity claim, a plaintiff must satisfy four elements. First, the activity must be inherently dangerous. *O'Carroll*, 132 N.C. App. at 312, 511 S.E.2d at 317. Second, at the time of the injury, the employer either knew, or should have known, that the activity was inherently dangerous. *Id.* Third, the employer failed to take the necessary precautions to control the attendant risks. *Id.* at 312, 511 S.E.2d at 318. And fourth, this failure by the employer proximately caused injury to plaintiff. *Id.*

[2] With respect to the first element, plaintiff asserts that the felling or trimming of trees is an inherently dangerous activity. A given activity is inherently dangerous if it carries with it some substantial danger inherent in the work itself. *Evans v. Rockingham Homes, Inc.*, 220 N.C. 253, 259, 17 S.E.2d 125, 128 (1941). Any collateral dangers created by how the work is actually performed are immaterial and have no effect on whether the activity is inherently dangerous. *Id.*

Although the question as to whether a given activity is or is not inherently dangerous can be decided as a matter of law, *see, e.g.*, *Brown v. Texas Co.*, 237 N.C. 738, 741, 76 S.E.2d 45, 47 (1953) (holding that sign erection is not inherently dangerous); *Evans*, 220 N.C. at 260-61, 17 S.E.2d at 30 (holding that open trenching in a heavily-populated area is inherently dangerous); *Peters v. Woolen Mills*, 199 N.C. 753, 754, 155 S.E. 867, 868 (1930) (holding that installing electrical wires is inherently dangerous); *Vogh v. Geer*, 171 N.C. 672, 676, 88 S.E. 874, 876 (1916) (holding that ordinary building construction is not inherently dangerous), this determination often must be left for the jury to consider in light of the particular conditions and circumstances of each case. *Woodson*, 329 N.C. at 353-54, 407 S.E.2d at 236.

In this regard, the area where the activity is to be performed is significant. For instance, our Supreme Court in *Evans v. Rockingham Homes, Inc.* held that trench digging in a heavily-populated area is inherently dangerous as a matter of law, but pointed out that the same activity performed in a rural, unpopulated area would not be inherently dangerous. *Evans*, 220 N.C. at 260-61, 17 S.E.2d at 129. Along those lines, although tree felling in a rural, forested area is not inherently dangerous, *Young v. Lumber Co.*, 147 N.C. 26, 34-35, 60 S.E. 654, 658 (1908), a jury could conclude that performing such work in a populated urban area such as the one here is inherently dangerous. Our Supreme Court has even said as much in dicta:

> Cutting and removing a tree in the midst of a forest would probably not rank as a hazardous work. But the cutting and removal of a large tree in close proximity to dwellings and in an area traversed by many people, would probably be sufficiently hazardous as to require precautions with which we are familiar.

Evans, 220 N.C. at 260, 17 S.E.2d at 129-30. Plaintiff's evidence at trial with regard to the nature of the work and where it was to be performed was therefore sufficient to satisfy the first element of her claim.

As to the second element, however, we conclude plaintiff has failed to produce evidence demonstrating Ms. Frink either knew or should have known that tree felling is inherently dangerous. At trial, she admitted she had no experience in cutting down trees and no knowledge of how it is done. Instead, she relied exclusively on the expertise of Mr. Spann. Furthermore, Ms. Frink testified that, had she known tree felling was dangerous, she would not have even let Mr. Spann perform the work. Accordingly, plaintiff has not satisfied the

second element. *See Woodson*, 329 N.C. at 358, 407 S.E.2d at 238 ("There is no forecast that [the developer] had any knowledge or expertise regarding safety practices in the construction industry generally or in trenching particularly. So far as the forecast of evidence shows, [the developer] justifiably relied entirely on the expertise of [the independent contractor]."). Because plaintiff's evidence failed to satisfy all the elements of her inherently dangerous claim, the trial court properly refused to submit it to the jury.

[3] Under her next theory of liability, plaintiff asserts that Ms. Frink was negligent in hiring her great-nephew to perform the tree surgery. In order to substantiate a claim of negligent selection, and thus submit it for the jury's consideration, a plaintiff must prove four elements: (1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff's injury was the proximate result of this incompetence. *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990).

[4] Plaintiff's evidence at trial failed to satisfy the second and third requirements. With regard to Mr. Spann's alleged incompetence, plaintiff's evidence, at best, only showed that he had no professional certification or license in tree surgery and had never owned or operated a tree removal service. This, in and of itself, does not rise to the level of incompetence. The evidence at trial did reflect that Mr. Spann had been trained in tree felling and trimming. Furthermore, plaintiff's own expert testified there is no requirement that tree surgeons be certified or licensed and that most of them in fact are not. As to the knowledge requirement, plaintiff highlights the evidence that suggested Ms. Frink engaged Mr. Spann only because he was her great-nephew, she knew he was not professionally licensed, and she did not know anyone for whom Mr. Spann had performed tree removal services in the past. But again, this evidence alone is insufficient, especially considering that the evidence also showed she knew he had been trained in tree removal and had some prior experience doing it. Accordingly, the trial court properly refused to submit plaintiff's negligent selection claim for the jury's consideration.

[5] We also uphold the trial court's refusal to instruct the jury on plaintiff's third theory of liability, her landowner liability claim. Plaintiff bases this theory of liability upon the perceived duty of a

landowner to control the conduct of those on his property so as to avoid any unreasonable risk of harm to others outside his property. To the extent that such a claim does exist in North Carolina, it would necessarily be subsumed within either plaintiff's agency claim or her inherently dangerous activity claim. Ms. Frink does have a duty to control and supervise any of her agents performing work on her property; likewise she has a non-delegable duty of reasonable care if she knows or should know inherently dangerous activities are being performed on her property by independent contractors. *See generally* W. Page Keeton, *Prosser and Keeton on Torts*, § 57, at 391-92 (5th ed. 1984). Thus, plaintiff's landowner claim is simply part and parcel to her other claims, and the trial court was not required to submit it separately for the jury's consideration.

In sum, we conclude the trial court properly refused to submit plaintiff's inherently dangerous activity, negligent selection, and landowner liability claims to the jury. Having properly done so, the trial court therefore also properly denied plaintiff's motion for new trial.

No error.

Chief Judge EAGLES and Judge EDMUNDS concur.

SONOPRESS, INC., PETITIONER v. TOWN OF WEAVERVILLE, RESPONDENT

No. COA99-56

(Filed 1 August 2000)

1. Cities and Towns— annexation—standard of review—compliance or noncompliance

The trial court's utilization of the improper "material prejudice" standard of review in considering a municipality's alleged violations of N.C.G.S. § 160A-35 in its attempt to annex certain real property constitutes error and requires that the order affirming the ordinance be vacated, because the proper standard for review of a municipality's fulfillment of N.C.G.S. §§ 160A-35 and 160A-36 is governed by assessment of compliance or noncompliance.

2. Cities and Towns— annexation—standard of review—material prejudice

In an action involving a municipality's attempt to annex certain real property, the trial court properly applied the material prejudice standard of review in considering the procedural requirements of N.C.G.S. § 160A-37, including whether the notice of public hearing contained a "legible map of the area," N.C.G.S. § 160A-37(b)(2).

3. Cities and Towns— annexation—standard of review—maps incorporated in report

In an action involving a municipality's attempt to annex certain real property, the trial court erred by applying the material prejudice standard of review regarding maps incorporated into the service report because the trial court was required to determine whether the contents of the report, including maps and plans for provision of services, complied or failed to comply with N.C.G.S. § 160A-35.

4. Cities and Towns— annexation—standard of review—statement showing area annexed meets requirements

In an action involving a municipality's attempt to annex certain real property, the trial court erred by applying the material prejudice standard of review regarding whether the municipality complied with N.C.G.S. § 160A-35(2) requiring that the service report contain a statement showing that the area to be annexed meets the requirements of N.C.G.S. § 160A-36, because the proper standard of review is governed by assessment of compliance or noncompliance.

5. Cities and Towns— annexation—standard of review—solid waste collection—financing of services

In an action involving a municipality's attempt to annex certain real property, the trial court erred by applying the material prejudice standard of review regarding the questions of solid waste collection and the financing of services, because an alleged violation of N.C.G.S. § 160A-35 is reviewed in light of compliance or noncompliance.

6. Cities and Towns— annexation—standard of review

Since the trial court's utilization of the improper standard of review in considering a municipality's alleged violations of N.C.G.S. § 160A-35 in its attempt to annex certain real property

constitutes error and requires that the order affirming the ordinance be vacated, on remand the trial court shall consider petitioner's assertions of procedural violations of the municipality contravening N.C.G.S. § 160A-37, as well as the contentions that the municipality failed to comply with N.C.G.S. §§ 160A-35 and 160A-36.

Appeal by petitioner from order filed 5 October 1998 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 20 October 1999.

Robert E. Dungan, P.A., by James Michael Lloyd, for petitioner.

Roberts and Stevens, P.A., by Carl W. Loftin and Christopher Z. Campbell, for respondent.

JOHN, Judge.

Petitioner Sonopress, Inc. (Sonopress), appeals the trial court's order affirming an annexation ordinance (the Ordinance) adopted 18 May 1998 by respondent Town of Weaverville (Weaverville). For reasons set forth herein, we vacate the order and remand this matter to the trial court.

In light of our disposition, a detailed recitation of the underlying facts is unnecessary. In brief, the Town Council of Weaverville adopted a "Resolution of Intent of Annexation" (the Resolution) on 16 March 1998. Certain real property, including that owned by Sonopress, was thereby proposed for annexation.

The Resolution scheduled a public hearing on the proposed annexation for 4 May 1998. A "Notice of Public Hearing" (the Notice) was mailed 3 April 1998 to individual property owners directly affected by the annexation, including Sonopress. The Notice provided that the "Standards of Service Report" (the Report) required by N.C.G.S. § 160A-35 (1997) would be available at the Town Clerk's office thirty (30) days prior to the 4 May 1998 hearing. In addition, the Town Clerk certified that a legible map of the area to be annexed would likewise be available.

Following the hearing, Weaverville amended the Report on 18 May 1998 to include a municipality map reflecting the present town boundaries and those resultant from the proposed annexation. The Town Council thereafter adopted the Ordinance, setting 30 June 1999 as the effective date. On 16 June 1998 and pursuant to N.C.G.S.

§ 160A-38 (1997), Sonopress filed a "Petition for Review and Appeal of May 18, 1998 Annexation Ordinance" in Buncombe County Superior Court. Following a 1 October 1998 review, the trial court filed a 5 October 1998 order (the Order) affirming the Ordinance. Sonopress appeals.

[1] On appeal, Sonopress contends, *inter alia,* that Weaverville violated certain procedural requirements of N.C.G.S. § 160A-37 (1997), and failed to comply with G.S. § 160A-35 and N.C.G.S. § 160A-36 (1997). We conclude the trial court's utilization of an improper standard of review in considering Weaverville's alleged violations of G.S. § 160A-35 requires that the Order be vacated.

G.S. § 160A-37 provides that a notice of public hearing shall *inter alia*:

> (1) Fix the date, hour and place of the public hearing. (2) Describe clearly the boundaries of the area under consideration, and include a legible map of the area. . . .

G.S. § 160A-37(b)(1)&(2).

Under G.S. § 160A-35, a municipality is required to prepare plans for extension of services to the area proposed to be annexed as well as a service report reflecting such plans. G.S. § 160A-35. The report must include:

> (1) A map . . . of the municipality and adjacent territory to show . . . [t]he present and proposed boundaries of the municipality. . . .
>
> (2) A statement showing that the area to be annexed meets the requirements of G.S. § 160A-36.
>
> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:
>
> a. Provide for extending police protection, fire protection, solid waste collection and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. . . . A contract with a private firm to provide solid waste collection services

> shall be an acceptable method of providing solid waste collection services.
>
> . . . .
>
> c. Set forth the method under which the municipality plans to finance extension of services into the area to be annexed.

G.S. § 160A-35(1),(2)&(3).

Upon a petition challenging an ordinance, the trial court is to consider whether:

> (1) . . . the statutory procedure was not followed or
>
> (2) . . . the provisions of G.S. 160A-35 were not met, or
>
> (3) . . . the provisions of G.S. 160A-36 have not been met.

G.S. § 160A-38(f).

Should the court determine that "*procedural* irregularities . . . materially prejudiced the substantive rights of any . . . petitioner[]," G.S. § 160A-38(g)(1) (emphasis added), the statute mandates "remand[ing] the ordinance to the municipal governing board for further proceedings," *id.* Additionally, the court must:

> (2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of G.S. § 160A-36 if it finds that [such] provisions . . . have not been met [and/or,]
>
> (3) Remand the report to the municipal governing board for amendment of the plans for providing services to the end that the provisions of G.S. § 160A-35 are satisfied.

G.S. § 160A-38(g)(2)&(3).

In the case *sub judice*, we note at the outset that the Order reflects the trial court utilized a "material[] prejudice" standard of review in considering Weaverville's alleged violations of G.S. § 160A-35. As noted above, G.S. § 160A-38(f)&(g) expressly provides that the standard of review for *procedural* irregularities in violation of G.S. § 160A-37, "Procedure for Annexation," including contents of the Notice, *see* G.S. § 160A-37(b), is whether such irregularities "materially prejudiced the substantive rights of any . . . petitioner[]." G.S. § 160A-38(g)(1).

However, review of a municipality's fulfillment of the requirements of G.S. § 160A-35 and G.S. § 160A-36 is governed, on the other hand, by assessment of compliance or noncompliance. *See Weeks v. Town of Coats*, 121 N.C. App. 471, 474, 466 S.E.2d 83, 85 (1996) (petitioners must show either failure on part of municipality to comply with statutory requirements, *or* that procedural irregularities occurred which materially prejudiced rights of petitioners), G.S. § 160A-38(f) (reviewing court to determine whether "statutory procedure was . . . followed" *or* that provisions of G.S. § 160A-35 or § 160A-36 "have not been met"), and G.S. § 160A-38(g)(1),(2)&(3) (reviewing court may order ordinance remanded to municipality governing board (1) if procedural irregularities "materially prejudiced" substantive rights of petitioners *or* (2) for amendment of plans for providing services in satisfaction of G.S. § 160A-35 or amendment of boundaries in satisfaction of G.S. § 160A-36).

Pointedly absent from G.S. § 160A-38(g)(2) is any reference to remand for non-compliance with either G.S. § 160A-35 or § 160A-36 being conditioned upon a determination of "material prejudice." When a statute "dealing with a specific matter is clear and understandable on its face, it requires no construction," *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citation omitted), and courts "must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein," *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (citation omitted); s*ee id.* at 151, 209 S.E.2d at 756 ("[w]here a statute is intelligible without any additional words, no additional words may be supplied"); *see also Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973) (citation omitted) (court's duty is to apply valid statute as written). Had the General Assembly intended a "material prejudice" determination to be imposed upon the court's finding of non-compliance with G.S. § 160A-35 or § 160A-36, "it would have been a simple matter [for it] to [have] include[d] th[at] explicit phrase," *In re Appeal of Bass Income Fund*, 115 N.C. App. 703, 706, 446 S.E.2d 594, 596 (1994), within G.S. § 160A-38(g)(2); *see McAninch v. Buncombe County Schools*, 347 N.C. 126, 133, 489 S.E.2d 375, 380 (1997) (after having "specifically declared" method of lost income calculation applicable to "the usual situation[]," General Assembly would have been "equally specific" if it intended a different method in "the exceptional cases"). In short, application of the material prejudice standard of review to Weaverville's alleged violations of G.S. § 160A-35 constituted error by the trial court.

Sonopress complained the Report failed to comply with G.S. § 160A-35 in several respects, including the absence of:

> (1) adequate maps of the current and proposed boundaries of the municipality; (2) a statement that the area to be annexed meets the requirements of N.C. Gen. Stat. § 160A-36; and, (3) a statement setting forth the municipality's plan for the extension of services to the area being annexed and how the municipality intends to finance the extension of services.

[2] Sonopress raised the issue of the illegibility of maps both with reference to the Notice and to the Report. The trial court resolved *both* complaints by concluding Sonopress "was not prejudiced in any way by the maps being illegible." Concerning the procedural requirements of G.S. § 160A-37, including that the Notice contain a "legible map of the area," G.S. § 160A-37(b)(2), to be annexed, the court properly applied a "material prejudice" standard of review. *See* G.S. § 160A-38(g)(1).

[3] Regarding maps incorporated into the Report, however, the trial court was required to determine whether the contents of the Report, including maps and plans for provision of services, complied or failed to comply, *see* G.S. § 160A-38(f)(2), with G.S. § 160A-35. The trial court erred in applying the material prejudice standard of review to the adequacy of maps contained in the Report.

[4] In addition, Sonopress raised the question of whether Weaverville complied with G.S. § 160A-35(2) requiring that the Report contain "[a] statement showing that the area to be annexed meets the requirements of G.S. 160A-36," dealing with the "character" of areas to be annexed. The court concluded that "since said property was eligible to be annexed, Petitioner cannot be prejudiced by this." Again, the trial court improperly applied a material prejudice standard of review as opposed to determining whether or not Weaverville had complied with G.S. § 160A-35(2).

[5] Sonopress further argued that the Report failed to comply with G.S. § 160A-35(3) regarding provisions for extension of services and the financing thereof. Sonopress asserted deficiencies in the Report addressing the proposed provision of police services, solid waste collection, and road maintenance service, as well as the financing of extension of services.

Careful reading of the trial court's order reveals no mention of proposed police service or road maintenance, although the court ulti-

mately concluded "[Sonopress] was not prejudiced by any . . . omissions found in the notice or report." Concerning solid waste collection, the trial court found that the Report inaccurately stated Weaverville "provides no solid waste collection to private industry (such as Petitioner)", but concluded Sonopress had "not been prejudiced by this incorrect statement in the [R]eport." As to the financing of extension of services, the trial court found as fact that the Report contained

> no specific statement on how each service would be financed, [but that] . . . the [Report] as a whole shows that there are sufficient funds to finance the extension of services from the anticipated revenues resulting from the annexation.

The court thereupon concluded Sonopress had "not [been] prejudiced" by failure of the Report to specify a method of payment for extension of services into the annexed area.

Once again, an alleged violation of G.S. § 160A-35 may not be reviewed on the basis of whether the purported error resulted in material prejudice, but rather in the light of compliance or lack thereof with the statutory requirements of G.S. § 160A-35. *See* G.S. § 160A-38(g)(3). At a minimum, therefore, the trial court again improperly applied a material prejudice standard of review to the questions of solid waste collection and the financing of services.

[6] Having held that the trial court applied an improper standard of review to several matters raised by Sonopress, we next consider the latter's remedy on appeal. In another context, we recently noted that "[i]n order for this Court to properly conduct its review, the trial court must first have properly reviewed the case." *Jordan v. Civil Service Board for the City of Charlotte*, 137 N.C. App., 575, 578, 528 S.E.2d 927, 930 (2000). We have also held that

> while the court's order in effect set out the applicable standards of review, it failed to delineate [the proper standard for review of the issues at bar].

In re Appeal of Willis, 129 N.C. App. 499, 503, 500 S.E.2d 723, 726 (1998).

In the case *sub judice*, the Order "in effect set out [one of] the applicable standards of review," *id.*, *i.e.*, material prejudice as applied to procedural irregularities under G.S. § 160A-37. However, the Order

"failed to delineate," *id.*, the proper issues to which that standard applied, and indeed misapplied the standard in reference to alleged violations of G.S. § 160A-35. The trial court thus having failed to review the case properly, we are unable to conduct our review, *see Jordan*, 137 N.C. App. at 578, 528 S.E.2d at 930. As a consequence, the Order must be vacated and this matter remanded to the trial court for entry of "a new order in accordance with our opinion herein." *Willis*, 129 N.C. App. at 503, 500 S.E.2d at 727.

On remand, the trial court shall consider the assertions of Sonopress of procedural violations by Weaverville contravening G.S. § 160A-37 as well as the contentions that Weaverville failed to comply with G.S. § 160A-35 and § 160A-36. In the former instance, should the court determine procedural irregularities occurred, it shall resolve whether such "irregularities . . . materially prejudiced the substantive rights," G.S. § 160A-38(g)(1), of Sonopress. In such event, the ordinance is to be remanded to the Weaverville Town Council "for further proceedings," *id.* If the court determines the provisions of G.S. § 160A-35 or § 160A-36 have not been met, G.S. § 160A-38(f)(2)&(3), it shall remand the ordinance to the Weaverville Town Council for appropriate amendment, *see* G.S. § 160A-38(g)(2)&(3). Finally, should the trial court reject assertions by Sonopress that requirements of either G.S. § 160A-35 or G.S. § 160A-36, or both, have "not [been] met," G.S. §§ 160A-35 & 36, and determine either that no procedural violations of G.S. § 160A-37 took place or that those which may have occurred did not "materially prejudice" substantive rights of Sonopress, the court shall affirm adoption of the Ordinance by the Weaverville Town Council.

Vacated and remanded.

Judges LEWIS and McGEE concur.

STATE OF NORTH CAROLINA v. DERRICK JOVAN McRAE

No. COA99-637

(Filed 1 August 2000)

1. Criminal Law— competency to stand trial—failure to conduct hearing

The trial court's failure to conduct a competency hearing on its own motion pursuant to N.C.G.S. § 15A-1002 before defendant's second trial for first-degree murder, based on the numerous psychiatric evaluations of defendant conducted before trial raising a bona fide doubt as to defendant's competency at the time of his second trial, requires: (1) a remand for a hearing to determine defendant's competency at the time of his trial, rather than a new trial; and (2) if the trial court cannot make a retrospective determination of defendant's competency, defendant's conviction must be reversed and a new trial may be granted when defendant is competent to stand trial.

2. Criminal Law— competency to stand trial—involuntary medication

Although defendant contends his due process rights, right to confront witnesses, and right to assistance of counsel were violated in a first-degree murder case based on the fact that he was involuntarily medicated with antipsychotic drugs in an attempt to make him competent to stand trial, the only evidence indicating that defendant was involuntarily medicated is too speculative since it consists of a statement by a doctor that lacks details surrounding administration of the medication.

3. Witnesses— cross-examination—pending charges—no details

Although defendant contends the trial court erred in a first-degree murder case by denying defendant the opportunity to cross-examine a State's witness about the witness's pending charges for the murder in this case and for two concealed weapons charges, a review of the voir dire hearing reveals that the trial court only prohibited defendant from asking about details surrounding the two concealed weapons charges, and not about the charges themselves.

4. Witnesses— cross-examination—pending charges

Although defendant contends the trial court erred in a first-degree murder case by denying defendant the opportunity to

cross-examine a State's witness about any charges pending at the time the witness spoke with police about the crime in this case, defendant was allowed to inquire as to any pending charges and did so.

Appeal by defendant from judgment entered 14 May 1998 by Judge Sanford L. Steelman, Jr. in Richmond County Superior Court. Heard in the Court of Appeals 19 April 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

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

LEWIS, Judge.

On 18 March 1996, defendant was indicted for first-degree murder in violation of N.C. Gen. Stat. § 14-17. Defendant was tried at the 27 April 1998 session of Richmond County Superior Court on the first-degree murder charge. A deadlocked jury resulted in a mistrial on 1 May 1998. At retrial on 14 May 1998, the jury returned a verdict of guilty. Defendant was sentenced to life imprisonment without parole.

At approximately 3 a.m. on 14 October 1995, the body of the victim, Jerry Rankin, was discovered on the back porch of Allen Davis's residence. Rankin had been shot in the head by a gun fired from six to twelve inches away. Defendant lived approximately 400 yards from where the victim's body was found. Edward Tender, defendant's cellmate in the Richmond County jail, testified defendant confessed to shooting Rankin. In addition, Thurman Nelson, a friend of defendant, testified that on 13 October 1995, Rankin purchased crack cocaine from defendant and paid him with fake money; defendant threatened to "get" the victim. (Tr. at 64.) Defendant later told Nelson that he shot Rankin.

Several of defendant's friends and members of his family testified that defendant attended a cookout on 13 October 1995, the night before Rankin's death. Defendant became so intoxicated at the cookout, they said, that defendant's brother, sister and a friend walked with him to his mother's house where he went to bed and did not leave until the following day. One witness testified he reported defendant's presence at the cookout to the police, but they took no

statement. Several of the witnesses testified they did not tell this story to police because they thought the police "didn't want to hear it." (Tr. at 224.)

Written documents show that before his first trial, defendant underwent six psychiatric evaluations at Dorothea Dix Hospital to determine his competency. Two forensic psychiatrists, Dr. Robert Rollins and Dr. Nicole Wolfe, conducted these evaluations on different occasions. In addition, the trial court held three separate hearings before defendant's first trial finding him incapable of standing trial. The last of these hearings was conducted on 27 April 1998, the day of defendant's first trial. After defendant's first trial, he underwent one more psychiatric evaluation; however, the trial court did not conduct another hearing on the issue of defendant's capacity to stand trial.

[1] Citing N.C. Gen. Stat. § 15A-1002, defendant first contends the trial court was required to conduct a hearing, on its own motion, before his second trial to determine his competency to stand trial. G.S. 15A-1002 provides that "[w]hen the capacity of the defendant to proceed is questioned, the court *shall* hold a hearing to determine the defendant's capacity to proceed" (emphasis added). Although defendant neither requested this hearing nor objected to the trial court's failure to provide a competency hearing, defendant argues G.S. 15A-1002 affords defendant a right to a competency hearing that cannot be waived. The State contends defendant's statutory right to a competency hearing can be waived by failure to request such a hearing or object to the court's failure to provide a competency hearing, citing *State v. Young*, 291 N.C. 562, 231 S.E.2d 577 (1977). Because we find the court's failure to conduct a competency hearing under the circumstances present in this case violated defendant's federal due process rights, we forego an analysis under this statutory provision.

There are certain circumstances which impose on the trial court a constitutional duty to conduct a hearing on its own motion on the issue of a defendant's capacity. "[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." *Drope v. Missouri*, 420 U.S. 162, 171, 43 L. Ed. 2d 103, 113 (1975). Failure of the trial court to protect a defendant's right not to be tried or convicted while mentally incompetent deprives him of his due process right to a fair trial. *Pate v. Robinson*, 383 U.S. 375, 385, 15 L. Ed. 2d 815, 822 (1966). A conviction cannot stand where defendant lacks capacity to

defend himself. *Drope*, 420 U.S. at 183, 43 L. Ed. 2d at 120. Our Supreme Court has also held that " 'a trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent.' " *Young*, 291 N.C. at 568, 231 S.E.2d at 581 (quoting *Crenshaw v. Wolff*, 504 F.2d 377 (8th Cir. 1974) (emphasis added)); *see also Pate*, 383 U.S. at 385, 15 L. Ed. 2d at 822 (stating a competency hearing is required if there is a bona fide doubt as to defendant's competency). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant" to a bona fide doubt inquiry. *Drope*, 420 U.S. at 180, 43 L. Ed. 2d at 118.

The evidence produced at the 27 April 1998 competency hearing consisted of several written reports. In the first of these on 13 December 1996, Dr. Wolfe diagnosed defendant as schizophrenic and psychotic and found him incapable of standing trial. The same day, the trial court conducted a hearing on the issue of defendant's competency and also found defendant incompetent to stand trial.

On 7 April 1997, Dr. Rollins conducted an examination of defendant and found him competent to stand trial. Dr. Rollins's report noted his concerns for a risk of relapse if defendant failed to continue taking his medication.

On 17 September 1997, defendant was examined by Dr. Wolfe, who found him incapable of standing trial. The written report found him lethargic and unresponsive, and reemphasized his diagnoses as psychotic and schizophrenic. The same day, the trial court conducted a hearing and entered an order also finding defendant incompetent to stand trial.

In an evaluation conducted on 11 February 1998, Dr. Wolfe found defendant incompetent to stand trial. Dr. Wolfe noted in his evaluation his concern for defendant's history of non-compliance in taking his medications. The next day, after a hearing, the trial court also entered an order finding defendant incompetent to stand trial.

On 6 April 1998, Dr. Wolfe evaluated defendant, finding him "currently competent to stand trial," recommending that another competency evaluation be conducted immediately preceding trial due to defendant's history of medication non-compliance.

On 27 April 1998, the suggested competency evaluation was conducted by Dr. Wolfe, who deemed him competent to stand trial for the

next three weeks. At this time, the trial court conducted a hearing in which the trial court also determined him competent to stand trial. Defendant's first trial commenced that same day.

Following the mistrial, defendant's second trial date was set for 11 May 1998. Before defendant's second trial, on 6 May 1998, Dr. Rollins evaluated defendant and found him competent to stand trial. In his report, Dr. Rollins ordered that defendant continue to take his medication. While the trial court had access to Dr. Rollins's 11 May 1998 written report, defendant made no pre-trial motion to determine his capacity to proceed to trial and the trial court did not conduct a post-evaluation competency hearing before his second trial. Defendant did not object to the trial court's failure to hold such a hearing.

In our opinion, the numerous psychiatric evaluations of defendant's competency that were conducted before trial with various findings and expressions of concern about the temporal nature of defendant's competency raised a bona fide doubt as to defendant's competency at the time of his second trial. *See, e.g., Meeks v. Smith*, 512 F. Supp. 335, 338 (W.D.N.C. 1981) (defendant diagnosed as schizophrenic underwent seven psychiatric evaluations yielding different conclusions as to competency raised bona fide doubt as to his competence to stand trial). Accordingly, he was entitled to receive a hearing on the issue of his competency whereby the court was required to conduct a thorough inquiry before it allowed the defendant to be tried or plead guilty. *Pate*, 383 U.S. at 385, 15 L. Ed. 2d at 822. Furthermore, defendant's failure to request a hearing or object to the court's failure to issue a hearing before his second trial does not bar him from seeking relief on appeal. *Id.* at 384, 15 L. Ed. 2d at 821; *Meeks*, 512 F. Supp. at 338. By failing to conduct a hearing with appropriate findings and conclusions, this defendant was not afforded due process.

Having determined that the trial court erred in not conducting a competency hearing, we consider the appropriate remedy. North Carolina courts have never addressed this issue; however, a federal court within our circuit has, in at least one instance, ordered a new trial upon the trial court's failure to conduct a competency hearing. *Meeks*, 512 F. Supp. at 339 (trial court never conducted a hearing before the defendant was tried). Given that defendant here was afforded several hearings before trial, and each time the trial court followed the determination made in the corresponding psychiatric evaluation, we remand for a hearing to determine the defendant's competency at the time of his trial, rather than remand for a new trial.

See, e.g., United States v. Haywood, 155 F.3d 674, 681 (3d Cir. 1998); *People v. Ponder*, 225 N.W.2d 168, 170 (Mich. Ct. App. 1975). Such a determination may be conducted, however, only if a meaningful hearing on the issue of the competency of the defendant at the prior proceedings is still possible. The trial court is in the best position to determine whether it can make such a retrospective determination of defendant's competency. Thus, if the trial court concludes that a retrospective determination is still possible, a competency hearing will be held, and if the conclusion is that the defendant was competent, no new trial will be required. If the trial court determines that a meaningful hearing is no longer possible, defendant's conviction must be reversed and a new trial may be granted when he is competent to stand trial.

[2] In his next assignment, defendant contends he was involuntarily medicated with antipsychotic drugs in an attempt to make him competent to stand trial, violating his due process rights, his right to confront witnesses and his right to assistance of counsel. The only evidence in the record indicating that defendant was, in fact, involuntarily medicated consists of a statement made by Dr. Wolfe at defendant's competency hearing before the trial court on 27 April 1997. Dr. Wolfe testified that defendant had been treated with several medications, "some of [which] were involuntarily-administered medications that he did not want to take because he does not believe he has a mental illness." (Comp. Hearing Tr. at 8.) Defendant has presented no other evidence regarding his purported involuntary medication. Any legal analysis as to this issue necessarily involves an analysis of whether defendant's constitutionally protected rights at trial were impaired by taking the medication, including effects on his outward appearance, his ability to follow proceedings and the substance of his communication with counsel. *Riggins v. Nevada*, 504 U.S. 127, 136-37, 118 L. Ed. 2d 479, 490-91 (1992). Because Dr. Wolfe's statement lacks details surrounding administration of the medication, we find the evidence on this issue too speculative. Accordingly, we conclude this argument is without merit.

[3] Defendant also contends the trial court erred by sustaining one of the State's objections during defendant's cross-examination of Nelson, a witness for the State, denying defendant his right to effective cross-examination. Specifically, defendant contends he should have been permitted to cross-examine Nelson regarding charges pending against him at the time of his testimony in order to establish potential bias, specifically, whether the State may have been holding

any such charges in abeyance pending Nelson's testimony in this case.

A defendant has the right to cross-examine about a witness with respect to charges pending at the time of his or her testimony or cooperation with police in order to establish potential bias. *State v. Evans*, 40 N.C. App. 623, 624, 253 S.E.2d 333, 334 (1979). The trial court in this case properly allowed defendant to ask Nelson on cross-examination whether he had been charged with first-degree murder in this case. Defendant contends, however, the trial court improperly prohibited his asking Nelson about pending charges of carrying a concealed weapon in August 1996 and March 1997.

At the time of trial, Nelson was out on bond for the murder in this case and on the two concealed weapons charges. During cross-examination of Nelson, defense counsel asked about the two concealed weapons charges, specifically, "[W]hat have you been charged with since being released on bond?" (Tr. at 78.) After sustaining the State's objection to this question, the court conducted a *voir dire* hearing out of the jury's presence. During the hearing, defense counsel not only asked Nelson about the two concealed weapons charges, but also asked about the *type* of weapon and bullet used in that weapon—whether a 9-mm can shoot a .380 bullet—the type used in the shooting in this case. Objecting to questions surrounding the substance of the charges, the State argued, "We have no objection to Your Honor allowing him to ask Mr. Nelson if he had any deal in any other pending charges that he has and let him answer that in front of the jury. I've got no objection to that. That's permissible under the case law. My objection is going into any details about the substance of the nature of the offense." (Tr. at 85.) After hearing both sides on the issue, the trial court stated, "All right. Is there any confusion as to the court's ruling? The only thing I have excluded are any questions about these subsequent charges." (Tr. at 86.) Neither party expressed confusion and the trial continued. Defendant did not ask Nelson any more questions about these two weapons charges.

Because the State objected to questions regarding the *substance* of the charges and not to questions about the charges themselves, it appears the trial court did not exclude defendant from asking about Nelson's pending charges, but only prohibited him from asking about *details* surrounding those charges. Defendant, on his own accord, chose not to ask about the charges themselves after the hearing. We find no error here.

[4] Defendant also contends the State improperly denied defendant the right to cross-examination the State's witness, Edward Tender, about any charges pending at the time he spoke with police about the crime here. Our review indicates, however, that defendant was allowed to inquire as to any pending charges and did so. Accordingly, we find no error.

We have reviewed defendant's remaining argument and find it to be without merit.

In sum, we remand this case for a hearing to determine the defendant's competency at the time of trial, pursuant to G.S. 15A-1002. If the trial court determines that a retrospective determination is still possible, the court should review the evidence which was before it preceding defendant's second trial, to wit, any psychiatric evaluations and presentations by counsel. If the trial court concludes from this retrospective hearing that defendant was competent at the time of trial, no new trial is required. If, however, the trial court determines that a meaningful hearing is no longer possible, defendant's conviction must be reversed and a new trial granted when he is competent to stand trial.

Remanded.

Judges JOHN and EDMUNDS concur.

RICHARD PEARSON, EMPLOYEE, PLAINTIFF v. C. P. BUCKNER STEEL ERECTION, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS, HEALTH CARE CENTER, INC., D/B/A CARY MANOR NURSING HOME, INTERVENOR

No. COA99-1082

(Filed 1 August 2000)

1. Workers' Compensation— attorney fees—law of the case

A Supreme Court reinstatement of an order in a workers' compensation case did not become the law of the case on intervenor's entitlement to attorney fees where the Supreme Court's ruling did not address the additional attorney fee requested here or the fee awarded in the order.

2. Workers' Compensation— attorney fees—appeal of order—not a collateral attack on earlier order

An appeal of an order by an Industrial Commissioner awarding attorney fees was not an improper collateral attack on an order of the Full Commission which had earlier awarded attorney fees. Although intervenor suggested that the second order awarding attorney fees was simply a supplemental order expounding on a Supreme Court ruling and taxing attorney fees for the entire appellate process, the Supreme Court ruling reinstating the earlier order did not address attorney fees and, although intervenor was granted attorney fees in the order appealed from, intervenor was incorrect to assume that the Supreme Court intended to change long-held statutory law. Moreover, intervenor did not move for the attorney fees in question until after the Supreme Court's ruling and the order award was a new and separate order properly appealed to the Commission.

3. Workers' Compensation— Industrial Commission panel—two signatures on opinion

Although intervenor argued that two Commissioners cannot constitute a panel of the Industrial Commission for the decision of a workers' compensation action, the opinion here clearly stated that there was a third commissioner on the panel even though the third signature was lacking due to illness.

4. Workers' Compensation— attorney fees—care provider—Medicaid accepted—provider's fees not a benefit to employee

The Industrial Commission correctly concluded that intervenor was not entitled to attorney fees in a workers' compensation action where intervenor was a nursing home which had accepted payment from Medicaid. In so doing, intervenor gave up its right to hold the injured employee liable for any costs associated with the care aside from the standard deductible, coinsurance or copayments, and the plain language of N.C.G.S. § 97-88 only authorizes payments to the injured employee for his costs. Intervenor cannot now argue that payment of its attorney fees is either payment of the injured employee's costs or is of some benefit to the injured employee.

Appeal by intervenor from an opinion and award entered 3 June 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 May 2000.

The Jernigan Law Firm, by N. Victor Farah and Leonard T. Jernigan, Jr., for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffrey A. Doyle, for defendant-appellees.

Lore & McClearen, by R. James Lore, for intervenor-appellant.

HUNTER, Judge.

The present appeal is the result of an opinion and award of the North Carolina Industrial Commission ("Commission") entered on 3 June 1999 due to a remand from our Supreme Court in *Pearson v. C. P. Buckner Steel Erection Co.*, 348 N.C. 239, 498 S.E.2d 818 (1998), which contains a full review of the facts and procedural history of this case—most of which is unnecessary to resolve this appeal. In the present appeal, the intervenor Cary Health Care Center, Inc., doing business as Cary Manor Nursing Home ("intervenor"), appeals the two-member panel of the Commission's reversal of an award of attorneys' fees to intervenor. Intervenor contends that the two commissioners who entered the opinion and award of 3 June 1999 did not have jurisdiction to do so (the third member being absent due to illness), and; assuming *arguendo* they did, intervenor contends the panel misapplied N.C. Gen. Stat. § 97-88. We disagree and affirm the Commission's opinion and award.

Briefly, the facts relevant to the present appeal reveal that defendant-employer C.P. Buckner Steel Erection and defendant-insurer Liberty Mutual Insurance Company (collectively "defendants"), appealed the prior award of the Commission (dated 19 December 1995) which ordered defendants to pay intervenor the difference between the amount paid intervenor by Medicaid and the amount allowable under the Commission's fee schedule, and which also ordered defendants to pay intervenor $500.00 in attorneys' fees. In *Pearson v. C. P. Buckner Steel Erection Co.*, 126 N.C. App. 745, 486 S.E.2d 723 (1997) ("1997 appeal"), this Court held that:

> *Attorneys' fees may be awarded* by the Commission *when the hearing or proceeding is brought by the insurer* and the insurer is ordered to pay or continue to pay benefits. N.C. Gen. Stat. § 97-88 (1991). *In the present case*, the opinion and award ordering defendants to pay the expenses in excess of those paid by Medicaid was not the result of an appeal by the insurer. *It was the direct result of a motion made by plaintiff.* Therefore, an award of attorneys' fees to the plaintiff was improper.

Id. at 752, 486 S.E.2d at 728 (emphasis added). The Supreme Court reversed and remanded *on appeal by intervenor* in *Pearson v. C. P. Buckner Steel Erection Co.*, 348 N.C. 239, 498 S.E.2d 818 ("1998 appeal"), stating,

> we hold that the Commission's 19 December 1995 order directing defendants to pay intervenor and plaintiff's other health-care providers the difference between the amount reimbursed to Medicaid and the amount allowable under the Act was a proper exercise of its authority. We further hold that the Commission correctly applied the workers' compensation law of this State and that such law is not preempted by federal Medicaid law. We therefore reverse the Court of Appeals' holding that the Commission's 19 December 1995 order was in error. . . .

Pearson, 348 N.C. at 246-47, 498 S.E.2d at 823. However, the Supreme Court did *not* rule on the issue of attorneys' fees.

On 19 June 1998, intervenor petitioned for supplemental attorneys' fees pursuant to N.C. Gen. Stat. § 97-88 for the additional time necessary to defend against defendants' 1997 appeal to this Court, and intervenor's 1998 appeal to the Supreme Court which resulted in reinstatement of the Commission's order of 19 December 1995. On 7 August 1998, Commissioner Bolch entered an order for the Full Commission requiring defendants to pay plaintiff the sum of $10,000.00 as attorneys fees *for the time intervenor's counsel spent in defending against defendants' appeals.* Defendants sent a letter to Commissioner Mavretic, asking for a stay from the order dated 7 August 1998, and requesting a hearing *de novo*. An order staying the 7 August 1998 order was entered by Industrial Commission Chairman Howard Bunn on 31 August 1998, "pending final resolution of Defendants' appeal." On 26 October 1998, intervenor filed a motion to dismiss, alleging that defendants failed to timely appeal the 7 August 1998 order to the North Carolina Court of Appeals as required by N.C. Gen. Stat. § 97-86. Intervenor asserted that the Commission could not proceed to review said order by collateral attack through a separate Full Commission panel. On 3 June 1999, two Full Commissioners filed the order denying intervenor's motion to dismiss, reversing the 7 August 1998 order and its granting of $10,000.00 in attorneys' fees to intervenor, and denying intervenor's motion for additional attorneys' fees under N.C. Gen. Stat. § 97-88.1.

Although on 10 June 1999 intervenor filed its notice of appeal from the order of 3 June 1999; we note that on 14 June 1999, unaware

that intervenor had filed notice of appeal, the Full Commission filed an amended opinion and award which clarified the Commission's position as to *why* it ruled as it did. (However, the amended opinion *in no way* altered any of the Commission's findings or conclusions of the original 3 June 1999 order.) Defendant requested that the Commission's amended order and award be included in the record on appeal. However, in her order settling the record on appeal, Commissioner Renee Riggsbee stated that:

> When the Order was filed, the Full Commission panel was not aware that Intervenor had filed notice of appeal two days earlier. Nevertheless, plaintiff's notice of appeal was filed before the Commission's Order, thereby divesting the Commission of jurisdiction. Although the Order does not change the effect of the original Opinion and Award, it is [my] opinion . . . that the Order further explains and clarifies the Commission's position and, therefore, does not merely correct a clerical mistake, oversight, or omission within the meaning of Rule 60(a) of the Rules of Civil Procedure. Accordingly, the Order amending Opinion and Award for the Full Commission filed 14 June 1999 shall not be included in the record on appeal. Defendants may petition the Court of Appeals for an order allowing the inclusion of the Commission's Order.

In response, defendants petitioned this Court for a Writ of Certiorari on 15 October 1999 pursuant to N.C.R. App. P. 21, requesting that the Commission's amended opinion and award be included as part of the record on appeal. This Court granted the writ and allowed the record to be so amended. Thus, we now consider intervenor's appeal to be from both of the Commission's orders and awards filed 3 June and 14 June 1999, and any objections made by intervenor to the 3 June 1999 order, we deem made to the 14 June 1999 order also.

Intervenor argues that the two commissioners who signed and entered the opinion and award of 3 June 1999 lacked jurisdiction to do so (1) because the Supreme Court's ruling in the 1998 appeal was *res judicata* with regard to attorneys' fees; (2) because defendants cannot collaterally attack a Full Commission decision; and (3) because three Commissioners are necessary to make up a panel.

[1] Intervenor first contends that once the Supreme Court ordered reinstatement of the 19 December 1995 order which awarded $500.00 in attorneys' fees to intervenor, intervenor's entitlement to attorneys' fees became the law of the case. We disagree. It is true that reinstate-

ment of the 19 December 1995 order reinstated the $500.00 attorneys' fee awarded *as of that date*. However, the Supreme Court's ruling *does not address* the $10,000.00 attorneys' fee requested by intervenor in the present appeal. In fact, the Supreme Court's ruling did not even address the attorneys' fees awarded in the 19 December 1995 order. (*See Pearson*, 348 N.C. 239, 498 S.E.2d 818.) Additionally, we note that intervenor has failed to properly preserve this argument in an assignment of error. Accordingly, we will not consider it. N.C.R. App. P. 10.

[2] Secondly, intervenor argues that the two Commissioners who signed the 3 June 1999 opinion and award lacked jurisdiction to overturn Commissioner Bolch's 7 August 1998 "Order for Attorneys Fees Pursuant to G.S. 97-88." It is intervenor's contention that by appealing Commissioner Bolch's award of attorneys' fees to intervenor, defendants improperly collaterally attacked one Full Commission panel's order and requested review by another Full Commission panel. However, we note that intervenor continually suggests that Commissioner Bolch's order was simply a "supplemental order" in that it somehow expounded on the Supreme Court's ruling and taxed defendants with intervenor's attorneys' fees for the entire appellate process. We disagree.

As stated above, the Supreme Court's ruling reinstating the Commission's 19 December 1995 order did NOT address attorneys' fees at all. It neither addressed whether the fees were properly granted nor whether intervenor was, in fact, entitled to fees. Instead, the Court's focus was strictly on the merits of intervenor's argument that defendants should be required to pay the difference between what Medicaid had already paid intervenor and the amount intervenor would be entitled to under the Industrial Commission's payment guidelines. *Pearson*, 348 N.C. 239, 246, 498 S.E.2d 818, 822-23. Thus, although intervenor was granted attorneys' fees in the order, intervenor is incorrect to assume—and we refuse to assume—that our Supreme Court intended to change the long-held statutory law which requires that any grant of attorneys' fees must benefit the injured employee. N.C. Gen. Stat. § 97-88.

We further note that intervenor did not even move the Commission for the attorneys' fees in question at present until *after* the Supreme Court's ruling. Thus, Commissioner Bolch's award of attorneys' fees, although clearly based on the fact that the Commission's order "filed December 19, 1995 . . . was ultimately affirmed by the Supreme Court of North Carolina," was not, as inter-

venor contends, a "supplemental order for the Full Commission," but in fact was a new and separate order. Thus, defendants properly appealed to the Full Commission for a hearing on the matter pursuant to N.C. Gen. Stat. § 97-88.

[3] Thirdly, regarding intervenor's argument that two Commissioners cannot constitute a panel, we note that although only two Commissioners *signed* the opinion and award of 3 June 1999, the opinion clearly states that there was a third Commissioner on the panel. Explaining the reason why a third signature is not on the filed document, Commissioner Dianne C. Sellers wrote: "Commissioner Christopher Scott, *who was a member of the Full Commission panel which reviewed this case*, was unavailable at the time of the filing of this Opinion and Award because of illness." Therefore, we overrule intervenor's argument.

[4] In the alternative, intervenor next contends that even if the two member panel had jurisdiction, its opinion and award of 3 June 1999 misapplied the applicable statute and thus, the Commission concluded in error that intervenor was not entitled to attorneys' fees. Again, we disagree.

N.C. Gen. Stat. § 97-88 provides:

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

N.C. Gen. Stat. § 97-88 (1999) (emphasis added). We note that the plain language of this statute only authorizes payments to the *injured employee* for *his* costs. Case law well establishes that where the statutory language is "clear and without ambiguity, 'there is 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)).

In its opinion and award filed 3 June 1999, Commissioner Sellers, writing for the panel, found in pertinent part that:

> 5. Upon remand [from the Supreme Court] to the Industrial Commission, plaintiff and [intervenor] ***separately petitioned for attorney's fees*** taxed to defendants pursuant to N.C. Gen. Stat. § 97-88 . . . . On 7 August 1999, Commissioner Bolch . . . filed an Order granting fees to counsel for [intervenor] in the amount of $10,000.00 . . . . *The motion filed by plaintiff [for attorneys' fees] appears to be still pending* before Commissioner Bolch.

(Emphasis added.) Thus, because the plain language of N.C. Gen. Stat. § 97-88 is clear and unambiguous on its face, and because the evidence clearly supported a finding that plaintiff's and intervenor's attorneys' fees were separate and apart, the Commission specifically concluded as law that:

> 2. N.C. Gen. Stat. § 97-88 endows the Industrial Commission with the authority to order an insurer to pay an injured employee reasonable attorney's fees. *It does not empower the Commission to award attorney's fees to a medical provider or to an intervenor in any manner or for any reason. Further,* ***the statute expressly limits its purpose to reimbursing "the cost [of appellate review] to the injured employee." As there is no evidence that the award of attorney's fees to the intervenor in this case was made to satisfy "costs to the injured employee," the award contained in the 7 August 1998 Order . . . is not proper under the Act.***
>
> 3. . . . Given the absence of statutory authority under N.C. Gen. Stat. § 97-88 for awarding fees to any party other than the "injured employee," defendants' application for review was reasonable; therefore, there is no basis upon which to award the intervenor with attorney's fees for the defense of the resulting review.

(Emphasis added.)

In reviewing the record before us, we agree with Commissioner Sellers that it is devoid of any evidence indicating that the plaintiff in the present case incurred attorneys' fees as a result of intervenor's involvement in the case at bar. In fact, once intervenor accepted Medicaid as payment for the injured employee's medical care under Medicaid, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v (1994) and in conjunction with North Carolina's Medicaid program as

set out in N.C. Gen. Stat. §§ 108A-54 thru 108A-70.5 (1997), intervenor gave up its right to hold the injured employee liable for any costs associated with that care aside from the standard deductible, coinsurance or copayment required. "A State plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, *as payment in full,* the amounts paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual. . . ." 42 C.F.R. 447.15 (1996) (emphasis added). Thus by accepting payment from Medicaid, intervenor effectively released the injured employee from any associated costs. Because intervenor could not hold the injured employee liable for its attorneys' fees, we hold that intervenor cannot now argue that payment of its attorneys' fees is either payment of the injured employee's costs or is of some benefit to the injured employee. Accordingly, we affirm the Commission's 3 July 1999 opinion and award as amended by its 14 June 1999 order reversing the previous 7 August 1998 award of attorneys' fees to intervenor.

Affirmed.

Judges GREENE and HORTON concur.

PISGAH OIL COMPANY, INC., PETITIONER-APPELLANT v. WESTERN NORTH CAROLINA REGIONAL AIR POLLUTION CONTROL AGENCY, RESPONDENT-APPELLEE

No. COA99-910

(Filed 1 August 2000)

1. Administrative Law— agency decision—whole record test

The trial court properly applied the whole record test and its determination that respondent-Agency's decision to uphold a fine against petitioner for $5,000 for failure to utilize the required vapor recovery equipment on a tanker truck while unloading fuel was not arbitrary and capricious based on its consideration of the factors in N.C.G.S. § 143-215.112(d)(1a), including the degree and extent of harm caused by the violation, the cost of rectifying the damage, and the amount of money the violator saved by not having made the necessary expenditures to comply with the appropriate pollution control requirements.

2. Appeal and Error— preservation of issues—failure to cite authority

Although petitioner contends the trial court erred in affirming respondent-Agency's decision to uphold a fine against petitioner for $5,000 for failure to utilize the required vapor recovery equipment on a tanker truck while unloading fuel based on an alleged failure to hold an adequate evidentiary hearing and failure to prepare an adequate record for judicial review, petitioner has abandoned this assignment of error since it offered no legal authority to substantiate these contentions, and in any event, the trial court was provided sufficient information to review the Agency's decision.

3. Administrative Law— agency decision—civil penalty—statutory factors

The trial court did not err in finding that respondent-Agency had discretion under N.C.G.S. § 143-215.112(d)(1a) to levy a civil penalty against petitioner for $5,000 for failure to utilize the required vapor recovery equipment on a tanker truck while unloading fuel, because: (1) the Agency was informed as to each of the three statutory factors in making its decision to access the fine; and (2) although petitioner contends the trial court made insufficient findings, the trial court need not explain the reasons for affirming the administrative ruling.

Appeal by petitioner from order entered 7 May 1999 by Judge Dennis J. Winner in Haywood County Superior Court. Heard in the Court of Appeals 11 May 2000.

Patrick U. Smathers, P.A., by Patrick U. Smathers, for petitioner-appellant.

Siemens Law Office, P.A., by Jim Siemens, for respondent-appellee.

McGEE, Judge.

The Western North Carolina Regional Air Pollution Control Agency (the Agency) is an administrative agency established pursuant to N.C. Gen. Stat. § 143-215.112 (1999) as a local air pollution control program. Mike Matthews (Matthews), an inspector for the Agency, observed David Bylko (Bylko), an employee of Pisgah Oil Company, Inc. (petitioner), unload fuel from his tanker truck into two

storage tanks at the Bethel Grocery store in Waynesville, North Carolina on 8 August 1998. Matthews observed that Bylko was not utilizing required vapor recovery equipment on his tanker truck while unloading fuel, in violation of the air quality rules and regulations adopted by the Agency's board. When Matthews approached Bylko to question him, Bylko admitted that he had not been using the equipment. However, Bylko had started filling the second tank only a few minutes before Matthews spoke to him, and Bylko immediately attached the vapor recovery equipment before continuing to fill the second tank.

The Agency informed petitioner in a letter dated 14 August 1998 that a fine of $7,500, consisting of $5,000 for the first tank and $2,500 for the second, had been assessed for the violation. Petitioner asked Bylko to resign from his position, and he complied. Petitioner timely appealed the penalty for the reasons that: this was petitioner's first offense; the financial burden that such a large sum would place upon petitioner, which is a small company compared to its competitors, was unfair; and petitioner's management had a "continued commitment to comply with all pertinent regulations." The Agency removed the $2,500 fine on 26 October 1998 as to the second tank while upholding the $5,000 fine for the first tank.

Petitioner filed a petition for judicial review in Haywood County Superior Court on 20 November 1998. The petition refers to N.C.G.S. § 143-215.112(d)(1a), which provides three factors for consideration in determining the amount of the penalty. The petition further states that:

> Petitioner excepts to the decision of the [Agency] determining a fine of $5,000.00 in that [the Agency] did not consider the foregoing factors and the decision of [the Agency] was unsupported by substantial evidence and/or was arbitrary and capricious, and/or was an unlawful deprivation of Petitioner's rights to due process pursuant to both the North Carolina and United States Constitution[s].

The petition filed by petitioner was heard on 3 May 1999. The trial court stated that it considered the petition, the response to the petition, and the record of the proceedings submitted by the Agency in entering its order on 7 May 1999 affirming the fine of $5,000. In its order, the trial court found that petitioner had admitted the violations for which penalties were levied by the Agency, and the Agency had the discretion to levy civil penalties for violations pursuant

to N.C.G.S. § 143-215.112(d)(1a). Petitioner filed timely notice of appeal.

[1] In its brief, petitioner first argues the trial court erred in affirming a fine that was "arbitrary and capricious" where respondent did not consider the statutory factors of N.C.G.S. § 143-215.112(d)(1a) in determining the amount of the penalty assessed. The proper standard for the superior court's judicial review "depends upon the particular issues presented on appeal." *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). When the petitioner "questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test." *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). *See also Associated Mechanical Contractors v. Payne*, 342 N.C. 825, 467 S.E.2d 398 (1996) (concluding that the proper standard of review of agency decisions to determine the sufficiency of the evidence is the "whole record" test). "The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118.

As to appellate review of a superior court order regarding an agency decision, "the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* at 675, 443 S.E.2d at 118-19 (citation omitted). " 'As distinguished from the "any competent evidence" test and a *de novo* review, the "whole record" test "gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." ' " *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706-07, 483 S.E.2d 388, 392 (1997); *Bennett v. Bd. of Education*, 69 N.C. App. 615, 618, 317 S.E.2d 912, 915, *cert. denied*, 312 N.C. 81, 321 S.E.2d 893 (1984) (quoting *Overton v. Board of Education*, 304 N.C. 312, 322, 283 S.E.2d 495, 501 (1981)).

First, it appears from the record that the trial court exercised the appropriate scope of review in its order. The order states that the trial court had considered "the Petition filed by the Petitioner, the Response to the Petition and the Record of Proceedings submitted by the Agency[.]" Therefore, the trial court employed the whole record test as it "examine[d] all competent evidence (the 'whole record') in

order to determine whether the agency decision [was] supported by 'substantial evidence.' " *See Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118.

Second, we find the trial court properly applied the whole record test. There is sufficient evidence in the record to show the Agency considered the appropriate factors in N.C.G.S. § 143-215.112(d)(1a) in levying the $5,000 fine against petitioner. The factors to be considered are "the degree and extent of harm caused by the violation, the cost of rectifying the damage, and the amount of money the violator saved by not having made the necessary expenditures to comply with the appropriate pollution control requirements." N.C.G.S. § 143-215.112(d)(1a). The Agency may then assess "a penalty not to exceed ten thousand dollars ($10,000) per day for so long as the violation continues." *Id.*

The Agency's reasons for assessing the $5,000 fine were set forth in the minutes of its 14 September 1998 Agency board meeting:

> Mr. Patrick Smathers, a representative of [petitioner] . . . talked about the history of Pisgah Oil Company and . . . said the company did not dispute that the driver did not use his Stage I Vapor Recovery lines and read a statement from the driver stating his negligence. Mr. Smathers said the driver has since submitted his resignation. Mr. Hampton [the general manager] explained to the Board the training process given by the company to their drivers. Mr. Hampton also said the company was under the "mercy of the employee" when something like this happens. Mr. Mike Matthews . . . explained what he found on August 7, 1998. . . . Mr. Queen [of the Board] asked how [petitioner] was going to handle a situation like this in the future. Mr. Hampton said he was going to train better and monitor much closer. Mr. Queen said he questioned the violation of the second tank of $2,500.00 because Mr. Matthews caught [Bylko] in the first few minutes of unloading gasoline.

Clearly "the degree and extent of harm caused by the violation" was considered when the Agency's board reduced petitioner's fine by $2,500 on the ground that the violation had ceased early in the process of filling the second tank. Second, while obviously the damage in this case could not be rectified after the vapors escaped into the atmosphere, the cost of rectifying the situation was addressed when the general manager for petitioner explained that he would improve training and monitoring in the future. Finally, "the amount of

money the violator saved by not having made the necessary expenditures to comply with the appropriate pollution control requirements" was answered when petitioner explained in its 4 September 1998 letter to the Agency that its truck was already equipped with the proper vapor recovery devices; therefore petitioner had not saved any money through non-compliance.

The record demonstrates the Agency was informed as to each of the statutory factors in making its decision to assess petitioner's $5,000 fine, and the amount was one-half of a maximum daily assessment for ongoing violations under the statute. N.C.G.S. § 143-215.112(d)(1a). Moreover, our Court may not weigh the evidence that was presented to the Agency and substitute our evaluation of the evidence for that of the Agency. *See In re Appeal of AMP, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975); *In re Appeal of Phillip Morris*, 130 N.C. App. 529, 539, — S.E.2d —, — (1998). We therefore reject petitioner's first argument that the trial court erred in affirming the $5,000 fine in that the fine was not the product of an "arbitrary and capricious" decision by the Agency.

[2] Petitioner's second argument is that the trial court erred in affirming respondent's decision "because the respondent did not hold an adequate evidentiary hearing, make the necessary findings and conclusions[,] nor prepare an adequate record for judicial review." For support, petitioner provides the single quotation from *Taborn v. Hammonds*, 83 N.C. App. 461, 466, 350 S.E.2d 880, 883 (1986), *rev'd*, 324 N.C. 546, 556, 380 S.E.2d 513, 519 (1989), that "a reviewing court must be able to determine what factors were used to reach an administrative decision as well as whether said decision was arbitrary, capricious, an abuse of discretion, or not in accordance with law." However, our Supreme Court in the same case held that simply stating a basis for a decision sufficed as an adequate explanation by a school board such that its decision had a "rational basis," and that requiring more extensive consideration would cause appellate courts to interfere with the discretion of local boards of education. *Taborn v. Hammonds*, 324 N.C. 546, 557-58, 380 S.E.2d 513, 519-20 (1989). Petitioner also contends that the hearing at which the Agency decided to reduce petitioner's fine was "not a formal evidentiary hearing in which examination and cross-examination of witnesses[']sworn testimony took place[,]" and that the record of the hearing was not complete because the minutes were "not verbatim." Petitioner offers no legal authority to substantiate these contentions within its argument, and therefore we reject the argument. *See Byrne v.*

Bordeaux, 85 N.C. App. 262, 354 S.E.2d 277 (1987) (where plaintiff failed to cite authority in support of assignment of error, such assignment is deemed abandoned).

In any event, we believe the trial court was provided sufficient information to review the decision of the Agency. As previously stated, the trial court's order states that the trial court had considered "the Petition filed by the Petitioner, the Response to the Petition and the Record of Proceedings submitted by the Agency[.]" We have already determined the Agency's decision was supported by substantial evidence. The facts in this matter were not contested and we have determined the $5,000 fine was not the result of an arbitrary or capricious decision by the Agency. We fail to see how petitioner was prejudiced by the Agency not preparing what petitioner contends is an "adequate record for judicial review."

[3] In its third argument, petitioner contends the trial court erred "in finding [solely] that the respondent had discretion pursuant to N.C.G.S. § 143-215.112(d)(1a) to levy the civil penalty." Petitioner sets out the procedure for judicial review of the Agency decision, and then states that the trial court "cannot merely contend that the Respondent has discretion to levy civil penalties without further findings of fact." Petitioner acknowledges that the Agency "does have some discretion to decide certain aspects, such as, what weight to give each factor, how to decide to calculate each factor and how those decisions will translate into a dollar amount for a penalty." However, according to petitioner "there is no discretion in whether or not to use the three factors in determining the amount of civil penalties." We have already determined that the Agency was informed as to each of the three statutory factors in making its decision to assess petitioner's $5,000 fine. Insofar as petitioner argues the trial court made insufficient findings, we disagree. *See Area Mental Health Authority v. Speed*, 69 N.C. App. 247, 250, 317 S.E.2d 22, *cert. denied*, 312 N.C. 81, 321 S.E.2d 893 (1984) (stating the trial court need not explain the reasons for affirming the administrative ruling). The trial court did not err in affirming the fine assessed by the Agency against petitioner.

Affirmed.

Judges WALKER and HUNTER concur.

SHIRLEY B. NORRIS AND MURRAY NORRIS, PLAINTIFFS v. RAYMOND L. SATTLER, M.D., WILMINGTON NEUROSURGICAL ASSOCIATES, P.A., AND CAPE FEAR MEMORIAL HOSPITAL, INC., DEFENDANTS

No. COA99-642

(Filed 1 August 2000)

Appeal and Error— appealability—interlocutory order—denial of ex parte contact with physician—no substantial right

An appeal was dismissed as interlocutory where plaintiffs filed an action alleging negligent neurosurgery; dismissed their claims against the doctor and practice, leaving the claim against defendant hospital; defendant filed a motion to permit contact with the treating physician; that motion was denied; and defendant appealed. Interlocutory discovery orders are not ordinarily appealable prior to final judgment, but review has been allowed if a substantial right is implicated. Here, while defendant is prohibited from ex parte contact, the order in no way precludes the multi-varied discovery methods of Rule 26 and defendant's assertion that the order precluded preparing its defense was not persuasive.

Appeal by defendant Cape Fear Memorial Hospital from order entered 16 March 1999 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 13 March 2000.

Henson & Fuerst, P.A., by Thomas W. Henson, for plaintiffs-appellees.

Harris, Shields, Creech & Ward, P.A., by Thomas E. Harris, R. Brittain Blackerby, and Mary V. Ringwalt, for defendant-appellant Cape Fear Memorial Hospital.

JOHN, Judge.

Defendant Cape Fear Memorial Hospital, Inc. (Cape Fear) appeals the trial court's order denying its "Motion to Waive Privilege and Permit Contact with Treating Physician." Cape Fear's appeal is interlocutory and must be dismissed.

Pertinent facts and procedural history include the following: On 15 June 1995, plaintiffs Murray and Shirley B. Norris (Mr. and Mrs. Norris), husband and wife, filed suit against defendants Raymond Sattler, M.D. (Dr. Sattler), Wilmington Neurological Associates, P.A.

(WNA), and Cape Fear. Plaintiffs' complaint alleged that Dr. Sattler, an employee of WNA, negligently performed neurosurgery on Mrs. Norris proximately causing her to become blind in her right eye and to suffer, *inter alia*, "diminished mental status . . . [and] emotional immobility."

Plaintiffs further alleged Dr. Sattler was an agent of Cape Fear which, at the time of the operation upon Mrs. Norris, knew that Dr. Sattler suffered from "physical and/or mental illness" such that he exhibited "erratic, bizarre, dangerous, and life threatening behavior." Notwithstanding, the complaint continued, Cape Fear "allowed him to continue practicing at their facility" and to perform the surgery at issue. Plaintiffs sought compensatory and punitive damages.

Cape Fear filed its answer 3 August 1995 and Dr. Sattler and WNA answered 14 August 1995, each of the three generally denying plaintiffs' claims. Dr. Sattler's deposition was taken 26 September 1996. On 30 July 1997, plaintiffs voluntarily dismissed with prejudice their claims against Dr. Sattler and WNA.

Cape Fear thereafter filed a (22 December 1998) "Motion to Waive Privilege and Permit Contact with Treating Physician" seeking an order "confirming" that the physician-patient privilege between Dr. Sattler and Mrs. Norris had been waived, and

> permitting [Cape Fear] to have such discussions with Dr. Sattler as [Cape Fear] deems necessary and appropriate to prepare for the trial of the case.

Cape Fear also filed a motion requesting that the court make findings of fact in support of its order. *See* N.C.G.S. § 1A-1, Rule 52(a)(2) (1999). On 16 March 1999, the trial court entered an order (the Order) denying Cape Fear's motion, citing *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990) as "controlling" authority.

Cape Fear subsequently appealed in a timely manner. On 1 July 1999, plaintiffs moved to dismiss Cape Fear's appeal as interlocutory.

In *Crist*, our Supreme Court held that notwithstanding waiver of the physician-patient privilege by a patient, *see* N.C.G.S. § 8-53 (1999),

> defense counsel may not interview plaintiff's nonparty treating physicians privately without plaintiff's express consent. Defendant instead must utilize the statutorily recognized methods of discovery enumerated in N.C.G.S. § 1A-1, Rule 26 [(1999) (Rule 26)].

Crist, 326 N.C. at 336, 389 S.E.2d at 47. Cape Fear maintains the case *sub judice* is distinguishable from *Crist*; however, it is unnecessary to address Cape Fear's argument in that we conclude plaintiffs' motion to dismiss the instant appeal should be allowed.

> An order of the trial court
>
> is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy. . . . There is generally no right to appeal an interlocutory order.

Howerton v. Grace Hospital, Inc., 124 N.C. App. 199, 201, 476 S.E.2d 440, 442 (1996) (citations omitted). The rule prohibiting interlocutory appeals

> prevent[s] fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.

Fraser v. Di Santi, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985).

Without doubt, the Order challenged herein is interlocutory as it does not fully dispose of the case. *See Howerton*, 124 N.C. App. at 201, 476 S.E.2d at 442. Interlocutory orders may be appealed only in two instances:

> first, where there has been a final determination of at least one claim, and the trial court certifies there is no just reason to delay the appeal, [N.C.G.S. § 1A-1, Rule 54(b) (1990) (Rule 54)]; and second, if delaying the appeal would prejudice a "substantial right."

Liggett Group v. Sunas, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993) (citations omitted).

There is no issue of the applicability of the first avenue of appeal herein. No final determination has been made as to any claims and the trial court did not certify the present appeal pursuant to Rule 54. *See id.*

Under the substantial right exception, *see* N.C.G.S. §§ 1-277(a), 7A-27(d)(1) (1999), an otherwise interlocutory order may be appealed upon a showing by the appellant that: (1) the order affects a right that is indeed "substantial;" and, (2) "enforcement of that right, absent

immediate appeal, [will] be 'lost, prejudiced, or be less than adequately protected by exception to entry of the interlocutory order.' " *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 250, 507 S.E.2d 56, 62 (1998) (quoting *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987)).

> Our courts have acknowledged that the substantial right test
>
> is more easily stated than applied [and] [i]t is usually necessary to resolve the question in each case by considering the particular facts of the case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). In any event, "it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

The Order is best categorized as a discovery order in that it prohibits Cape Fear from contact with Dr. Sattler other than through "the statutorily recognized methods of discovery enumerated in" Rule 26. *Crist*, 326 N.C. at 336, 389 S.E.2d at 47. It is a well-established "general rule that interlocutory discovery orders are not ordinarily appealable prior to entry of a final judgment," *Sharpe v. Worland*, 351 N.C. 159, 164, 522 S.E.2d 577, 580 (1999), as they do not affect a substantial right, *id.* at 163, 522 S.E.2d at 579.

> We consider discovery . . . issues . . . to be fragmentary and partial issues which, in the interest of judicial economy, should not be considered by this Court.

Hale v. Leisure, 100 N.C. App. 163, 167-68, 394 S.E.2d 665, 668 (1990).

However, our courts have allowed review of such orders if a substantial right is indeed implicated. *See Sharpe*, 351 N.C. at 164, 522 S.E.2d at 580 (order compelling discovery of documents protected by statutory privilege affected substantial right); *Shaw v. Williamson*, 75 N.C. App. 604, 606, 331 S.E.2d 203, 204 (order compelling discovery of documents protected by constitutional right against self-incrimination affected substantial right), *disc. review denied*, 314 N.C. 669, 335 S.E.2d 496 (1985); *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554, 353 S.E.2d 425, 426 (1987) (order compelling discovery appealable if order enforced by sanctions); *Tennessee-Carolina Trans. Co. v. Strict Corp.*, 291 N.C. 618, 625, 629, 231 S.E.2d

597, 601, 603 (1977) (order denying deposition of witness "effectively preclude[d]" defendant from introducing "highly material" evidence and therefore affected substantial right).

According to Cape Fear, the "substantial right" involved herein "is the right to prepare adequate defenses for trial with the critical witness in the case." Cape Fear insists the Order has placed it

> in the untenable position of having to defend the conduct of a physician without having the ability to meet with and discuss the case with that individual prior to trial.

On the contrary, while it is true that Cape Fear is prohibited from *ex parte* contact with Dr. Sattler, the Order in no way precludes Cape Fear from "meet[ing] with and discussing the case with" Dr. Sattler in the context of the multi-varied discovery methods detailed in Rule 26. *See* Rule 26(a) (parties may obtain discovery by "depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission"). Further, the Order in no way precludes Cape Fear from discovering or introducing "highly material" evidence, as in *Tennessee-Carolina Trans. Co.*, 291 N.C. at 629, 231 S.E.2d at 603.

In weighing the competing interests in light of analogous arguments in *Crist*, our Supreme Court observed that

> "*ex parte* interviews may be less expensive and time-consuming than formal discovery and may provide a party some means of equalizing tactical advantage . . . ."
>
> . . . .
>
> [However,] considerations of patient privacy, the confidential relationship between doctor and patient, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery.

Crist, 326 N.C. at 335-36, 389 S.E.2d at 46-47 (citing *Nelson v. Lewis*, 534 A.2d 720, 723 (N.H. 1987)).

Under the circumstances *sub judice*, therefore, we hold Cape Fear has not met its "burden to present appropriate grounds,"

Jeffreys, 115 N.C. App. at 379, 444 S.E.2d at 253, for hearing the instant interlocutory appeal. Cape Fear has been unpersuasive in its assertion that the Order precluded it from preparing its defense with the critical witness, *see Tennessee-Carolina Trans. Co.*, 291 N.C. at 629, 231 S.E.2d at 603, so as to deprive it of a substantial right, thereby justifying an immediate appeal, *see Dworsky v. Insurance Co.*, 49 N.C. App. 446, 448, 271 S.E.2d 522, 523 (1980).

Notwithstanding, Cape Fear interjects that our Supreme Court vacated, *see Crist*, 326 N.C. at 330, 389 S.E.2d at 44, and thus overruled, this Court's earlier *Crist* decision dismissing as interlocutory the defendant's appeal of a trial court's order prohibiting *ex parte* contact with the plaintiff's non-party treating physicians, *see Crist v. Moffatt*, 92 N.C. App. 520, 523, 374 S.E.2d 487, 488 (1988). In the Court of Appeals opinion, we held the order appealed from did not "deprive[] defendant of any right, substantial or otherwise." *Id.* at 520, 374 S.E.2d at 488.

Contrary to Cape Fear's assertion, however, the Supreme Court did not overrule our determination that a substantial right was not affected, but rather acknowledged the appeal was interlocutory and nonetheless elected to review the case pursuant to its discretionary powers " 'to review upon appeal any decision of the courts below, upon any matter of law or legal inference,' " *Crist*, 326 N.C. at 330, 389 S.E.2d at 44 (citing N.C. Const., art. IV, § 12(1)); *see also Lea Company v. N.C. Bd. of Transportation*, 317 N.C. 254, 263, 345 S.E.2d 355, 360 (1986) (supervisory powers provided in art. IV, § 12(1) rarely utilized, but may be invoked "to promote the expeditious administration of justice"). Ultimately, moreover, the Supreme Court affirmed the trial court's order prohibiting *ex parte* contact with the plaintiff's non-party treating physicians. *Crist*, 326 N.C. at 337, 389 S.E.2d at 48.

In sum, because Cape Fear's appeal is interlocutory and Cape Fear has failed to show the Order affects a substantial right, plaintiffs' motion to dismiss the appeal must be allowed. *See Liggett Group*, 113 N.C. App. at 23-24, 437 S.E.2d at 677.

Appeal dismissed.

Judges LEWIS and EDMUNDS concur.

MICHELLE PARLET ALLSUP, PLAINTIFF v. McVILLE, INC., DEFENDANT

No. COA99-1030

(Filed 1 August 2000)

Premises Liability— contributory negligence—customer tripped over wooden structure

The trial court did not err by granting summary judgment in favor of defendant based on plaintiff's contributory negligence as a matter of law in a case where plaintiff tripped over a wooden structure and fell in a restaurant after ordering her food, because: (1) plaintiff conceded that she saw the platform long before she tripped over it; and (2) plaintiff was not distracted by any action by defendant.

Chief Judge EAGLES dissenting.

Appeal by plaintiff from judgment entered 6 May 1999 by Judge D. Jack Hooks, Jr., in Chatham County Superior Court. Heard in the Court of Appeals 15 May 2000.

Moody, Williams & Roper, by C. Todd Roper, for plaintiff-appellant.

Tuggle, Duggins & Meschan, P.A., by Leonard A. Colonna, for defendant-appellee.

EDMUNDS, Judge.

Plaintiff Michelle Parlet Allsup appeals from summary judgment entered in favor of defendant. We affirm.

On 28 December 1994, plaintiff escorted four Girl Scouts, ages eleven and twelve, to defendant's McDonald's restaurant in Kernersville. As plaintiff joined a line of patrons waiting to place a food order at the restaurant counter, she observed a low, unpainted, wooden structure positioned to her right and partially beneath the counter overhang. This structure was a platform or bridge that allowed young patrons to climb to a level where they could be seen and served by the cashier. Plaintiff asked each of the Scouts what she wanted, then instructed them to wait in the dining area while she placed the combined order. When her turn came, plaintiff ordered four soft drinks and two ice cream cones in cups. She then stepped to her right to wait while the order was filled.

The drinks and ice cream were delivered to plaintiff on a tray. Plaintiff picked up the tray, taking care not to spill the food. As she turned to walk to the dining area where the Scouts were waiting, she tripped over the wooden structure and fell, hitting her hip on the structure and her shoulder on the restaurant floor. Plaintiff suffered injuries as a result of the fall.

Plaintiff filed a complaint on 11 November 1997, alleging defendant's negligence in failing to keep the area in a reasonably safe condition. Defendant's answer denied any negligence and asserted that plaintiff's contributory negligence caused her injuries. Defendant moved for summary judgment on 21 April 1999. On 6 May 1999, the trial court granted the motion, dismissed the complaint with prejudice, and taxed costs against plaintiff.

Defendant is entitled to summary judgment if the record shows "that there is no genuine issue as to any material fact and that [defendant] is entitled to . . . judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). Defendant, as the moving party, bears the burden of establishing the absence of any triable issues of fact. *See Smith v. Cochran*, 124 N.C. App. 222, 476 S.E.2d 364 (1996). In ruling on a summary judgment motion, the trial court must construe all evidence in the light most favorable to the non-moving party. *See Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 488 S.E.2d 608 (1997), *aff'd per curiam*, 347 N.C. 666, 496 S.E.2d 379 (1998).

> While issues of negligence and contributory negligence are rarely appropriate for summary judgment, the trial court will grant summary judgment in such matters where the evidence is uncontroverted that a party failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of the injury.

Diorio v. Penny, 103 N.C. App. 407, 408, 405 S.E.2d 789, 790 (1991) (internal citations omitted), *aff'd*, 331 N.C. 726, 417 S.E.2d 457 (1992). The doctrine of contributory negligence will preclude a defendant's liability if the visitor actually knew of the unsafe condition or if a hazard should have been obvious to a reasonable person. *See Pulley v. Rex Hospital*, 326 N.C. 701, 705, 392 S.E.2d 380, 383 (1990).

We believe that this case is controlled by *Stansfield v. Mahowsky*, 46 N.C. App. 829, 266 S.E.2d 28 (1980). In *Stansfield*, the plaintiff arrived at the defendant's restaurant and noticed a sign on a tripod leaning against a door. During the next fifteen or twenty minutes, she saw that the sign had blown down onto the sidewalk. After

another ten minutes, the plaintiff left the restaurant, tripped over the sign, and was injured. She stated that she had forgotten about the sign and that she would have seen it if she had looked down. This Court held that the plaintiff was contributorily negligent as a matter of law. *See id.*

Similarly, in the case at bar, plaintiff conceded that she saw the platform long before she tripped over it, and in fact the record indicates that she stood near it as she waited to place her order, then beside it as she waited for that order to be filled. She was not distracted by the Scouts, whom she had directed to wait elsewhere in the restaurant, nor had the restaurant taken any action designed to attract plaintiff's attention away from the floor. *See Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E.2d 559 (1981). Therefore, although an argument may be made that defendant was negligent in placing the platform so that it was partially hidden by the counter overhang, plaintiff's contributory negligence would necessarily defeat any verdict in her favor. *See Stansfield*, 46 N.C. App. at 831, 266 S.E.2d at 29-30.

We note that there is some dispute in the record as to the exact size and shape of the platform over which plaintiff tripped and whether photographs of a structure contained in the record depict the actual platform in question. We do not believe that details of the platform are material; whatever its precise nature, the parties agree that it was a moderately-bulky wooden object. Our holding is based upon plaintiff's admission that she saw the structure before she tripped over it and the fact that she was not distracted by any action by defendant. Therefore, disputes over the structure itself do not raise an issue of fact pertinent to summary judgment.

Affirmed.

Judge LEWIS concurs.

Chief Judge EAGLES dissents.

Chief Judge EAGLES dissenting.

I respectfully dissent.

Summary judgment is only appropriate under exceptional circumstances in negligence cases because a jury ordinarily applies the reasonable person standard to the facts of each case. *See Williams v.*

Carolina Power & Light Co., 296 N.C. 400, 250 S.E.2d 255 (1978); *Rone v. Byrd Food Stores, Inc.*, 109 N.C. App. 666, 428 S.E.2d 284 (1993).

The majority finds plaintiff contributorily negligent as a matter of law because she saw the wooden obstacle ten minutes before falling over it, and defendant committed no act to distract her attention. Our Supreme Court has articulated the standard for contributory negligence:

> The basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for her own safety. The question is . . . whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.

Norwood v. Sherwin-Williams Co., 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981). Contributory negligence properly bars plaintiff's recovery when the evidence, viewed in the light most favorable to the plaintiff, "establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom." *Id.* at 469, 279 S.E.2d at 563; *see also Smith v. Wal-Mart Stores*, 128 N.C. App. 282, 288, 495 S.E.2d 149, 153 (1998).

Applying these principles, I respectfully disagree with the majority and believe that plaintiff's forecast of evidence would permit a jury to reasonably conclude that she was not negligent. Viewing the evidence in the light most favorable to the plaintiff, the hazard consisted of an unpainted wooden platform, without railings, low to the ground, and partially concealed by the counter where plaintiff stood. Plaintiff, accompanied by four children, initially noticed the bridge but ten minutes later fell over it when her attention had been diverted to pick up a tray loaded with drinks from defendant's cashier. In her answer to defendant's interrogatory, plaintiff stated she was "concentrating on not spilling [the] drinks" when she fell over the platform, and plaintiff's witness described her as "pretty much distracted the entire time" she waited in line. The witness also thought it was "possible" that plaintiff's tray blocked her view of the wooden bridge, which "was not obviously noticeable to patrons" standing where plaintiff stood. Because the trier of fact properly decides issues of contributory negligence when differing inferences may be drawn from the evidence, plaintiff here was not contributorily negligent as a matter of law.

Contrary to the majority's view, the fact that plaintiff once saw the wooden bridge does not automatically render her contributorily negligent as a matter of law. *See Walker v. Randolph County*, 251 N.C. 805, 808-09, 112 S.E.2d 551, 553-54 (1960) (citation omitted) ("Circumstances may exist under which forgetfulness or inattention to a known danger may be consistent with the exercise of ordinary care, as . . . where conditions arise suddenly which are calculated to divert one's attention momentarily from the danger"). In the *Norwood* case, the plaintiff tripped over an unpainted wooden platform raised four inches from the floor and protruding into an aisle of the defendant's store. The plaintiff saw the platform out of the corner of her eye, but she did not realize it protruded into the aisle, and her attention had been diverted by displays of merchandise on the platform, along the aisle, and behind the nearby cash register. *See Norwood*, 303 N.C. at 465-68, 279 S.E.2d at 561-63. Our Supreme Court held that the evidence there permitted a reasonable inference that a person exercising reasonable care could have struck the platform. *See id.* at 469, 279 S.E.2d at 563. As in *Norwood*, plaintiff here observed the structure ten minutes before she fell, but she did not realize it protruded significantly into her path.

Furthermore, the majority's conclusion that plaintiff "was not distracted by any action by defendant" is mistaken for two reasons. First, it improperly decides an issue of fact where plaintiff's forecast of evidence raised a reasonable inference that she was distracted. "If the plaintiff's attention was in fact diverted," (a reasonable inference here) "and if the same would have happened to an ordinarily prudent person, then . . . the plaintiff cannot be considered to have been contributorily negligent as a matter of law." *Price v. Jack Eckerd Corp.*, 100 N.C. App. 732, 737, 398 S.E.2d 49, 52 (1990) (holding that a plaintiff who tripped over a box very close to her when distracted by store displays and cashier's instructions was not contributorily negligent as a matter of law). Second, defendant may create distracting conditions without taking deliberate "action" to distract the plaintiff. In *Norwood*, the defendant took no deliberate action beyond the ordinary display of merchandise which commanded the attention of customers away from the floor. *See Norwood*, 303 N.C. at 468, 279 S.E.2d at 562-63. Here, the restaurant's procedures requiring patrons to order at a counter and, after waiting for preparation, to carry food on trays from the counter to the dining room also directed patrons' attention away from the floor and the hazard.

In relying on *Stansfield v. Mahowsky*, 46 N.C. App. 829, 266 S.E.2d 28 (1980), *disc. review denied*, 301 N.C. 96, — S.E.2d — (1980), the majority ignores two important distinctions. First, the plaintiff in *Stansfield* offered no evidence pointing to the defendant's negligence. *See id.* Here, plaintiff's forecast of evidence concerning the appearance and placement of the bridge permits a reasonable inference of negligence). Second, the evidence in *Stansfield* indicated that the plaintiff left the restaurant and made no mention of a distraction. *See id.* Here, plaintiff's forecast of evidence shows plaintiff's focus on the loaded tray and the four young Girl Scouts diverting her attention. Because plaintiff's forecast of evidence supports a reasonable inference that she exercised ordinary care under the circumstances, she was not contributorily negligent as a matter of law.

In the absence of contributory negligence, for plaintiff to survive defendant's motion for summary judgment she must forecast evidence of a *prima facie* case of negligence, showing that defendant owed plaintiff a duty of care, that defendant breached the duty, that the breach actually and proximately caused plaintiff's injury, and that damages resulted from the injury. *See Lamm v. Bissette Realty*, 327 N.C. 412, 395 S.E.2d 112 (1990). Whether defendant acted unreasonably in maintaining the low, wooden, railing-less bridge near the counter must be evaluated against the conduct of a reasonably prudent person under the circumstances. *See Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 516 S.E.2d 643 (1999), *cert. denied*, 351 N.C. 107, — S.E.2d — (1999) (citing *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 365 S.E.2d 898 (1988)).

Here, the appearance of the low, wooden, railing-less bridge presents a question of material fact requiring resolution by a jury. Defendant introduced photographs, used by the trial judge in ruling on summary judgment, showing a flat top with railings on both sides of the steps and platform. When shown the pictures during her deposition, however, plaintiff testified: "what I fell over is totally different than this." Taken in its most favorable light, plaintiff's forecast of evidence shows the structure as low and unpainted, with no railings, partially concealed beneath the counter. On these facts, a jury could reasonably find that the appearance and placement of the bridge violated defendant's duty of reasonable care in keeping the premises safe for lawful visitors. *See Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998); *Lorinovich*, 134 N.C. App. at 161, 516 S.E.2d at 646.

The majority, in reaching its conclusion, has decided the factual issue regarding the appearance of the bridge. That genuine issue of material fact precludes summary judgment.

Accordingly, I respectfully dissent.

BRADSHAW B. LUPTON, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, PLAINTIFF v. BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, A NON-PROFIT CORPORATION, DEFENDANT AND MICHAEL F. EASLEY, ATTORNEY GENERAL, ON BEHALF OF THE RIGHTS AND INTERESTS OF THE PUBLIC, DEFENDANT-INTERVENOR

ROLAND GIDUZ, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, PLAINTIFF v. BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, A NON-PROFIT CORPORATION, DEFENDANT AND MICHAEL F. EASLEY, ATTORNEY GENERAL, ON BEHALF OF THE RIGHTS AND INTERESTS OF THE PUBLIC, DEFENDANT-INTERVENOR

No. COA99-1138

(Filed 1 August 2000)

Insurance— reserves—filed rate doctrine

The trial court did not err by granting a Rule 12(b)(6) dismissal of plaintiffs' class actions alleging that defendant medical service corporation maintained excessive reserves on the ground that the filed rate doctrine precluded the actions. The filed rate doctrine holds that a plaintiff may not claim damages on the ground that a rate approved by a regulator as reasonable is excessive and that rates set by a regulator may not be collaterally attacked; although plaintiffs contended that they were seeking a declaration that defendant's reserve is excessive rather than a redetermination of their rates, the Commissioner of Insurance considers the reserve amount in approving rates and any allegation that defendant accumulated an excessive reserve requires the recalculation of approved rates.

Appeal by plaintiffs from order entered 14 June 1999 by Judge Ben F. Tennille in Durham County Superior Court. Heard in the Court of Appeals 8 June 2000.

Marvin Schiller and David G. Schiller for plaintiffs-appellants.

Maupin Taylor & Ellis, P.A., by M. Keith Kapp and Kevin W. Benedict; and Robinson, Bradshaw & Hinson, P.A., by Robin L. Hinson and Frank E. Emory, Jr., for defendant-appellee Blue Cross and Blue Shield of North Carolina.

WALKER, Judge.

On 30 June 1997, plaintiff Roland Giduz filed a class action against defendant Blue Cross and Blue Shield of North Carolina (Blue Cross) alleging, inter alia, violations of N.C. Gen. Stat. § 58-65-95. On 8 May 1998, plaintiff Bradshaw B. Lupton filed a class action against Blue Cross and filed an amended complaint on 28 October 1998, making allegations identical to those of Giduz. Pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, the Chief Justice of our Supreme Court designated both actions as exceptional and assigned them to the Special Superior Court for Complex Business Cases. The trial court consolidated the two actions and substituted Lupton as the named plaintiff.

Blue Cross is a non-profit medical service corporation governed by Articles 65 and 66 of Chapter 58 of the North Carolina General Statutes. Chapter 58 requires that health insurers and medical service corporations maintain monetary "reserves" such that the solvency of the insurer will not likely be threatened if claims or other expenses are higher than forecast in any given year. Under N.C. Gen. Stat. § 58-65-95, Blue Cross is required to maintain a minimum monetary "reserve" to provide for contingent expenditures. Specifically:

> Every such corporation [subject to this Article] shall accumulate and maintain, . . ., a special contingent surplus or reserve at the following rates annually of its gross annual collections from membership dues, exclusive of receipts from cost plus plans, until the reserve equals an amount that is three times its average monthly expenditures for claims and administrative and selling expenses:
>
> (1) First $200,000 . . . . . .4%
>
> (2) Next $200,000 . . . . . .2%
>
> (3) All above $400,000 . . . . . .1%

N.C. Gen. Stat. § 58-65-95(b) (1999). Additionally, the reserve may not "exceed an amount equal to six times the average monthly expendi-

tures for claims and administrative and selling expenses." N.C. Gen. Stat. § 58-65-95(c) (1999).

Under our State's statutory rate making scheme, the Commissioner of Insurance (Commissioner) determines whether the rates filed by an insurer are reasonable. N.C. Gen. Stat. § 58-65-40 provides in part:

> No corporation subject to the provisions of this Article and Article 66 of this Chapter shall enter into any contract with a subscriber after the enactment hereof unless and until it shall have filed with the Commissioner of Insurance a full schedule of rates to be paid by the subscribers to such contracts and shall have obtained the Commissioner's approval thereof. The Commissioner may refuse approval if he finds that such rates are excessive, inadequate or unfairly discriminatory; or do not exhibit a reasonable relationship to the benefits provided by such contracts. At all times such rates and form of subscribers' contracts shall be subject to modification and approval of the Commissioner of Insurance under rules and regulations adopted by the Commissioner, in conformity to this Article and Article 66 of this Chapter.

N.C. Gen. Stat. § 58-65-40 (1999). Under N.C. Gen. Stat. § 58-2-75(a) (1999), judicial review of the Commissioner's rate determination may be obtained by petition within 30 days of the Commissioner's decision. If no petition is filed, "the parties aggrieved shall be deemed to have waived the right to have the merits of the order or decision reviewed and there shall be no trial of the merits thereof by any court to enforce or restrain enforcement of the same." *Id.*

Plaintiffs' amended complaint alleged that Blue Cross violated N.C. Gen. Stat. § 58-65-95 by accumulating and maintaining a reserve that exceeds "the statutorily authorized level of reserves legislatively determined to be sufficient and reasonably necessary" for the payment of Blue Cross's claims and expenses. Further, plaintiffs claimed Blue Cross misrepresented to the Commissioner that its reserves were within the statutory limits. Plaintiffs argue they have "property and contractual rights" in the statutorily excessive reserves and seek to have it placed into a common fund and distributed to them.[1]

1. Plaintiffs cite N.C. Gen. Stat. § 58-65-160 in support of their contention that they have contractual rights in the reserves. Section 58-65-160 protects the rights of Chapter 58 corporations to merge or consolidate, provided that "the rights of the subscribers . . . in the reserves" must be "adequately pro-

Plaintiffs sought a declaratory judgment and stated four causes of action: (1) unfair and deceptive trade practices; (2) breach of fiduciary duties; (3) unjust enrichment; and (4) conversion and fraud.

On 13 July 1998, Blue Cross moved to dismiss plaintiffs' claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 10 June 1999, the trial court entered an order, which was amended on 14 June 1999, granting Blue Cross's motion to dismiss for failure to state a claim upon which relief may be granted, on the grounds that the "filed rate doctrine" precludes plaintiffs' actions as a matter of law.

Plaintiffs argue the trial court erred in granting Blue Cross's motion to dismiss. Specifically, dismissing their claims based upon the "filed rate doctrine" was error.

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *See* N.C.R. Civ. P. 12(b)(6) (1999); *Shaut v. Cannon*, 136 N.C. App. 834, 834-35, 526 S.E.2d 214, 215 (2000). A dismissal of a complaint for failure to state a claim upon which relief can be granted is proper when the complaint on its face reveals that no law supports a plaintiff's claim or that facts sufficient to make a good claim are absent or when some fact disclosed in the complaint necessarily defeats a plaintiff's claim. *See Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743 (1986). A motion to dismiss is properly granted where a valid legal defense stands as an insurmountable bar to a plaintiff's recovery. *See Johnson v. N.C. Dept. of Transportation*, 107 N.C. App. 63, 67, 418 S.E.2d 700, 702 (1992). For the purpose of the Rule 12(b)(6) motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of facts are not admitted. *See Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979) (*quoting Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)).

Our Supreme Court has recently adopted the "filed rate doctrine," where it held that a "plaintiff may not claim damages on the ground that a rate approved by a regulator as reasonable is nonetheless excessive because it is the product of unlawful conduct." *N.C. Steel, Inc. v. National Council on Compensation Ins.*, 347 N.C. 627, 632, 496 S.E.2d 369, 372 (1998). Further, after rates have been set by a regulator, those rates may not be collaterally attacked. *Id.* The proper venue for questions involving rates is through the Insurance Commissioner and not a court or a jury. *Id.* The filed rate doctrine

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tected" by rules and regulations adopted by the Commissioner. The section was repealed by Session Laws 1998-3, s. 3, effective 22 May 1998.

precludes a plaintiff from requesting a recalculation of the rates the Commissioner would have set absent the alleged illegal conduct of a defendant. *See N.C. Steel, Inc. v. National Council on Compensation Ins.*, 123 N.C. App. 163, 176, 472 S.E.2d 578, 585 (1996), *affirmed in part and reversed on separate grounds*, 347 N.C. 627, 496 S.E.2d 369 (1998). The "General Assembly has given the Insurance Commissioner the duty of setting rates. The Commissioner, aided by his staff, has the expertise to determine proper rates." *N.C. Steel*, 347 N.C. at 632, 496 S.E.2d at 372. The filed rate doctrine applies in the context of a suit under N.C. Gen. Stat. § 75-1 et seq. *See N.C. Steel*, 123 N.C. App. at 175, 472 S.E.2d at 585.

In *N.C. Steel*, the plaintiffs, companies paying workers' compensation insurance premiums, alleged that the defendant insurance companies withheld certain evidence from the Insurance Commissioner about servicing carrier fees for residual market workers' compensation insurance in order to secure approval of excessive rates. *See N.C. Steel*, 347 N.C. at 630, 496 S.E.2d at 371. The plaintiffs first argued that since defendants had wrongfully obtained the excessive rate, they were entitled to a refund of the excess premiums paid. *Id.* at 631, 496 S.E.2d at 372. Plaintiffs' second theory alleged that defendants conspired to pay excessive servicing carrier fees, which prevented the premiums from covering losses in the residual market. *Id.* at 636, 496 S.E.2d at 374. Plaintiffs argued this created a shortfall which required the defendants to use part of the premiums from the voluntary market to cover the loss. *Id.* Plaintiffs claimed that a recalculation of the rates in order to prove damages was not necessary. *Id.*

Our Supreme Court disagreed and held:

> We believe that the plaintiffs cannot prove their claim without the rates set by the Commissioner being questioned. The plaintiffs' damages must come from being shifted from the voluntary market to the residual market. If the plaintiffs offer evidence that a certain number of policyholders who were in the residual market should have been in the voluntary market, the defendants could show that the influx of these policyholders would have caused the Commissioner to set different rates for the two markets. This is a questioning of rates set by the Commissioner, which the filed rate doctrine is designed to prevent.

Id. at 636, 496 S.E.2d at 374-75.

In the case at bar, plaintiffs contend that they are not seeking a redetermination of their insurance rates but rather a declaration that

Blue Cross's reserve is statutorily excessive.[2] Plaintiffs argue that "the manner and method in which [Blue Cross] accumulated the reserves is irrelevant to the issue of whether the filed rate doctrine is applicable." We disagree.

In approving the rates, the Commissioner considers Blue Cross's reserve amount. Thereafter, Blue Cross's collection of premiums, based on these rates, determines the accumulation of the § 58-65-95 reserve. Thus, if Blue Cross accumulates a reserve in excess of the statutory limits, the Commissioner is authorized under N.C. Gen. Stat. § 58-65-40 to modify the rates, thereby affecting the amount of the reserve. Any allegation that Blue Cross accumulated an excessive reserve requires the recalculation of approved rates, notwithstanding plaintiffs' argument to the contrary. Accordingly, "the plaintiffs cannot prove their claim without the rates set by the Commissioner being questioned." *N.C. Steel*, 347 N.C. at 636, 496 S.E.2d at 374. Thus, the trial court properly dismissed plaintiffs' actions pursuant to Rule 12(b)(6).

Affirmed.

Judges JOHN and TIMMONS-GOODSON concur.

IN THE MATTER OF: KAYLA ANN McLEMORE AND TAYLOR LYNN McLEMORE

No. COA99-619

(Filed 1 August 2000)

Termination of Parental Rights— abandoment—alcoholism and imprisonment—no efforts to contact or support child

A termination of parental rights action was remanded where the trial court concluded that petitioner had demonstrated neither of the statutory grounds warranting termination and did not reach the best interests of the child under the two step process provided by Chapt. 7A at the time, but the court's conclusion that respondent did not willfully abandon his child was erroneous in

2. Plaintiffs' original complaint alleged that Blue Cross charged and collected excessive rates and misrepresented the amount of its statutory reserves to the Commissioner in order to secure the approval of higher rates. Plaintiffs' amended complaint removed all references to these allegations.

that the court's findings indicated that respondent provided no financial or emotional support and made no contact with his child during the relevant six months. Although the record is replete with evidence that respondent suffered from alcoholism, was incarcerated for some time, and had trouble maintaining steady employment, the court's findings do not provide an explanation inconsistent with willfulness within the meaning of *Bost v. Van Nortwick*, 117 N.C. App. 1. As in *In re Harris*, 87 N.C. App. 179, one ineffectual attempt at contact during the relevant six-month period would not preclude otherwise clear willful abandonment.

Appeal by petitioner from order entered 23 November 1998 by Judge H. William Constangy in Mecklenburg County District Court. Heard in the Court of Appeals 13 March 2000.

Law Office of Elizabeth T. Hodges, by Elizabeth T. Hodges and K. Mitchell Kelling, for petitioner-appellant.

Charles W. Porter, III, for respondent-appellee.

LEWIS, Judge.

Petitioner Jeni Carder and respondent Samuel Lee Benton were married in June 1991 and separated on 21 September 1992. Twins were born of this marriage, Kayla Ann McLemore and Taylor Lynn McLemore, on 6 May 1993. The parties were divorced in 1994, and petitioner was thereafter granted permanent custody of the minor children. At the time of this action, respondent had not seen the children since June 1993. In March 1994, respondent was ordered to pay child support in the amount of $131.80 per week for Taylor Lynn McLemore; petitioner has received no payments. At the time of this action, the last time respondent had provided financial assistance for his children was in June 1993, when he gave petitioner $200. Before that, respondent had contributed approximately $150 for the support of his children.

On 20 August 1997, petitioner filed a petition to terminate the parental rights of respondent with regard to Taylor Lynn McLemore. Only that petition is presently before us on appeal; thus, we only address respondent's parental rights in regard to Taylor and not Kayla. Among petitioner's allegations relevant to this appeal are that respondent failed without justification to pay any child support and that respondent willfully abandoned the child for at least six months preceding the filing of the petition to terminate parental rights.

At the time the petition in this case was filed, Chapter 7A of the North Carolina General Statutes governed termination of parental rights, providing for a two-stage termination proceeding. First, at the adjudication stage, the petitioner must demonstrate by clear, cogent and convincing evidence that one or more of the grounds warranting termination, as set forth in G.S. 7A-289.32, exist. N.C. Gen. Stat. § 7A-289.30(e). Upon a finding that grounds for terminating parental rights are present, the court moves to the disposition stage, determining whether the termination of parental rights is in the best interest of the child. N.C. Gen. Stat. § 7A-289.31(a). The standard for review in termination of parental rights cases is whether the court's findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. *In re Ballard*, 63 N.C. App. 580, 585, 306 S.E.2d 150, 153 (1983), *modified on other grounds*, 311 N.C. 708, 319 S.E.2d 227 (1984).

G.S. 7A-289.32 provides in relevant part:

> The court may terminate the parental rights upon a finding of one or more of the following:
>
> . . .
>
> (5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support and education of the child, as required by said decree or custody agreement.
>
> . . .
>
> (8) The parent has *willfully* abandoned the child for at least six consecutive months immediately preceding the filing of the petition. . . .

(Emphasis added.) The court in this case concluded that petitioner demonstrated neither of these statutory grounds warranting termination, and thus, did not reach the question of the best interests of the child and denied the petitioner's motion. Based upon our examination of the order, we reverse the trial court's order with regard to Taylor.

Because we hold the trial court's findings support the court's conclusion that respondent willfully abandoned his child, we need only

address that statutory ground. The trial court here concluded respondent's absence from his child's life was not willful under G.S. 7A-289.32(8) "because of the substance abuse and alcohol issues of the father within the meaning of *Bost v. Van Nortwick* and the incarceration of the father within the meaning of *In re Harris* and *In re Maynor*" (citations omitted).

"Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997). "It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and [willfully] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). The word "willful" encompasses more than a mere intention, but also purpose and deliberation. *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986).

In our opinion, the trial court here interpreted *Bost*, *Harris* and *Maynor* as allowing the fact of a respondent's alcohol abuse and incarceration, standing alone, to negate a finding of willfulness under the statute. We do not agree. In *Bost*, we held the trial court erred in concluding the respondent willfully abandoned his children for a period of at least six consecutive months preceding the filing of the petition pursuant to G.S. 7A-289.32(8). *Bost v. Van Nortwick*, 117 N.C. App. 1, 18, 449 S.E.2d 911, 920-21 (1994).

As to the statutory factor of willful abandonment, *Bost* requires the court to consider, during the relevant six month period, the financial support respondent has provided to the child, as well as the respondent's emotional contributions to the child. In addressing respondent's financial contributions, the *Bost* court noted, " '[A] mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment. Explanations could be made which would be inconsistent with a [willful] intent to abandon.' " *Id.* at 18, 449 S.E.2d at 921 (quoting *Pratt v. Bishop*, 257 N.C. 486, 501-02, 126 S.E.2d 597, 608 (1962)). In addressing the second consideration of emotional support, the court must consider a respondent's display of "love, care and affection" for his children. *Id.*

When considering the respondent's financial support as part of its abandonment analysis, the *Bost* court indicated that respondent's

severe alcoholism and financial inattentiveness due to his lack of gainful employment negated a finding of willful abandonment. It was relevant that the respondent in *Bost* lost his driver's license due to his alcohol related offenses in 1985 and was imprisoned in 1988 for driving while his license was revoked. *Id.* at 19, 449 S.E.2d at 920. However, necessary to the court's analysis was the fact that respondent made significant financial contributions to his children; during the six months under consideration, he paid $8500 in back child support. *Id.* at 17, 449 S.E.2d at 920. When considering the respondent's emotional contributions as part of the abandonment analysis, the *Bost* court found that respondent visited the children at least four times in the preceding six months and had expressed to the petitioner his desire to pay his back child support and set up regular visitation. *Id.* at 19, 449 S.E.2d at 921. All of this evidence, when viewed in light of respondent's severe alcoholism, allowed the court to conclude the respondent had not willfully abandoned his children.

We do not agree that the circumstances surrounding respondent's alcohol problems in this case negate a finding of willful abandonment. Although the record here is also replete with evidence that respondent suffered from alcoholism, was incarcerated for some time, and had trouble maintaining steady employment, the court's findings here indicate that respondent provided no financial or emotional support during the relevant six months, as did the respondent in *Bost*. The findings indicate that during these six months, respondent made no contacts with his child, financial or otherwise. Indeed, he had made neither financial nor emotional contributions to the child since 1993—four years before the filing of this petition. At best, the court's findings indicate that during the relevant six months, respondent made but one feeble *attempt* at providing financial support. While in prison, he listed the child's name as his dependent on a work release application such that child support payments could be deducted from his pay. However, he listed the wrong last name for his child and "Mecklenburg County" as the child's address. Further, when no deductions were made by the Department of Corrections, respondent failed to make any inquiry.

Even considering the time period outside the relevant six month period, the court's findings reflect that by 1997, when the petition in this case was filed, respondent had made but two inquiries regarding the whereabouts of his child in 1993 and 1994. Although that finding is uncontested on appeal, we note that in 1993 and 1994, the child's residence had not changed since birth, where respondent had previ-

ously visited them. Nonetheless, without any indication of efforts by respondent to fulfill his parental duties, financially or emotionally, notwithstanding his problems with alcohol, the court's findings in this case simply do not provide an explanation inconsistent with willfulness within the meaning of *Bost.* Thus, the trial court improperly concluded respondent did not willfully abandon his child.

In addition, the trial court in this case cited *In re Harris*, 87 N.C. App. 179, 360 S.E.2d 485 (1987), and *In re Maynor*, 38 N.C. App. 724, 248 S.E.2d 875 (1978), to establish that respondent's incarceration negated a finding of willfulness on the issue of abandonment. We disagree. In *Maynor*, we addressed whether a respondent's *commission of a crime* against nature against his daughter was consistent with a willful intent to abandon, and not whether the fact of respondent's *incarceration* was consistent with a willful intent to abandon. *Id.* at 727, 248 S.E.2d at 877. In *Harris*, although we noted that a respondent's incarceration, standing alone, neither precludes nor requires a finding of willfulness, we held one attempted contact during the relevant statutory period compelled a finding of willful abandonment, despite respondent's incarceration during the relevant time period under consideration. *In re Harris*, 87 N.C. App. at 184, 360 S.E.2d at 488. We also conclude that one ineffectual attempt at contact during the relevant six month period in this case would not preclude otherwise clear willful abandonment, despite the fact of respondent's incarceration during that time.

The trial court's conclusion that respondent did not willfully abandon his child is error. Accordingly, we reverse the trial court's conclusion that respondent did not willfully abandon his child and remand for consideration as to the best interests of the child commensurate with this opinion.

Reversed.

Judges JOHN and EDMUNDS concur.

STATE OF NORTH CAROLINA v. CHARLES REDDING SURCEY, DEFENDANT

No. COA99-937

(Filed 1 August 2000)

1. **Burglary and Unlawful Breaking or Entering— first-degree burglary and discharging a firearm into an occupied dwelling—occupancy of dwelling not alleged—second-degree burglary**

A defendant was not properly indicted for first-degree burglary where the State failed to allege that the dwelling house was occupied at the time of the breaking and entering, although the caption of the indictment referred to the offenses of "First Degree Burglary" and "Discharge [of a] Firearm Into [an] Occupied Building." The indictment alleged only second-degree burglary and the first-degree burglary conviction was reversed in part upon these grounds.

2. **Burglary and Unlawful Breaking or Entering; Firearms and Other Weapons— weapon fired with barrel inside house— burglary and discharging a weapon into an occupied dwelling—mutually exclusive**

A first-degree burglary conviction was reversed where defendant pushed a shotgun barrel through a window in the victim's house before firing. Defendant was convicted and sentenced for first-degree burglary and discharging a firearm into an occupied dwelling, but was not properly indicted for first-degree burglary, and the two offenses were mutually exclusive in that defendant must enter the dwelling for burglary (for which the gun may be an implement of the person), but is required to shoot into the dwelling while remaining outside (even if the gun is inside) for discharging the firearm into an occupied dwelling.

Appeal by defendant from judgment entered 17 February 1999 by Judge Donald W. Stephens in Johnston County Superior Court. Heard in the Court of Appeals 18 May 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Marilyn R. Mudge, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Bobbi Jo Markert, for defendant-appellant.

SMITH, Judge.

Defendant appeals a judgment entered on conviction by a jury of first-degree burglary and discharging a firearm into an occupied dwelling. Defendant contends this Court must vacate or reverse one of the convictions because they are mutually exclusive offenses. We agree.

The State's evidence at trial tended to show the following: On 13 September 1998 at approximately 10:00 p.m., Lloyd Pete McLamb (McLamb), while sitting in his living room, heard a loud sound, "like thunder[,] come into [his] window." McLamb testified a gun barrel had "punched out" his window and was sticking "about 12 to 14 inches" into the house, at a distance of "about two and a half or three foot [sic]" from him. McLamb jumped from his couch, retrieved a pistol, and hid himself behind a bedroom door facing the living room. McLamb testified he saw a man he recognized as defendant, "squatted down with the gun still in [his] window," and that when he stuck his head out from behind the door, defendant fired a shot that "sprayed the side of [McLamb's] face." McLamb further testified that he fired two shots and the second hit defendant. Defendant ran and McLamb proceeded to the front porch where he observed defendant run to a trailer located approximately 100 to 160 feet behind McLamb's residence. McLamb called 911.

Johnston County Deputies Sean Stewart (Deputy Stewart) and Frank Godwin (Deputy Godwin), arrived to McLamb's residence at approximately 10:30 p.m. Deputy Stewart testified that upon approaching the residence they noticed "a shotgun shell . . . lying on the porch" below a broken window, and a "trail" of blood, which they followed "down the porch . . . into the back yard . . . [and] to a mobile home" behind McLamb's residence. The front door to the trailer was open and the deputies observed defendant sitting upright in a chair bleeding from the side of his face. Defendant told the deputies that McLamb had shot him. The deputies returned to McLamb's house and questioned him about defendant's injury.

The deputies recovered the .22 caliber pistol McLamb used to shoot defendant, but were unable to locate the shotgun used by defendant. McLamb testified he found a shotgun six days after the shooting on a footpath between his house and defendant's trailer, and that he immediately called the police. Deputy Rodney Lee Starling (Deputy Starling) testified he was dispatched to McLamb's residence on 19 September 1998 and retrieved a shotgun from some brush on

the edge of the woods approximately 100 feet behind McLamb's residence. McLamb testified the shotgun was the same firearm defendant had fired into his house on 13 September 1998.

Defendant was indicted 26 October 1998 for burglary and discharging a firearm into an occupied dwelling. On 17 February 1999 a jury found defendant guilty, and the trial court, consolidating the convictions, sentenced defendant to a minimum of 82 months and a maximum of 108 months imprisonment.

[1] Defendant contends the first-degree burglary conviction must be reversed because the indictment failed to allege "occupancy of the dwelling house," an essential element of first-degree burglary.

A valid indictment charges all essential elements of an alleged criminal offense to inform a defendant of the accusation against him and enables him to be tried accordingly. *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969).

Our Supreme Court has held that

> the constituent elements 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) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein.

State v. Person, 298 N.C. 765, 768, 259 S.E.2d 867, 868 (1979). *See* N.C.G.S. § 14-51 (1999). The "sole distinction" between first-degree and second-degree burglary is the essential element of actual occupancy. *State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979). *See State v. Wilson*, 289 N.C. 531, 538, 223 S.E.2d 311, 315 (1976) ("[i]f the burglarized dwelling is occupied it is burglary in the first degree; if unoccupied, it is burglary in the second degree"). Accordingly, an indictment for burglary which fails to allege that the dwelling house was occupied by someone during commission of the crime, alleges only burglary in the second-degree. *State v. Fleming*, 107 N.C. 905, 908, 12 S.E. 131, 132 (1890).

In the instant case, the caption of the indictment refers to the offenses of "First Degree Burglary" and "Discharge [of a] Firearm Into [an] Occupied Dwelling," however, the indictment on the burglary offense, reads as follows:

> I. The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above

> the defendant named above unlawfully, willfully and feloniously did during the nighttime hours of 10:00 p.m. and 11:00 p.m. on September 13, 1998, break and enter the dwelling house of Lloyd McLamb located at 1691 Holly Grove Church Road, Benson, North Carolina. The defendant broke and entered with the intent to commit a felony therein.

The State's failure to allege that the dwelling house was occupied at the time of the breaking and entering results in the indictment only alleging second-degree burglary. As a result of this omission, and for the reasons hereinafter stated, we reverse the conviction for first-degree burglary.

[2] Defendant also contends this Court "must vacate either the burglary or the discharging a firearm into occupied property conviction because . . . the two verdicts are mutually exclusive." Defendant argues the burglary offense requires that defendant "ent[er]" into the house, whereas the charge of discharging a firearm requires that a defendant fire "into" occupied property while remaining outside such property, requiring "defendant's body to be in two different places at the same time." Though we agree with defendant's contention, it is not necessary for us to take such action in light of our reversal of the burglary conviction.

"Burglary is defined as the breaking and *entering* of a dwelling . . . during the nighttime with intent to commit a felony therein," and occupancy determines whether the offense is first-degree or second-degree. *State v. Simmons*, 65 N.C. App. 164, 166, 308 S.E.2d 502, 503 (1983) (emphasis added). *See* G.S. § 14-51. Our Supreme Court in *State v. Gibbs*, 297 N.C. 410, 418, 255 S.E.2d 168, 174 (1979), adopted the following in regards to the element of "entry" for burglary:

> Literally, entry is the act of going into the place after a breach has been effected, but the word has a broad significance in the law of burglary, for it is not confined to the intrusion of the whole body, but may consist of the insertion of any part for the purpose of committing a felony. Thus, an entry is accomplished by inserting into the place broken the hand, the foot, or any instrument with which it is intended to commit a felony.

Id. (citing 13 Am. Jur. 2d *Burglary* § 10). Therefore in the case *sub judice*, defendant, in pushing the shotgun through McLamb's window and firing, effectively committed a burglary by virtue of the gun,

which is considered to be an implement of his person, for "entry" into McLamb's home. *See id.*

Regarding the conviction for discharging a firearm into an occupied dwelling, the State was required to prove defendant "willfully or wantonly discharge[d] or attempt[ed] to discharge . . . [a] firearm *into* any building. . . ." N.C.G.S. § 14-34.1(2) (1999) (emphasis added). In *State v. Mancuso*, 321 N.C. 464, 364 S.E.2d 359 (1988), the defendant was charged with discharging a firearm into an occupied motor vehicle, a violation of the same statute as defendant in the instant case is alleged to have violated. In *Mancuso*, the defendant contended he could not be convicted of discharging firearm "into" the occupied vehicle because he was standing outside the automobile and holding a gun inside the automobile when he shot the victim. *Id.* at 468, 364 S.E.2d at 362. The *Mancuso* court rejected this argument and held that "a firearm can be discharged 'into' occupied property even if the firearm itself is inside the property, so long as the person discharging it is not inside the property," reasoning that it did not believe the Legislature intended "a person should escape liability for this crime by sticking his weapon inside the occupied property before shooting." *Id.* The evidence in the case at bar is uncontradicted that at the time defendant fired the shot at McLamb, he was standing on McLamb's porch outside the residence and was holding the shotgun inside McLamb's living room window. Accordingly, defendant's position outside the house while holding the shotgun inside the house was sufficient evidence to support a charge of discharging a firearm into an occupied dwelling, because the shot was fired "into" McLamb's home while defendant remained outside the residence.

However, while defendant may properly be convicted of either offense, he may not be convicted of both because they are mutually exclusive offenses requiring that defendant "enter," or be *inside* the residence for burglary, and that he shoot "into" the dwelling while remaining *outside* McLamb's home for the offense of discharging a firearm "into" an occupied dwelling. "Where several offenses charged allegedly arise from the same transaction, and the offenses are mutually exclusive, a defendant may not be convicted of more than one of the mutually exclusive offenses." *State v. Hall*, 104 N.C. App. 375, 386, 410 S.E.2d 76, 82 (1991) (offenses mutually exclusive because determination that defendants entered into one agreement to commit a series of unlawful acts over a period of time is inconsistent with a determination that multiple agreements to commit same series of acts over same period of time were made; "either one agreement was

made or two agreements were made. . . . Both views cannot exist at the same time"), *aff'd*, 342 N.C. 892, 467 S.E.2d 243, *cert. denied*, 519 U.S. 873, 136 L. Ed. 2d 129 (1996). *See State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 167 (1990) (embezzlement and false pretenses are mutually exclusive offenses; defendant can be indicted and tried on both but cannot be convicted of both where they are based upon a single transaction), and *State v. Jewell*, 104 N.C. App. 350, 354, 409 S.E.2d 757, 760 (1991) (aiding and abetting and accessory after the fact are mutually exclusive offenses, thus defendant cannot be convicted of both), *aff'd*, 331 N.C. 379, 416 S.E.2d 3 (1992).

Therefore, we reverse the first-degree burglary conviction, an offense for which defendant was never indicted, and find no error in the conviction of discharging of a firearm into an occupied dwelling.

No error in part and reversed in part.

Judges WALKER and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. HERBERT EUGENE PULLIAM

No. COA99-1315

(Filed 1 August 2000)

Search and Seizure— traffic stop—consent to search car—pat-down of person—search incident to arrest

The trial court did not err by denying defendant's motion to suppress cocaine where the car in which he was a passenger was stopped at a traffic check point; the car was driven by a man known to officers to be a convicted drug trafficker, who claimed that he did not know defendant's name and who consented to a search of the car; defendant became belligerent when asked to leave the vehicle; he appeared intoxicated when he finally left the vehicle; an officer saw a bulge in defendant's pocket about an inch wide and six inches long and conducted a pat-down search, discovering a utility razor knife; defendant was arrested for carrying a concealed weapon; and a search of defendant's person incident to the arrest produced a plastic baggie containing marijuana and cocaine.

Appeal by defendant from judgment entered 24 May 1999 by Judge William Z. Wood in Davie County Superior Court. Heard in the Court of Appeals 24 July 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas D. Zweigart, for the State.

Robert H. Raisbeck, Jr. for defendant appellant.

HUNTER, Judge.

After noting a timely appeal to the denial of his motion to suppress, defendant pled guilty to possession of cocaine with intent to manufacture, sell or deliver and to being an habitual felon. By judgment entered 24 May 1999, Judge William Z. Wood sentenced defendant in the mitigated range to eighty to 105 months imprisonment. We now address defendant's appeal from the denial of his suppression motion.

The State's witnesses at the suppression hearing were Detective Sergeant Christopher Paul Shuskey ("Shuskey") and Detective Anthony Ross Leftwich ("Leftwich") of the Davie County Sheriff's Office. On the evening of 23 October 1998, the detectives were assigned to a traffic check point at the intersection of Daniel and Gladstone Roads in southern Davie County. Shuskey testified that all vehicles passing through the intersection were stopped and checked for traffic violations. In addition, officers randomly asked drivers for consent to search their vehicles.

Defendant arrived at the check point as a passenger in a car driven by a man known by Shuskey and Leftwich to be a convicted drug trafficker. Shuskey asked the driver for his license and registration, which he produced. When asked who his passenger was, the driver claimed he did not know defendant's name. The driver consented to a search of his vehicle and pulled his car onto the shoulder of Daniels Road.

Before conducting the search, Shuskey asked Leftwich to "get [defendant] out of the vehicle." "[F]or my safety, I wanted to get him outside[,] and for his safety also[,]" Shuskey explained. When Leftwich asked him to leave the vehicle, defendant grew "belligerent," saying the detective had no right to make him get out. Defendant smelled of alcohol, was "very loud" and "[a]rgumentative" and used profanity. When defendant finally exited the vehicle, he was "unsteady on his feet" and appeared to be intoxicated. Leftwich saw

a "large bulge[,]" one inch wide and six or seven inches long, in defendant's front pants pocket. Leftwich conducted a pat down search of defendant for weapons and discovered a utility razor knife in defendant's pants pocket. Leftwich arrested defendant for carrying a concealed weapon. A search of defendant's person incident to the arrest produced a plastic baggie of marijuana and nine rocks of crack cocaine.

In denying the motion to suppress, the trial court made findings of fact consistent with the detectives' account of events. The court found the driver was known to the detectives as a convicted drug trafficker, did not know the name of his passenger, and consented to a search of his vehicle. The court further found defendant was asked to exit the vehicle pursuant to the consent search and was patted down for the officers' safety, as follows:

> Officer Leftwich then asked the defendant to get out of the vehicle . . . . The defendant, who exhibited an odor of alcohol, became hostile and belligerent with the officer. Upon the defendant exiting, the officer noticed a bulge in the front pocket of the defendant. The shape and dimensions of the bulge appeared to the officer as a possible weapon. . . .

The court concluded (1) the check point stop was lawful; (2) the driver granted valid consent to a search of his vehicle; (3) defendant was lawfully asked to exit the vehicle to effect the search; (4) Leftwich saw a bulge in defendant's pants pocket resembling a weapon, which justified a pat down "to protect the officer's safety[;]" (5) the knife was discovered during a lawful pat down; and (6) the marijuana and crack cocaine were found during a lawful search incident to defendant's arrest.

On appeal, defendant argues the warrantless search of his person was unconstitutional. He notes the detectives lacked any basis for a reasonable suspicion that he or the driver was engaged in criminal activity. He asserts the description of the lump in his pocket was too indeterminate to justify a belief he was carrying a weapon rather than any one of several innocent objects. Finally, defendant challenges the court's finding that the driver consented to the search of his vehicle, believing the "record is devoid of any evidence" of consent. Absent such consent, defendant claims the officers lacked probable cause to search him.

In reviewing a trial judge's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported

by competent evidence, and whether these findings of fact support the court's conclusions of law. *See State v. Rhyne*, 124 N.C. App. 84, 88-89, 478 S.E.2d 789, 791 (1996).

The sole factual challenge raised by defendant is whether the evidence supports the finding that the driver consented to a search of his vehicle. Contrary to defendant's claim, however, the record contains Shuskey's uncontradicted testimony affirming the driver's consent:

> [SHUSKEY:] . . . At that time I asked [the driver] for consent to search his vehicle.
>
> [COUNSEL:] Did [the driver] consent to the request?
>
> [SHUSKEY:] Yes, he did.

Shuskey confirmed the driver was free to "go on down the road" had he refused to allow the search.

Under both the North Carolina and United States Constitutions, "an officer may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, when the officer is justified in believing that the individual is armed and presently dangerous." *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993). In determining the reasonableness of a pat down search, the North Carolina Supreme Court has adopted the standard of *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968), "*i.e.*, 'whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' " *Sanders*, 112 N.C. App. at 481, 435 S.E.2d at 844-45 (quoting *State v. Peck*, 305 N.C. 734, 742, 291 S.E.2d 637, 642 (1982)).

Defendant does not challenge the constitutionality of the initial stop of the vehicle. Generally, an investigative stop and detention leading to a pat down search must be based on an officer's reasonable suspicion of criminal activity. *Id.* However, an investigative stop at a traffic check point is constitutional, without regard to any such suspicion, if law enforcement officers systematically stop all oncoming traffic. *See Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660 (1979); *Sanders*, 112 N.C. App. at 480, 435 S.E.2d at 844.

Moreover, the United States Supreme Court has affirmed the right of police to order passengers from a vehicle in order to conduct a search of the driver's car, despite the complete absence of probable cause or reasonable suspicion concerning the passengers. *Maryland*

v. Wilson, 519 U.S. 408, 137 L. Ed. 2d 41 (1997). Although the search of the vehicle in *Wilson* arose during a stop for a minor traffic offense, we believe the Court's analysis of passengers' rights applies equally to a consent search of a vehicle conducted during a check point stop:

> [A]s a practical matter, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car. Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

Id. at 413-14, 137 L. Ed. 2d at 47-48.

Based on *Prouse*, *Sanders* and *Wilson*, we conclude the initial check point stop and the driver's consent to the search of his vehicle provided sufficient constitutional justification for defendant's removal from the car. As a passenger, defendant was obliged to exit the vehicle for safety reasons during the search thereof, despite the absence of probable cause or a reasonable suspicion of criminal activity.

Once defendant was out of the car and in close proximity to sheriff's detectives, they were permitted to conduct a limited pat down search for weapons if they had a reasonable suspicion based on articulable facts under the circumstances that defendant was armed and dangerous. *See State v. Adkerson*, 90 N.C. App. 333, 338, 368 S.E.2d 434, 437 (1988).

We hold the facts as found by the trial court support its conclusion that the pat down search was constitutional. Among the articulable grounds for the search were the long, narrow bulge in defendant's front pants pocket, his belligerent attitude toward the detectives and his apparent intoxication. That the driver of the vehicle claimed not to know defendant's name also lent a degree of uncertainty and suspiciousness to the encounter.

Because we hold defendant's arrest was lawfully based on the fruits of a valid pat down search, the warrantless search of his person incident to the arrest, which yielded the marijuana and crack cocaine, was likewise constitutional. *See State v. Hardy*, 299 N.C. 445, 455, 263 S.E.2d 711, 718 (1980).The motion to suppress was properly denied.

No error.

Judges McGEE and TIMMONS-GOODSON concur.

IN RE APPEAL OF JAMES E. RAMSEUR AND R. GENE LENTZ FROM THE DECISION OF THE CABARRUS COUNTY BOARD OF ELECTIONS AND THE PROTEST OF THE CITY OF CONCORD MIXED BEVERAGE REFERENDUM CONDUCTED MAY 3, 1994

No. COA99-802

(Filed 1 August 2000)

Elections— refusal to disclose vote—failure to show effect on outcome—referendum not invalidated

The trial court did not err by concluding that petitioners are not entitled to a new election with regard to the City of Concord Mixed Beverage Referendum based on petitioners' failure to meet their burden to show that absent the alleged voting irregularities the referendum would have failed, because: (1) petitioners did not present any new evidence as to the five undisclosed illegal votes, and the Court of Appeals cannot speculate as to a possible result; and (2) petitioners have not set forth evidence that they objected to the five voters' failure to testify or that they attempted to compel such testimony.

Appeal by petitioners from an order entered 11 March 1999 by Judge A. Leon Stanback, Jr. in the Wake County Superior Court. Heard in the Court of Appeals 8 May 2000.

Cecil R. Jenkins, Jr. for petitioner appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General Susan K. Nichols, for the State Board of Elections, appellee.

Everett, Gaskins, Hancock & Stevens, by Hugh Stevens, for respondent appellees.

LEWIS, Judge.

Petitioners appeal a superior court order affirming a decision of the State Board of Elections, which adopted the Cabarrus County Board of Election's recommended decision that no new election be conducted with regard to the City of Concord Mixed Beverage Referendum. This is the second appeal of this case to this Court. A comprehensive recitation of the facts and procedural history is set forth in *In re Appeal of Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254 (1995) ("*Ramseur I*"), the first appeal brought by petitioners in this case. A mixed beverage referendum was conducted in and for the City of Concord on 3 May 1994. A recount of the votes on 5 May 1994 showed 5000 votes cast in favor of the sale of mixed beverages and 4997 votes cast against the sale of mixed beverages. *Id.* at 522, 463 S.E.2d at 255.

On 13 June 1994, the Cabarrus County Board of Elections ("County Board") found that ten ineligible persons had voted in the referendum. *Id.* When these ten voters were questioned as to how they voted, five declined to tell, three said they voted in favor of the proposition and two said they voted against it. *Id.* at 523, 463 S.E.2d at 255. As a result of these discovered irregularities, the County Board sent its recommended decision for a new election to the State Board of Elections ("State Board"). *Id.* On 16 June 1994, proponents of the referendum appealed to the State Board, which denied the County Board's recommended decision for a new referendum and certified the referendum results. *Id.* at 523, 463 S.E.2d at 256. The superior court affirmed the State Board's certification of the referendum results. *Id.* Thereafter, petitioner appellants filed their first appeal before this Court.

The appellants in *Ramseur I* argued that if the illegal votes *could* have altered the results of the referendum, a new election was required. *Id.* at 524, 463 S.E.2d at 256. Specifically, appellants contended that because five of the ten illegal voters refused to disclose their vote, there was no way to ascertain what the results of the ref-

erendum would have been absent the illegal votes. *Id.* As a result, appellants argued a new referendum was required. *Id.* at 524. In *Ramseur I*, we clarified appellants' statement of the applicable rule: "An election or referendum result will not be disturbed for irregularities absent a showing that the irregularities *are* sufficient to alter the result. The burden of proof is upon the unsuccessful candidate or the opponents of a referendum to show that they *would* have been successful had the irregularities not occurred." *Id.* at 525, 463 S.E.2d at 256-57. Applying this rule to the facts in *Ramseur I*, we stated:

> Here, four out of the five illegal voters who refused to disclose their votes would have had to testify that they voted in favor of the referendum in order for appellants to prevail.
>
> . . . [F]ive of the ineligible voters refused to disclose their vote and appellants did not attempt to compel those voters to testify. At this point, there is no way to determine whether, absent the ten illegal votes, the referendum would have failed.

Id. at 525-26, 463 S.E.2d at 257. We also noted that while an honest elector enjoys the privilege of refusing to disclose his vote, " '[i]f an illegal voter can claim the privilege at all, it is because he finds shelter under the very different principle that he cannot be compelled to criminate himself.' " *Id.* at 526, 463 S.E.2d at 257 (quoting *Boyer v. Teague*, 106 N.C. 576, 625, 11 S.E.2d 665, 679 (1890)). Because appellants in *Ramseur I* neither objected to the failure of the five ineligible voters to testify how they voted, nor attempted to compel the five voters to testify, we concluded appellants had not met their burden of proof. *Id.*

Despite appellants' failure to establish error on that issue, *Ramseur I* was remanded for consideration of other voting irregularities. The County Board conducted another review of the referendum and discovered that both an extra ballot from a previous election and an extra absentee ballot had been included in the previous vote count of 5000 votes for and 4997 votes against. Subtracting these ballots changed the referendum results to 4999 votes in favor and 4998 against. This was the only error found on remand.

In the present appeal, appellants' argument is as follows. In order to determine the actual number of votes cast on remand, the State Board had a duty to subtract the five disclosed illegal votes from the total count. When these five votes are subtracted, the result is a tie—

4996 in favor and 4996 against. Because no majority prevails, the referendum proposition fails. As such, the irregularities are sufficient to alter the outcome of the election so that a new election is required. The five remaining illegal votes which have not been disclosed are irrelevant, although it is not clear under what authority. We need only turn to *Ramseur I* to conclude that appellants' argument is without merit.

Although appellants do not address the appropriate standard of review in the present appeal, the core of their argument is that the State Board's decision was based on several errors of law. N.C. Gen. Stat. § 150B-51(b)(3), (4) (1999). As such, our standard of review is *de novo*. *Brooks v. Ansco & Associates*, 114 N.C. App. 711, 716, 443 S.E.2d 89, 92 (1994).

Contrary to appellants' assertions, the five undisclosed illegal votes are critical to the outcome of this appeal. To reiterate our point in *Ramseur I*, in order to meet their burden, appellants must be able to show that the referendum result *would* have been different had the voting irregularities not occurred. *Ramseur I*, 120 N.C. App. at 525, 463 S.E.2d at 257. This rule requires certainty; precisely, appellants here must establish that three out of the five ineligible voters who refused to disclose their votes voted in favor of the referendum in order to meet their burden. Without disclosure of these five votes, we are not able to determine with certainty whether the voting irregularities are sufficient to alter the result. Indeed, the five undisclosed votes could possibly cause the outcome to go either way. In failing to present any new evidence as to the five undisclosed illegal votes, appellants have asked us to speculate as to a possible result. This is not sufficient under our law.

In 1996, N.C. Gen. Stat. § 163-33(3) (Supp. 1998) was amended to prohibit a board of elections from considering as evidence the testimony of an ineligible voter as to how he voted. At the time of the referendum in this case, however, no law prohibited a board of elections from considering such evidence. Nonetheless, the issue of disclosure is not before us, as appellants have not set forth evidence that they objected to the five voters' failure to testify or attempted to compel such testimony.

We conclude appellants have not met their burden to show that absent the voting irregularities, the referendum would have failed. Accordingly, the superior court correctly concluded appellants are not entitled to a new election.

Affirmed.

Chief Judge EAGLES and Judge EDMUNDS concur.

AMBER DAWN MUSE, BY AND THROUGH HER GUARDIAN AD LITEM, HUGH D. MUSE; HUGH D. MUSE, INDIVIDUALLY; AND ANGELA MUSE, INDIVIDUALLY, PLAINTIFFS-APPELLANTS V. DAVID E. ECKBERG, M.D.; NEW BERN ANESTHESIA ASSOCIATES, P.A.; RONALD JACK REIDA, M.D.; CRAVEN EMERGENCY PHYSICIANS, P.A.; CRAVEN REGIONAL MEDICAL CENTER; DARA BASS, R.T.; CAROL BROWER, R.N.; LAURA WHEATON, R.N.; CALVIN G. WARREN, M.D.; SARAH STITT ADAMS, M.D.; COASTAL CHILDREN'S CLINIC, INC., DEFENDANTS-APPELLEES

No. COA99-1102

(Filed 1 August 2000)

Costs— voluntary dismissal—preparation for depositions

The trial court erred by allowing defendants to recover costs that were incurred in preparation for depositions in a medical malpractice action where plaintiffs voluntarily dismissed the case without prejudice under N.C.G.S. § 1A-1, Rule 41(a), because the taxing of deposition expenses as costs under N.C.G.S. § 1A-1, Rule 41(d) is limited to expenses that are directly related to the taking of depositions.

Appeal by plaintiffs from order entered 1 June 1999 by Judge Clifton W. Everett, Jr. in Superior Court, Craven County. Heard in the Court of Appeals 7 June 2000.

Corne, Corne & Grant, P.A., by Robert M. Grant Jr., and Donald J. Dunn, P.A., by Donald J. Dunn for plaintiffs-appellants.

Walker, Clark, Allen, Herrin, & Morano, L.L.P., by Robert D. Walker, Jr. and Gay Parker Stanley, for defendants-appellees.

North Carolina Academy of Trial Lawyers, by Stella A. Boswell, Amicus curiae.

WYNN, Judge.

In 1999, the plaintiffs voluntarily dismissed without prejudice under N.C.R. Civ. P. 41(a) their medical malpractice action against the defendant medical providers. Thereafter, the defendants moved

under N.C.R. Civ. P. 41(d) to recover from the plaintiffs their costs incurred to prepare for depositions—consultation fees by three physicians and expenses relating to travel, copying, long distance telephone calls, and postage. From the trial court's order awarding these expenses as costs incurred in preparation for depositions, the plaintiffs appeal.

The issue on appeal is whether the trial court properly allowed the defendants to recover costs that were incurred in preparation for depositions. We reverse the trial court's award of these costs.

Under N.C.R. Civ. P. 41(d), a plaintiff who takes a voluntary dismissal of an action or claim shall be taxed with the costs of the action unless the action was brought in forma pauperis. Our courts strictly construe such statutory authorizations for costs because "the right to tax costs did not exist at common law and costs are considered penal in their nature." *City of Charlotte v. McNeely*, 281 N.C. 684, 692, 190 S.E.2d 179, 186 (1972)); *see also State v. Johnson*, 282 N.C. 1, 27, 191 S.E.2d 641, 658 (1972). Thus, while the decision to tax costs is not reviewable absent an abuse of discretion, *see Chriscoe v. Chriscoe*, 268 N.C. 554, 557, 151 S.E.2d 33, 35 (1966), the discretion to award costs is strictly limited by our statutes.

In *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982) this Court held that "[e]ven though deposition expenses do not appear expressly in the statutes they may be considered as part of 'costs' and taxed in the trial court's discretion." Thereafter, in *Sealey v. Grine*, 115 N.C. App. 343, 444 S.E.2d 632 (1994), this Court extended the holding of *Dixon* to allow the award of costs relating to a deposition, including costs for traveling to and from the deposition, videotaping the deposition, copies of the deposition, and court reporting services.

We are now asked in this appeal to extend the holding of *Sealey* to allow the recovery of costs that are incurred in *preparation* of depositions. We decline to do so. Instead, as with statutory authorizations for costs, we strictly construe the holding of *Sealey* and limit it to expenses that are *directly* related to a deposition.

The expenses sought by the medical providers in this case are too far removed from a deposition itself to be considered direct "deposition expenses." For instance, some of the travel expenses in this case relate to travel to visit the defendants' witnesses, not travel to and

from a deposition. And the record on appeal fails to show conclusively that any of the expenses incurred for copying, long distance phone calls and postage stemmed directly from a deposition. Accordingly, since the record fails to establish that the costs sought in this case were directly related to the taking of depositions, we reverse the trial court's award of costs.

Reversed.

Judges MARTIN and McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 1 AUGUST 2000

BARNETT v. BARNETT No. 99-664	Iredell (97CVD1688)	Affirmed
BARTOS v. JAY R. PLASTERING, INC. No. 99-1132	Ind. Comm. (083700)	Affirmed
BLALOCK PAVING, INC. v. WILKINSON No. 99-559	Wake (96CVD394)	Affirmed
BROYHILL v. N.C. DEP'T OF TRANSP. No. 99-1137	Wilkes (97CVS1147)	Vacated and Remanded
CATES v. NATIONAL SPINNING CO. No. 99-636	Ind. Comm. (947775)	Affirmed
CLINE v. WERNEK No. 99-754	Mecklenburg (94CVD2778-JVH)	Affirmed
COVINGTON v. SARA LEE HOSIERY No. 99-1048	Ind. Comm. (359554)	Affirmed
DEAN v. YUDELL & LAUREL EYE ASSOCS. No. 99-1264	Gaston (99CVS1292)	Affirmed
HARDISON v. NATIONSBANK N.A. No. 99-876	Guilford (98CVS10219)	Affirmed
HENDRIX v. BARKER No. 99-830	Forsyth (98CVS9872)	Dismissed
HENSLEY v. CALAWAY No. 00-44	Stokes (99CVD443)	Dismissed
HOFFER v. HOFFER No. 99-919	Guilford (96CVD8392)	Affirmed
HORACE MANN INS. CO. v. EDGE No. 99-528	Wake (97CVS09197)	Affirmed
HORVATH v. N.C. DIV. OF MOTOR VEHICLES No. 99-1282	Pitt (98CVS1421)	Affirmed
IN RE LINDSAY No. 99-1438	Durham (97J248N(TPR))	Affirmed
IN RE LONG No. 00-67	Cabarrus (98J167) (98J168)	Affirmed

IN RE WILLIAMS No. 99-1555	Mecklenburg (98J495) (98J496)	Affirmed
JOHNSON v. CITY OF WINSTON-SALEM No. 99-1300	Ind. Comm. (551825)	Affirmed
JONES v. WAINWRIGHT No. 99-1565	Wake (97CVD11666)	Vacated and Remanded
MORRIS v. CARTER No. 99-1127	Guilford (98CVS7425)	Affirmed
MULTIFAMILY MORTGAGE TR. 1996-1 v. CENTURY OAKS LTD. No. 99-983	Durham (96CVS02957)	Dismissed
REGISTER v. HYDRO CONDUIT CORP. No. 99-568	Ind. Comm. (437297)	Affirmed
ROPER v. BENFIELD No. 99-1400	Burke (96CVS951)	Affirmed
SIEGELMAN v. GILMORE No. 99-905	Clay (91CVD78)	Vacated
SMITH v. SMITH No. 99-1498	Moore (93CVD55)	Affirmed
SPRING LAKE ASS'Y OF GOD CH v. N.C. DIST. COUN. ASSEMBLIES OF GOD, INC. No. 99-620	Cumberland (98CVS2440)	Affirmed
STATE v. AMPRAZIS No. 00-72	Guilford (98CRS27744)	No Error
STATE v. BAILEY No. 00-60	Wake (97CRS23181)	No Error
STATE v. BANNERMAN No. 00-116	Washington (99CRS928) (99CRS1083)	No Error
STATE v. BARDEN No. 99-579	Columbus (97CRS9500) (97CRS9501)	No Error
STATE v. BERTHA No. 99-586	Mecklenburg (96CRS54029)	Appeal Dismissed

STATE v. CHEEK No. 99-1122	Onslow (96CRS13061) (96CRS13062)	No Error
STATE v. COLE No. 99-1469	Wake (95CRS71786)	No Error
STATE v. CUNNINGHAM No. 99-1600	Mecklenburg (96CRS37072)	No Error
STATE v. DeVRIES No. 99-1398	Cabarrus (98CRS16481)	Affirmed
STATE v. DURHAM No. 99-778	Forsyth (98CRS24734) (98CRS28858)	No Error
STATE v. FAIRCLOTH No. 99-1006	Sampson (98CRS7167) (99CRS3585)	No Error
STATE v. GREEN No. 99-832	Durham (97CRS12460) (97CRS12461)	No Error
STATE v. HANCOCK No. 99-1459	Cabarrus (98CRS000631) (97CRS019683)	No Error
STATE v. HERRING No. 99-793	Duplin (98CRS7164) (98CRS7165)	No error as to trial, but remanded for correction of clerical error in judgments
STATE v. HOLBROOK No. 99-1319	Davidson (97CRS5962)	No Error
STATE v. IJAMES No. 99-1159	Forsyth (98CRS27695) (98CRS31504)	No Error
STATE v. LAWRENCE No. 99-1529	Beaufort (97CRS5183)	No Error
STATE v. LEGETTE No. 00-148	Forsyth (99CRS26021)	No Error
STATE v. MARSHBURN No. 99-238	Craven (95CRS4944) (95CRS4945)	No prejudicial error in part; Remanded in part with instructions to correct clerical error

STATE v. MASHBURN No. 99-1537	Guilford (96CRS27992) (96CRS27993) (96CRS27994) (96CRS27995) (96CRS27996) (96CRS27996) (96CRS27996) (96CRS27997) (96CRS27998) (97CRS45872) (97CRS45873) (97CRS45874) (99CRS23477)	Affirmed
STATE v. McMILLIAN No. 99-1027	Cumberland (95CRS25474)	No Error
STATE v. MILLS No. 99-1401	Wake (98CRS10327)	No Error
STATE v. PULIDO No. 99-1551	Guilford (99CRS38447) (99CRS38448)	Affirmed
STATE v. RHODES No. 00-130	Cumberland (97CRS36080) (97CRS55457)	Affirmed
STATE v. ROSS No. 99-1304	Lenoir (97CRS436) (97CRS437) (97CRS438) (97CRS439)	Remanded for correction of clerical error
STATE v. SAFRIT No. 99-862	Union (98CRS6755) (98CRS7495) (98CRS7496)	No prejudicial error
STATE v. SAGUILAR No. 99-1516	Forsyth (98CRS52399) (98CRS52407) (98CRS52408) (98CRS52409) (98CRS52410) (98CRS52411) (98CRS52400) (98CRS52401) (98CRS52402)	No Error
STATE v. SIMMONS No. 99-1627	Wilkes (98CRS5722) (99CRS3387)	No Error

STATE v. TURNER No. 99-1605	Guilford (98CRS039896)	No Error
STATE v. WALKER No. 99-1530	Mecklenburg (98CRS121709) (98CRS121708)	No Error
STATE v. WHITESIDES No. 00-12	Iredell (98CRS0026)	No Error
STATE v. YARBROUGH No. 99-1503	Cumberland (98CRS40458)	No Error
STIMSON v. FOUST TEXTILES No. 99-1345	Ind. Comm. (542561)	Affirmed
VITIELLO v. DAVIS No. 99-1080	Burke (98CVS591)	Affirmed
WARREN FIELD AIRPORT COMM'N v. WASHINGTON AIR. SERVS., INC. No. 99-1561	Beaufort (99CVD837)	Affirmed

STATE OF NORTH CAROLINA v. RUSSELL EDWARD MANNING

No. COA99-661

(Filed 15 August 2000)

1. Constitutional Law— double jeopardy—drug tax—trafficking convictions

The trial court did not err by denying defendant's motion to dismiss trafficking in cocaine offenses on double jeopardy grounds because he had previously been assessed a controlled substance tax. It has recently been held that double jeopardy does not preclude criminal prosecution for violations of the Controlled Substances Act, despite prior entry of judgment for unpaid taxes on seized drugs. Additionally, defendant in this case was convicted on charges arising from the transportation, sale, and delivery of cocaine, while the tax levied involved the possession of cocaine.

2. Criminal Law— severance of narcotics offenses—common pattern

The trial court did not abuse its discretion by denying defendant's motions to sever various cocaine charges where the charges occurred within a six-month period and showed the same pattern of operation between defendant and an informant, indicating a common, continual method of transacting drug sales.

3. Evidence— motion in limine—prior drug deals

The trial court did not err in a cocaine prosecution by denying defendant's motion in limine to require that the State reveal those acts it intended to prove under N.C.G.S. § 8C-1, Rule 404(b) and those it would elicit under Rule 608(b), should defendant testify. The court ruled that defendant's prior drug deals could come in only if defendant opened the door by testifying that he had never dealt drugs; moreover, defendant did not make an offer of proof regarding his testimony and there is no evidence as to what his factual defense would have been.

4. Evidence— audiotapes—intelligible

The trial court did not abuse its discretion in a cocaine prosecution by admitting audiotapes which defendant contended were inaudible, unintelligible, and fragmented where the court did not find that the tapes were inaudible or unintelligible and no

juror interrupted when they were played to assert that they were inaudible or unclear.

5. Criminal Law— prosecution comment on audience noise—objection to informant's address—no mistrial

The trial court did not abuse its discretion in a cocaine prosecution by denying a defense motion for a mistrial based upon the prosecution's comments on noise from the audience and its objection to an informant being asked where he lived. There was no prejudice from the comments.

6. Discovery— narcotics trafficking—currency and serial number list—not available at trial—testimony admitted—not provided before trial

The trial court did not abuse its discretion by not declaring a mistrial in a cocaine prosecution where defendant was not provided information concerning the currency used in drug transactions during discovery because the currency and information concerning the currency had been used in other drug buys or was destroyed before trial, but the existence and use of the currency, the serial number list, and the photocopy were presented to the jury through testimony. These items were used to charge defendant, fell within N.C.G.S. § 15A-903(d), and should have been made available; however, there was no substantial and irreparable prejudice to defendant due to the overwhelming evidence against him.

7. Drugs— trafficking by transportation—running from arresting officer with cocaine in pocket

The trial court did not err by denying defendant's motion to dismiss the offense of trafficking in cocaine by transportation where the charge resulted from defendant running away from arresting officers while carrying 109 grams of cocaine just after he had sold an informant 449 grams.

Chief Judge EAGLES concurring.

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

Appeal by defendant from judgments entered 21 October 1998 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 27 March 2000.

Attorney General Michael F. Easley, by Assistant Attorney General David N. Kirkman, for the State.

W. Gregory Duke for defendant-appellant.

HUNTER, Judge.

Defendant was convicted of four counts of trafficking in cocaine by transportation, three counts of trafficking in cocaine by sale, and three counts of trafficking in cocaine by delivery. We find no error.

The State's evidence at trial indicated that on 7 November 1996, 27 November 1996, 3 April 1997, and 6 May 1997, defendant sold cocaine to Edgar Lloyd Harrington, III ("Harrington"), who was an undercover agent for the North Carolina State Bureau of Investigation ("SBI") and was equipped with either a body transmitter or vehicle transmitter when each offense occurred. Harrington had formerly been charged with cocaine trafficking offenses.

During the time period when the offenses occurred, defendant resided in Pitt County on Clark's Neck Road, but also kept a trailer on Sticks Road. On 7 November 1996, Harrington went to defendant's trailer on Sticks Road and defendant drove into the woods, returning with a bag of cocaine. Harrington purchased just under two ounces of cocaine for $2,700.00. When Harrington left defendant's property, he drove down a long dirt path and met SBI agent Ken Bazemore ("Bazemore"). Before he turned over the evidence to Bazemore, Harrington opened the package and smelled the evidence to ensure that it was really cocaine.

On 27 November 1996, Harrington met Bazemore and arranged to meet the defendant. Harrington went to where the defendant was hunting, waited for approximately forty-five minutes while defendant was being located and was told to come back at 5:00 p.m. Harrington returned at that time with $3,200.00 in cash provided by the SBI. Harrington talked to defendant about purchasing two ounces of cocaine. Defendant then left but returned approximately forty-five minutes later with a clear plastic bag of cocaine. The exchange took place and Harrington left to meet SBI agent Bazemore.

Harrington next made arrangements to meet defendant on 3 April 1997. He first met defendant at defendant's home and arranged to make a purchase later in the day. The SBI provided Harrington with $2,100.00, and Harrington went to defendant's property on Sticks Road. Harrington was asked to follow the defendant, who jumped

over a ditch, went in the woods, and returned with a clear plastic bag containing cocaine. Harrington gave defendant the SBI money, and then took the bag to Bazemore.

On 5 May 1997, Harrington went to Sticks Road and told defendant he needed 500 grams of cocaine, which defendant told Harrington would cost $15,000.00. Defendant told Harrington to return to Sticks Road for the purchase the next day.

On 6 May 1997, Harrington, who had been given $15,000.00 by the SBI, met defendant at defendant's property on Sticks Road. Defendant asked Harrington to follow him down a dirt path, and he then pulled a bag out of an ammo box located in the woods and gave it to Harrington. Harrington gave defendant the money and drove away to meet Bazemore. At that point, defendant was apprehended by SBI agents, who found a clear plastic bag on his person containing cocaine.

On 6 May 1997, defendant was charged with four counts of trafficking in cocaine by transportation and four counts of trafficking in cocaine by possession. On 23 June 1997, true bills of indictment were returned against defendant for five counts of trafficking in cocaine by transportation, five counts of trafficking in cocaine by possession, four counts of trafficking in cocaine by sale, and four counts of trafficking in cocaine by delivery. Defendant was also charged by indictment with conspiracy to traffick in cocaine by possession, conspiracy to traffick in cocaine by transportation, conspiracy to traffick in cocaine by delivery, two counts of maintaining a dwelling place for the purpose of storing cocaine, and maintaining a vehicle for the purpose of storing cocaine.

On 7 May 1997, defendant was given a notice of controlled tax assessment for his possession of 141.75 grams and 567 grams of cocaine on 3 April 1997 and 6 May 1997, respectively. The tax assessment was $213,784.80, and the North Carolina Department of Revenue, in order to satisfy the controlled substance tax liability of defendant, seized all his personal property, including two automobiles. A judgment lien was also filed by the North Carolina Department of Revenue in the office of the Clerk of Court of Pitt County in the cumulative amount of the tax assessment.

Defendant was brought to trial during the 12 October 1998 criminal session of Pitt County Superior Court. The State elected not to prosecute defendant for any of the four counts of trafficking in

cocaine by possession. The trial court dismissed each of the conspiracy charges prior to trial. At the close of the State's evidence, the trial court dismissed the two counts of maintaining a dwelling place for the purpose of storing cocaine and the count of maintaining a vehicle for the purpose of storing cocaine.

The jury returned a verdict of not guilty for the counts alleged to have occurred on 27 November 1996. In regards to the counts alleged to have occurred on the other dates, the jury returned verdicts of guilty as to four counts of trafficking in cocaine by transportation, three counts of trafficking in cocaine by sale, and three counts of trafficking in cocaine by delivery. Defendant appeals.

[1] Defendant first contends that the trial court erred by denying his motion to dismiss each of the trafficking in cocaine offenses on the grounds of double jeopardy. Defendant argues that he was previously punished for the very same conduct for which he was criminally convicted by the assessment of the controlled substance tax. Therefore, his trafficking in cocaine convictions should have been dismissed by the trial court under the Fifth and Fourteenth Amendments to the United States Constitution. We disagree.

In our recent decision in *State v. Adams*, 132 N.C. App. 819, 513 S.E.2d 588 (1999), *disc. review denied*, 350 N.C. 836, 538 S.E.2d 570, *cert. denied*, 528 U.S. 1022, 145 L. Ed. 2d 414 (1999), we upheld the application of the controlled substance tax, holding that double jeopardy did not preclude criminal prosecution for violations of the North Carolina Controlled Substances Act, despite prior entry of judgment against defendant for unpaid taxes on seized drugs. Additionally, in the case *sub judice*, the tax levied on defendant involved his possession of the various quantities of cocaine, while he was convicted on charges arising from the transportation, sale, and delivery of cocaine. Accordingly, we overrule defendant's first assignment of error.

[2] Defendant next asserts that the trial court committed error in denying his motions, made both before and at the commencement of his trial, to sever the offenses for which he was charged. Defendant contends that each offense was separate and distinct from the other, and did not constitute a series of acts which were part of a single scheme or plan. Again, we disagree with defendant's contention.

In this state, two or more offenses may be joined for trial when the offenses are based on the same act or transaction, or a series of acts or transactions connected together or constituting parts of a single scheme or plan. *State v. Chandler*, 324 N.C. 172, 376 S.E.2d 728

(1989). Public policy favors consolidation of offenses because it tends to expedite the administration of justice, reduces congestion of trial dockets, and conserves judicial time and lessens the burden on jurors and witnesses. *State v. Boykin*, 307 N.C. 87, 296 S.E.2d 258 (1982). Our General Statutes provide:

> (b) Severance of Offenses.—The court, on motion of the prosecutor or on motion of the defendant, must grant a severance of offenses whenever:
>
> (1) If before trial, it is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense; or
>
> (2) If during trial, upon motion of the defendant or motion of the prosecutor with the consent of the defendant, it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

N.C. Gen. Stat. § 15A-927(b)(1), (2) (1999). "A defendant is not prejudiced by the joinder of two crimes unless the charges are 'so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant.' " *State v. Howie*, 116 N.C. App. 609, 615, 448 S.E.2d 867, 871 (1994) (quoting *State v. Hammond*, 112 N.C. App. 454, 458, 435 S.E.2d 798, 800 (1993)). "If the consolidated charges have a transactional connection, the decision to consolidate the charges is left to the 'sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion.' " *State v. Weathers*, 339 N.C. 441, 447, 451 S.E.2d 266, 269 (1994) (quoting *State v. Silvia*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981)) (error to consolidate, for trial, charge of murder with charge of failure to appear for murder trial). "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).

Defendant points out that evidence was presented to the jury on a total of fifteen different trafficking offenses encompassing four separate offense dates (7 November 1996, 27 November 1996, 3 April 1997, and 6 May 1997) which occurred in a time span of six months.

Defendant contends that the State was able to adduce evidence regarding each offense date, the effect of which was to strengthen evidence of defendant's guilt on the weaker counts with evidence from the stronger counts. Defendant submits that the "sheer quantity of offenses charged, coupled with the evidence adduced to attempt to prove each offense, created a trial atmosphere which was unjust, unfair and highly prejudicial." Likewise, the State contends that the testimony and evidence indicate that all four transactions were strikingly similar as they were transpired, monitored, recorded, and executed almost identically. In each instance, the transaction was carefully set up, monitored, recorded and documented. The State contends that they "showed the defendant to be a major drug dealer who made repeated drug sales" to the same informant. We agree. In *State v. Howie*, we held that the trial court correctly consolidated two charges for trial when the offenses occurred weeks apart, stating:

> The evidence clearly shows that the offenses were not only similar, but that they involved the same pattern of operation. Defendant watched as each victim used a teller machine at the same bank, NationsBank in Watauga Village. Defendant followed each victim home. Defendant observed each victim while hiding outside, and, stealthily, entered the house and stole the victim's purse. On cross-examination, defendant admitted that it was his "operation" to watch people use their ATM cards, memorize the numbers, and then steal their purses. We do not find that the circumstances of the two offenses are so distinct as to render consolidation unjust and prejudicial.

Howie, 116 N.C. App. at 615-16, 448 S.E.2d at 871. Similarly, in ruling on this issue in the case at bar, the trial court stated:

> The events involve the same parties and involve the same informant dealing in the same subject. It's basically the same conduct going on in each episode. And I think the jury can determine that there were four separate events, that they occurred on four separate occasions, and that the ends of justice will best be promoted by having them all tried together in one case.
>
> I don't feel it's unduly prejudicial to the defendant and it would preclude the necessity of having to try four separate cases involving basically not a very unusual factual situation in each one of them. And in any event, Judge Hockenbury has already ruled on your motion previously that the cases be severed be

denied, so that matter has already been addressed. I'll address it again and deny it.

In the case sub judice, each of the charges against defendant occurred within a six month period and indicated the same pattern of operation between defendant and the informant Harrington during this time. Defendant always retrieved the cocaine from the woods, on or near his property at Sticks Road, would often plan the exchange with Harrington ahead of time, always took cash in payment from Harrington, and almost always delivered the cocaine to Harrington in clear plastic bags. This evidence indicates defendant had a common, continual method of transacting drug sales, and we are therefore unable to say that the trial judge abused his discretion by consolidating all charges for trial. Accordingly, the assignment of error is rejected.

[3] Defendant next assigns error to the trial court's denial of his motion *in limine* to require the State to reveal to him those acts it intended to prove under Rule 404(b) of the Rules of Evidence, and those acts it would attempt to elicit, should the defendant testify, under Rule 608(b) of the Rules of Evidence.

Rule 608 of the Rules of Evidence permits the State to inquire into specific acts of conduct on cross-examination if the act inquired about is probative of truthfulness or untruthfulness. *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). Whether an act is probative of truthfulness or untruthfulness is a legal question and a criminal defendant should have assurances that she will not be questioned improperly about such matters prior to testifying on her own behalf. *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988). In *Lamb*, the defendant repeatedly requested a ruling as to whether the State could question her about evidence implicating her in other murders. The North Carolina Supreme Court held that the failure of the trial court to rule on this motion resulted in an impermissible chilling of the defendant's right to testify on her own behalf. *Lamb*, 321 N.C. at 649, 365 S.E.2d at 609. Whether the denial of defendant's motion *in limine* impermissibly chills the defendant's right to testify is based upon the peculiar facts of each case. *State v. Barber*, 120 N.C. App. 505, 463 S.E.2d 405 (1995), *disc. review denied*, 342 N.C. 896, 467 S.E.2d 906 (1996).

The trial court in the present case ruled that defendant's prior drug deals could only come in if he "open[ed] the door" by taking the stand and denying he had ever dealt drugs. The court stated:

> It would be my thinking unless he opens the door and gets up here and testifies to something about he hadn't done anything at all and that sort of thing, then you can't get into what Mr. Bazemore said in his search warrant affidavit.

Defendant asserts that this ruling was "tantamount to no ruling . . . as each individual act of the Defendant, whether probative of truthfulness or not, would be admissible." We disagree. This ruling indicates that defendant could not be questioned about prior drug deals unless he opened the door by denying involvement in such deals on direct examination. Furthermore, assuming the ruling was erroneous, the defendant has not shown prejudice because he did not make an offer of proof regarding his testimony, and there is no evidence as to what his factual defense would have been. Accordingly, this assignment of error is overruled.

[4] Defendant next contends that the trial court erred by admitting audiotapes into evidence that were inaudible, unintelligible, and fragmented.

The determination as to whether an audiotape should be admitted into evidence, and as to whether it is sufficiently audible and intelligible, is a question for the trial court. *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971). In the present case, the trial court ruled that the audiotapes in question were admissible and did not find that they were inaudible or unintelligible. The evidence indicates that while the tapes were played, no juror interrupted to assert that any of the tapes, or any portion of them, was inaudible, unclear, unintelligible, or fragmented. Accordingly, we hold that defendant has failed to show an abuse of discretion by the trial court, and this assignment of error is overruled.

[5] Defendant next assigns error to the trial court's denial of his motion for mistrial based upon the prosecution's comments during trial as to disturbances by noise from the audience, and its objection to Harrington being asked where he lived in questioning by defendant; however, we note defendant was not mentioned in these comments. Our Criminal Procedure Act provides in pertinent part: "The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (1999). "It is well established that the decision as to whether substantial and irreparable prejudice has occurred lies

within the sound discretion of the trial judge and that his decision will not be disturbed on appeal absent a showing of abuse of discretion." *State v. Thomas*, 350 N.C. 315, 341, 514 S.E.2d 486, 502, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). In the case at bar, we are at a loss to discern how the prosecution's comments about noise in the audience could prejudice defendant. While defendant asserts that the objection regarding Harrington's residence was meant to convey that defendant was a dangerous and violent man, likewise, we see no way that this could substantially prejudice defendant. Defendant was not mentioned in this comment. Harrington himself testified that he had been a drug informant in other cases; therefore, it was clear that the State would not want the residence of an undercover agent revealed, especially one that had been involved in numerous cases. We see no prejudice against defendant resulting from the prosecution's statements. Therefore, we hold the trial court did not abuse its discretion in denying defendant's motion for a mistrial. Accordingly, this assignment of error is overruled.

[6] Defendant next contends the trial court abused its discretion by not declaring a mistrial under N.C. Gen. Stat. § 15A-1601 because the State did not provide discovery to him as required by N.C. Gen. Stat. § 15A-903(d), resulting in substantial and irreparable prejudice against him. The record reveals that during trial, Maria Joycs ("Officer Joycs"), a special agent with the Federal Bureau of Investigation, testified that prior to giving Harrington $15,000.00 to buy cocaine from defendant on 6 May 1997, she photocopied the currency and compiled a list of the serial numbers on the bills. She further testified that she determined, by comparing the money seized from defendant with the photocopy and serial number list, that the currency seized was the same currency that had been given to Harrington for a drug buy. Defendant objected to this testimony on the basis that he was not provided with this information through discovery.

We note that defendant is not entitled to evidence in the form of testimony until the witness takes the stand at trial:

> In any criminal prosecution brought by the State, no statement or report in the possession of the State that was made by a State witness or prospective State witness, other than the defendant, shall be the subject of subpoena, discovery, or inspection until that witness has testified on direct examination in the trial of the case.

N.C. Gen. Stat. § 15A-903(f)(1) (1999). Therefore, if Officer Joyces made a statement prior to trial regarding this evidence, defendant was not entitled to it through discovery. However, under N.C. Gen. Stat. § 15A-903(d), the State must furnish to the defendant any documents or tangible objects "within the possession, custody, or control of the State . . . which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant." N.C. Gen. Stat. § 15A-903(d) (1999). The record reveals that the currency, serial number list, and photocopy in question were not exhibits at trial because they had either been used in other drug buys and were not available or had been destroyed prior to trial. Ken Bazemore, of the State Bureau of Investigation, testified on *voir dire* examination:

> Q. Mr. Bazemore, did you maintain a record of those serial numbers taken from the currency that your agency seized from Russell Manning on May 6, 1997?
>
> A. I did not.
>
> Q. Did you maintain photocopies which were made of the currency that was seized from Russell Manning's residence on May 6, 1997?
>
> A. No.
>
> Q. Did you ever receive either the photocopy of the serial numbers or the photocopy of the currency which was seized from Russell Manning's residence on May 6, 1997?
>
> A. The photocopy was initially in my possession.
>
> Q. Okay. Well, what did you do with them?
>
> A. As soon as we confirmed—because of the amount of money, number one, we knew that the money was going to be returned, not as evidence, but back in the system for additional drug buys. The reason we photocopy the bills was in case something went wrong with the deal, someone was shot, et cetera, et cetera, we could attach the money to the bad guy. None of that occurred. At the conclusion of the deal we knew the money was not going to be available to be present in court to match those serial numbers with the photocopies; there was no reason to keep the photocopy of those numbers.

Q. Okay. So who made the decision to destroy the photocopy of the currency?

A. I probably did.

Q. Do you know if you did?

A. I'm sure I did.

Q. Do you know who actually destroyed it?

A. I did.

Q. You did?

A. Yeah.

. . .

Q. Did you consult with the District Attorney's Office before you destroyed the photocopies of the currency?

A. I don't know if the District Attorney ever knew that I had a photocopy.

. . .

Q. Did you have any discussions with any members of the District Attorney's Office prior to you making the decision to destroy the copies of the currency that you say you made of money that was seized from Mr. Manning's property on May 6, 1997?

A. No.

Q. And did you and Ms. Joyce have any discussions prior to this morning about her testifying about the fact that she compared the serial numbers with the photocopies with the money that was seized from Russell Manning's residence on May 6, 1997?

A. Absolutely did not.

Q. Did not?

A. Did not.

Q. Now, why is it your testimony or why did you believe that the money could not be introduced at the trial of this case?

A. Because I knew the money was not going to be here. I knew the money would already be back in circulation for future drug buys.

Q. And my question is why did you not take that money and safeguard that and put that in the evidence locker like any other evidence?

A. Because it was not a financially feasible thing to do based on the amount of cocaine we have to buy on different days. We cannot afford to do that.

The currency in question was obtained from defendant, and the serial number list and photocopy was used to identify the currency and charge defendant. Thus, it is clear all of these objects should fall under the ambit of N.C. Gen. Stat. § 15A-903(d), and as such, should have been made available to defendant. See *State v. Stephens*, 347 N.C. 352, 362, 493 S.E.2d 435, 441 (1997), *cert. denied*, 525 U.S. 831, 142 L. Ed. 2d 66 (1998). (N.C. Gen. Stat. § 15A-903(d) requires the State to turn over all "documents . . . [and] tangible objects . . . material to the preparation of [the] defense.") Obviously, if these documents were not presented to the prosecution by the investigating officers, the prosecution has no way to convey them to defendant; however, their existence and use was presented to the jury through testimony of the State's witnesses. Defendant should have been informed as to their existence through discovery, in order for him to prepare his defense. We do not approve of the practice of destroying evidence as was employed in this case, as such approval would encourage the State to destroy evidence which should be made available to a defendant without repercussion. However, we do not believe that defendant has shown substantial and irreparable prejudice to his case due to the overwhelming evidence on the charges stemming from the drug buy on 6 May 1997, including a recording of the drug buy obtained from the wire-tapped informant, testimony of the informant, surveillance of the area by officers, and seizure of defendant just after the transaction, when a substantial amount of cocaine was found on his person. As we have previously noted, "the decision as to whether substantial and irreparable prejudice has occurred lies within the sound discretion of the trial judge and . . . his decision will not be disturbed on appeal absent a showing of abuse of discretion." *State v. Thomas*, 350 N.C. at 341, 514 S.E.2d at 502. Based on the foregoing, we cannot say that the trial court abused its discretion on this matter, and accordingly, we overrule this assignment of error.

[7] Finally, defendant contends that the trial court erred in denying his motion to dismiss the cocaine trafficking offense contained in 97CRS 11031, trafficking cocaine by transportation. The charge at issue in this assignment of error resulted from defendant's running away from arresting officers while carrying 109 grams of cocaine after he had just sold Harrington 449 grams of cocaine. Defendant asserts that these two instances constitute one offense.

A continuing offense is a breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is "intended to cover or apply to successive, similar obligations or occurrences." *State v. Johnson*, 212 N.C. 566, 570, 194 S.E. 319, 322 (1937). Under our General Statutes,

> Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" . . . .

N.C. Gen. Stat. § 90-95(h)(3) (1999). "A conviction for trafficking in cocaine by transportation requires that the State show a 'substantial movement.' " *State v. Wilder*, 124 N.C. App. 136, 140, 476 S.E.2d 394, 397 (1996) (quoting *State v. Greenidge*, 102 N.C. App. 447, 451, 402 S.E.2d 639, 641 (1991)). Transportation is defined as " 'any real carrying about or movement from one place to another.' " *State v. Outlaw*, 96 N.C. App. 192, 197, 385 S.E.2d 165, 168 (1989), *disc. review denied*, 326 N.C. 266, 389 S.E.2d 118 (1990) (quoting *Cunard Steamship Company v. Mellon*, 262 U.S. 100, 122, 67 L. Ed. 894, 901 (1922)).

> Our courts have determined that even a very slight movement may be "real" or "substantial" enough to constitute "transportation" depending upon the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved. For instance, in *State v. Outlaw*, 96 N.C. App. 192, 385 S.E.2d 165 (1989), *disc. review denied*, 326 N.C. 266, 389 S.E.2d 118 (1990), our Court concluded that the defendant was guilty of trafficking by transporting cocaine when he removed drugs from a dwelling, placed them in his truck parked in the driveway, and backed a minimal distance down his driveway.

State v. McRae, 110 N.C. App. 643, 646, 430 S.E.2d 434, 436, *disc. review denied*, 334 N.C. 625, 435 S.E.2d 347 (1993) (citation omitted). In *McRae*, this Court held that when defendant removed the drugs from a dwelling house and carried them to a car by which he left the premises with an undercover agent, there was "substantial" move-

ment sufficient to sustain the charge of trafficking by transporting cocaine. Also, in *State v. Greenidge*, we held that the tossing of drugs from a dwelling to a point outside the curtilage was "real" or "substantial" movement so as to constitute "transportation." *State v. Greenidge*, 102 N.C. App. 447, 402 S.E.2d 639. In another case where the defendant had tossed contraband into bushes approximately ten feet from the car in which he was stopped, the Court pointed out:

> A reasonable mind could further conclude that there was a "substantial movement" of the cocaine when the defendant threw the cocaine into the bushes thus avoiding being caught with the cocaine and making it possible to later retrieve it for his subsequent use and benefit.

State v. Wilder, 124 N.C. App. at 140, 476 S.E.2d at 397.

A determination of whether there has been "substantial movement" involves consideration of "*all* the circumstances surrounding the movement," including "the purpose . . . and the characteristics of the areas from which and to which the contraband is moved." *Greenidge*, 102 N.C. App. at 451, 402 S.E.2d at 641 (emphasis in original). The evidence relevant to the issue at hand indicates that defendant had sold 449 grams of cocaine to Harrington and Harrington had left the area. Armed officers then appeared shouting "police, police. Don't move. Put your hands up," at which point defendant ran some distance, transporting 109 grams of cocaine which had not been traded in the transaction with Harrington. Defendant did not attempt to rid himself of the cocaine as he fled the area in a futile attempt to outrun police officers. Obviously, defendant tried to transport the cocaine out of the reach of the police. A reasonable mind could conclude that defendant's purpose in transporting the cocaine as he fled was for his own use in a future drug sale. Therefore, we believe that his fleeing the area, for some distance, with 109 grams of cocaine, constituted substantial movement of the cocaine. Accordingly, a separate charge of trafficking in cocaine by transportation was justified and the trial court did not err in failing to dismiss this charge. This assignment of error is overruled.

No error.

Chief Judge EAGLES concurs in a separate opinion.

Judge TIMMONS-GOODSON concurs in part and dissents in part in a separate opinion.

Chief Judge EAGLES concurring.

I concur. Because *State v. Greenidge*, 102 N.C. App. 447, 402 S.E.2d 639 (1991), binds us, I concur in the majority's opinion. Nevertheless, I write separately to express my unease with this Court's application of *Greenidge* to the facts of this case and factually similar situations. Despite assertions in *Greenidge* to the contrary, I believe the case could lead to untoward results. *Greenidge* as applied here is perilously close to permitting courts to convict individuals for trafficking by transporting cocaine when the facts simply establish the mere movement of a defendant while he possesses cocaine. This issue merits attention by the General Assembly to establish a clearer and fairer standard for proof of trafficking in cocaine by transportation.

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

I disagree with the holding of the majority that the trial court was correct in denying defendant's motion to dismiss the contested charge of trafficking cocaine by transportation. Considering all of the circumstances surrounding the movement of the cocaine, I believe that, as a matter of law, the evidence of defendant's actions was insufficient to sustain the charge of trafficking in cocaine by transportation in violation of section 90-95(h)(3) of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 90-95(h)(3) (1999).

In *State v. Greenidge*, 102 N.C. App. 447, 451-52, 402 S.E.2d 639, 641-42 (1991), this Court found that moving drugs from a dwelling to a point beyond its curtilage was sufficient to sustain a conviction for trafficking cocaine by transportation. While the majority quotes *Greenidge*, the facts are distinguishable from the facts *sub judice*. In *Greenidge*, an officer knocked on the door of a residence. The officer observed a man looking out the window and heard the man shout "it's the police." *Id.* at 448, 402 S.E.2d at 640. After the officer heard movement inside the house, he knocked a second time, and within minutes someone opened the door. Another officer, positioned near the rear entry of the residence, observed the defendant step onto a back porch, close a bag containing cocaine, and toss the bag into the yard next door. The officer yelled at the defendant, and the defendant retreated into the residence. Thus, the contraband had been moved from the area of the house to the area of a yard of a nearby residence.

The *Greenidge* court noted the defendant's concern that finding sufficient evidence based upon these facts

> could result in a charge of trafficking [by transportation] where a suspect merely throws drugs onto the ground when approached by the police, or where a suspect moves drugs from room to room in a house, or from one drawer to another drawer, or from inside the house to the porch.

Id. at 450, 402 S.E.2d at 641. The Court disagreed, stating that a determination on whether there was " 'substantial movement' . . . requires a consideration of *all* the circumstances surrounding the movement and not simply the fact of a physical movement of the contraband from one spot to another." *Id.* Specifically, the Court stated:

> [I]n addressing the question of whether the movement is a "substantial movement" so as to constitute transportation requires, among other things, considerations as to the purpose of the movement and *the characteristics of the areas from which and to which the contraband is moved.*

Id. (emphasis added).

The relevant evidence in the case at bar indicates that the SBI agent involved, Tre Harrington, performed a prearranged drug sale set up by law enforcement. Several armed law enforcement officers wearing camouflage clothing were positioned in the wooded area immediately surrounding the controlled buy. Officers observed defendant retrieve a metal box from behind a tree. Harrington drove up to the location, got out of his vehicle, and approached defendant. Defendant took a plastic bag containing cocaine from the metal box. After defendant handed Harrington the plastic bag, Harrington gave defendant a paper bag containing the agreed purchase price, and defendant placed the money in the metal box. Harrington testified that at the time of the buy, he could see a camouflaged figure only fifteen to twenty feet away. Also, one officer testified that he was located twenty to twenty-five feet from the buy and was close enough to hear the conversation between defendant and Harrington.

As Harrington drove away, officers approached defendant, shouting "police, police. Don't move. Put your hands up." At least one officer had his weapon pointed at defendant. Officers were close enough to defendant for him to hear and respond to their commands. Defendant momentarily hesitated, looked directly at one of the officers, and attempted to flee. The group of officers ran approximately fifteen to twenty yards from their original location, at which time one of the officers tackled defendant. Officers subsequently found a torn

bag of cocaine underneath defendant and cocaine powder scattered on the ground around defendant.

As a matter of law, the very specific factual scenario presented by this case did not constitute trafficking in cocaine by transportation. As noted above, in determining whether there has been "substantial movement," the *Greenidge* court directs us to examine "the characteristics of the areas from which and to which the contraband is moved." *Id.* at 451, 402 S.E.2d at 641. In utilizing the term "areas," the *Greenidge* court contemplated that substantial movement includes movement of contraband from one distinct area to another, not movement within the same area.

A review of the evidence in the case at bar reveals that defendant did not "move" the cocaine from one area to another. Rather, defendant progressed from one location within an area to another location within the same isolated, wooded area that was under the complete and exclusive control of law enforcement. I am convinced that the General Assembly did not intend a person be convicted for trafficking in cocaine by transportation based on those facts. I am further convinced that the evidence presented does not support the trafficking by transportation conviction, considering that defendant's movement was clearly in reaction to the officers' presence, and its purpose was to evade the officers' pursuit and to avoid criminal consequences.

For the foregoing reasons, I would reverse the trafficking by transportation conviction and find no error in the remaining convictions.

STATE OF NORTH CAROLINA v. SIMARON DEMETRIUS HILL

No. COA99-976

(Filed 15 August 2000)

1. Confessions and Incriminating Statements— voluntariness—admonition to tell the truth—witness present during questioning

The trial court did not err in a prosecution for first-degree kidnapping, attempted rape, two counts of first-degree sexual offense, and robbery with a dangerous weapon, by concluding defendant's statements to police were made freely, voluntarily,

and understandingly, and by denying defendant's motion to suppress written and oral statements made by defendant to law enforcement officers, because: (1) no one had made any promise or inducement to defendant to make a statement; (2) no threats or suggestions of violence were made; (3) even though one of the officers discussed with defendant the necessity for his being truthful, custodial admonitions to an accused to tell the truth standing by themselves do not render a confession inadmissible; and (4) the presence of defendant's friend, who had inculpated defendant, in the room while defendant was being questioned was not so coercive as to overcome defendant's free will and render his statements involuntary, especially in light of the fact that defendant acknowledged his friend made no comments or gestures.

2. Evidence— motion to suppress—defendant's statement to victim—data form—similar evidence

The trial court did not err in a prosecution for first-degree kidnapping, attempted rape, two counts of first-degree sexual offense, and robbery with a dangerous weapon, by denying defendant's motion to suppress a statement attributed to him on a data form taken from the victim at the hospital emergency room, because the nurse's reading of the victim's statement from the form at trial did not prejudice defendant where defendant's objection was properly sustained, his motion to strike was allowed, and substantially the same information was presented to the jury through other testimony.

3. Evidence— pistol—used in crimes

The trial court did not abuse its discretion in a prosecution for first-degree kidnapping, attempted rape, two counts of first-degree sexual offense, and robbery with a dangerous weapon, by admitting into evidence the pistol allegedly used in these crimes, because the evidence showed that: (1) the victim testified the pistol offered into evidence was similar in appearance to the pistol defendant pointed at her; (2) an officer testified he saw defendant's friend with a .38 pistol in his hand at the mall, the friend told the officer he threw the pistol under the dumpster, and the officer retrieved a .38 pistol under the dumpster; and (3) defendant admitted to the officer that he had a .38 pistol throughout the incident with the victim, and further admitted he had given the pistol to his friend.

4. Kidnapping— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the kidnapping charge even though defendant asserts the confinement, restraint, and removal necessary to convict defendant of kidnapping was inherent in the commission of the robbery with a dangerous weapon, because: (1) defendant forced his way into and took control of the victim's car by threatening her with a pistol, completing the force necessary to commit the robbery; (2) defendant exposed the victim to greater danger than that inherent in the robbery by further restraining her in the car and driving her to an isolated park; and (3) the additional restraint and removal is sufficient to support the element of restraint necessary for his conviction of the separate crime of kidnapping.

5. Robbery— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the robbery with a dangerous weapon charge even though defendant later abandoned the victim's car a short distance away from the crime, because viewed in the light most favorable to the State, a rational trier of fact could find that defendant, by forcing his way into the victim's car at gunpoint, driving the car to another location, and subsequently forcing the victim out of her car and driving away in it, intended to permanently deprive the victim of her car.

6. Sexual Offenses— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the two counts of sexual offense and attempted first-degree rape even though there was only a fifteen minute lapse between the time the victim was seen leaving the store and the time police records show the call came in reporting the incident because viewed in the light most favorable to the State, the victim's testimony, the DNA evidence, and defendant's own testimony provide substantial evidence to support these convictions.

7. Criminal Law— prosecutor's argument—rhetorical question while facing defense counsel

The trial court did not abuse its discretion in a prosecution for first-degree kidnapping, attempted rape, two counts of first-degree sexual offense, and robbery with a dangerous weapon, by denying defendant's motion for a mistrial made as a result of the prosecutor's closing argument shouting rhetorical questions

while facing in the direction of defense counsel and while holding the pistol that had been introduced into evidence, because: (1) the trial court ex mero motu instructed the prosecutor to direct his argument to the jury even though no objection was made; and (2) after conducting a hearing, the trial court determined that while the argument was inappropriate, the case had been hotly contested and under all the circumstances, defendant had not been prejudiced by the argument.

Appeal by defendant from judgment entered 5 February 1999 by Judge Melzer A. Morgan, Jr., in Randolph County Superior Court. Heard in the Court of Appeals 7 June 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas O. Lawton, III, for the State.

Robert T. Newman, Sr., for defendant-appellant.

MARTIN, Judge.

Defendant was tried on proper bills of indictment charging him with first degree kidnapping, attempted first degree rape, two counts of first degree sex offense and robbery with a dangerous weapon. Prior to trial, defendant moved to suppress certain written and oral statements which he made to law enforcement officers. The trial court conducted a *voir dire* hearing and, after making oral and written findings of fact and conclusions of law, denied the motion to suppress.

Briefly summarized, the State's evidence at trial tended to show that at approximately 5:00 a.m. on 10 October 1997, the victim, T.H.A., went to the Lowe's Food Store in Randolph County. She purchased a drink inside the store and returned to her car. T.H.A. opened the door to her car and got in, but when she turned to close the car door, defendant was between the car and the door so that she could not close it. He put a gun to her head and told her to move over. Defendant drove out of the grocery store parking lot to a nearby park, and parked the car in an unlit area. Defendant demanded money from T.H.A. After going through her pocketbook three times and not finding any money, defendant told T.H.A. that she would "pay for it." Defendant pulled down his pants and forced T.H.A. at gunpoint to perform oral sex on him. He then made her take off her pants and get on top of him. Defendant attempted to penetrate T.H.A. vaginally, but was unable to do so. He forced her to perform oral sex on him a

second time. Defendant then instructed T.H.A. to put her clothes back on and get out of the car. He drove away in her car.

Police recovered T.H.A.'s car a short time later. Defendant was recognized and identified from a Lowe's surveillance camera. Defendant's mother told police that defendant was at the shopping mall, and they went there to apprehend him. They first saw Sukari Nettles running with a pistol in his hands. They caught Mr. Nettles, a friend of the defendant, and recovered the pistol. Acting on information from Mr. Nettles, police found defendant in a wooded area behind the mall. Both were taken to the police station. Defendant was advised of his rights, consented to answer questions, and gave statements in which he acknowledged having driven T.H.A. away from the food store after displaying a pistol and having demanded money, but denied any sexual contact.

The State also offered evidence that two swabs were taken from T.H.A.'s mouth, as well as a cutting from the crotch area of her shorts, all of which showed the presence of sperm. Defendant's DNA was present in each of the items.

Defendant testified in his own behalf, admitting that he had encountered T.H.A. on the date in question, but asserting that she had asked to meet him and had offered to provide oral sex in exchange for cocaine, as they had done in the past. He claimed that after she performed oral sex on him, he refused to give her the cocaine. He denied having a pistol and denied giving any statements to the police.

The jury found defendant guilty of all of the charges. Because one of the sexual offenses was used to prove an element of first degree kidnapping, the trial court sentenced defendant as though he had been convicted of second degree kidnapping. Judgments were entered imposing consecutive active sentences of 23 to 37 months for kidnapping, 250 to 309 months for one count of first degree sexual offense, 151 to 191 months for attempted first degree rape, 250 to 309 months for the other count of first degree sexual offense, and 77 to 102 months for robbery with a firearm. Defendant appeals.

Defendant contends the trial court erred (1) by denying his motion to suppress his statements to law enforcement officers, (2) by denying his motion to suppress a statement attributed to him on a data form taken from T.H.A. at the hospital emergency room, (3) by admitting into evidence as State's Exhibit 10 the pistol allegedly used

in these crimes, (4) by denying his motion to dismiss at the conclusion of all the evidence and his motion for appropriate relief due to insufficiency of the evidence, and (5) by denying his motion for mistrial made as a result of the prosecutor's closing argument. For the reasons stated below, we conclude that defendant received a fair trial, free from prejudicial error.

I.

[1] First, defendant contends that the trial court erred in denying defendant's motion to suppress written and oral statements alleged to have been made by defendant to law enforcement officers. Defendant first claims that he did not make the statements, and, alternatively, that they were coerced and thus not freely and voluntarily given.

The trial court found, in denying defendant's suppression motion, facts which included:

> 3. . . . Sometime just before 5:54 p.m. the defendant was placed under arrest . . . . The defendant was advised of what he was being held on. At that point Lt. Mason advised the defendant that he had the right to remain silent, that anything he said could be used against him in a court of law, that he had the right to talk to a lawyer and have a lawyer present while [he was] being questioned, that if he wanted a lawyer during questioning but could not afford to hire one, a lawyer would be appointed to represent him at no cost to him, before any questioning, and that if he answered questions then without a lawyer he still had the right to stop answering questions at any time. These rights were read by then Sgt. Mason to the defendant in a slow manner. At the time, the defendant was alert and coherent. Then Lt. Mason asked the defendant if he understood each of these rights and the defendant said that he did. Lt. Mason wrote "yes" after the question "Do you understand each of these rights I have explained to you?" Then Lt. Mason asked the defendant if he would answer some questions for him then and the defendant initially said "no". Then within a short period of time the defendant changed his mind and said "Yeah, I'll talk. I have nothing to hide." Then Lt. Mason marked out the "no" he had written by the question "Will you answer some questions for me?" and wrote in "yes", which the defendant and Lt. Mason both initialed. Then the defendant signed the form. The defendant was never specifically asked if he wanted to give up his right not to talk. The defendant was never specifically asked if he wanted to give up his right to a lawyer.

Thereafter Lt. Mason advised the defendant of the need for truthfulness . . . . Lt. Mason placed the defendant in leg irons and talked generally with the defendant until sometime around 7:30 p.m. when Sgt. Messenger came in. In the time between the defendant signing the Asheboro Police Department Adult Waiver of Rights form and the time when Sgt. Messenger came in the office, the defendant did not say he wanted a lawyer, nor did he backout (sic) on his willingness to talk with the officers.

4. Sometime after 7:30 p.m., Detective Scott Messenger came into the room where the defendant and Lt. Mason were situated. Detective Messenger asked if Lt. Mason had advised the defendant of his Miranda rights and he was told that the defendant had been so advised. Then Det. Messenger asked the defendant if he understood those rights. The defendant indicted [sic] that he did. Det. Messenger then asked the defendant if he wanted to talk with him. Det. Messenger explained that the defendant did not have to talk to him, that he could remain silent. The defendant indicated that he [was] willing to talk with Det. Messenger. The defendant then began talking in response to Det. Messenger's questions. Under all the circumstances, the defendant impliedly waived his right to remain silent and his right to counsel. Such implied waiver was made freely, knowingly, intelligently, and voluntarily. At the beginning of the questioning, the defendant denied that he had done anything wrong and there was conversation between Nettles and the defendant, back and forth. Det. Messenger believed that if Nettles was in the same room with the defendant that Nettles being there would encourage the defendant to tell what happened. Det. Messenger did not feel that Nettles being there would pressure the defendant. Eventually the defendant made an incriminating oral statement. Then Det. Messenger made a tape recording of questions asked of the defendant. Then defendant was asked to give a written statement. The defendant then wrote out several paragraphs, which he signed.

5. At no time did anyone make any promise, offer of reward or inducement for defendant to make a statement or give up his right to counsel.

6. At no time did anyone make any threat, suggestion of violence, or show of violence which persuaded or induced the defendant to make a statement or give up his right to counsel.

7. At no time during the questioning did the defendant indicate that he desired to stop talking.

8. At no time during the questioning did the defendant indicate that he wished to consult with a lawyer or to have a lawyer present.

From these facts, the trial court concluded defendant had understood his rights, had freely and voluntarily waived those rights, and that his statements were made freely, voluntarily, and understandingly.

"[F]indings of fact made by a trial court following a voir dire hearing on the voluntariness of a confession are conclusive on appellate courts if supported by competent evidence in the record." *State v. Rook*, 304 N.C. 201, 212, 283 S.E.2d 732, 740 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). Findings supported by the evidence are binding on appeal even if there is evidence to the contrary. *Id.* However, the legal significance of the facts found by the trial court is a question of law, fully reviewable on appeal. *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983).

The standard for admissibility of a criminal defendant's inculpatory statement is whether, under the totality of the circumstances, the statement was made voluntarily and understandingly. *State v. Baldwin*, 125 N.C. App. 530, 482 S.E.2d 1, *disc. review improv. granted*, 347 N.C. 348, 492 S.E.2d 354 (1997). One such circumstance is whether the means employed by the law enforcement officers "were calculated to procure an untrue confession." *Id.* at 533-34, 482 S.E.2d at 4 (quoting *State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983)). In this case, defendant's sole argument with respect to the admissibility of his statement is that the statements were coerced, and therefore not voluntarily made, because the officers brought Sukari Nettles, who had already inculpated defendant, into the room while defendant was being questioned.

The trial court found that no one had made any promise or inducement to defendant to make a statement, that no threats or suggestions of violence were made. These findings are supported by competent evidence in the record. Though the trial court found that one of the officers had discussed with defendant the necessity for his being truthful, "custodial admonitions to an accused by police officers to tell the truth, standing by themselves, do not render a confession inadmissible." *Rook* at 219, 283 S.E.2d at 744. Nor are we persuaded that Nettles' presence in the room was so coercive as to

overcome defendant's free will and render his statements involuntary; neither Nettles nor the officers made any promises or threats to defendant and defendant acknowledged on *voir dire* that Nettles made no comments or gestures. *See State v. Chapman*, 343 N.C. 495, 500, 471 S.E.2d 354, 357 (1996) (officer's placing nine photographs of the murder victim in interrogation room so that defendant would see the photos in every direction he looked did not overbear defendant's free will). The trial court's findings support its conclusion that defendant's statements were made freely, voluntarily, and understandingly. Admission of the statements was not error.

II.

[2] Defendant also moved to suppress evidence of a statement allegedly made by him to the victim at the time of the offenses, which was reported by the victim on the N.C. Sexual Assault Data Form completed by a nurse at the emergency room. Defendant contended, as the basis for the motion, that the statement had not been provided to him in discovery. The trial court found that the substance of the statement had been provided to defendant and denied the motion to suppress, but ruled that the nurse could not read from the form and could use it only to refresh her recollection of statements made to her by the victim.

When the nurse testified, the nurse recounted what T.H.A. had told her and, reading from the form, testified that defendant had told T.H.A., "Don't fight me, I'll kill you right now." Defendant's objection was promptly sustained and his motion to strike was allowed. Where a defendant's objection is sustained and the objectionable testimony is stricken, he has no grounds to assign error. *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991). Moreover, T.H.A. also testified:

> Q. Okay. When he put the gun to your head, what did you do then?
>
> A. I moved over.
>
> Q. And did you do anything? Did you scream or—
>
> A. I blowed (sic) the car horn and he told me to stop, if I didn't, he would kill me.
>
> Q. Okay. Did you try to get out the passenger side?
>
> A. Yes.
>
> Q. What happened then?

A. I was trying to get out of the door and he says, don't you try that, and pulled the chamber back on the gun. Pop.

Q. So it was one of those that had slide chamber at the top?

A. Yes. And he said, I'll kill you. He says, won't be the first one I kill and won't be the last one.

Thus, defendant was clearly not prejudiced by the nurse's reading T.H.A.'s statement from the data form. *See State v. Barton*, 335 N.C. 696, 441 S.E.2d 295 (1994) (no prejudice where defendant's objection sustained and substantially same information is presented to jury through other testimony); *see also Quick* at 29, 405 S.E.2d at 196.

III.

[3] Next, defendant assigns error to the admission into evidence of State's Exhibit 10, the pistol allegedly used by him in the commission of the offenses. Defendant contends that there was no foundation and no chain of custody to establish that the pistol offered into evidence was the same pistol as the one used by him.

The State must establish a detailed chain of custody only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. *State v. Owen*, 130 N.C. App. 505, 503 S.E.2d 426, *disc. review denied*, 349 N.C. 372, 525 S.E.2d 188 (1998). "The trial court possesses and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition." *State v. Taylor*, 332 N.C. 372, 388, 420 S.E.2d 414, 423-24 (1992) (citing *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1980)). The identification of an item of evidence for the purpose of admission need not be unequivocal. *State v. Stinnett*, 129 N.C. App. 192, 497 S.E.2d 696, *disc. review denied*, 348 N.C. 508, 510 S.E.2d 669, *cert. denied*, 525 U.S. 1008, 142 L. Ed. 2d 436 (1998). Further, any weaknesses in the chain of custody relate only to the weight of the evidence and not to its admissibility. *State v. Sloan*, 316 N.C. 714, 343 S.E.2d 527 (1986). "If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition." McCormick's Handbook of the Law of Evidence § 212 (E. W. Cleary ed. 2d ed. 1972).

"As a general rule weapons may be admitted in evidence 'where there is evidence tending to show that they were used in the commission of a crime.' " *State v. Crowder*, 285 N.C. 42, 46, 203 S.E.2d 38, 41 (1974), *vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976) (quoting *State v. Wilson*, 280 N.C. 674, 678, 187 S.E.2d 22, 24 (1972)). In *Crowder*, the defendant argued that a pistol was improperly admitted since it was never identified as the murder weapon. The evidence showed that (1) a police officer found the pistol offered into evidence in a parking lot, four to six parking spaces from where the victim was shot, about one and a half hours later; (2) the parking lot was not searched right away due to crowd control problems; (3) an eyewitness testified that he heard defendant say he had "a .38" just before he shot the victim, and that the pistol offered in evidence resembled the gun he saw the defendant use; and (4) another witness said that she had seen defendant with a pistol which looked like the one offered in evidence within a week or two prior to the killing. The Supreme Court held this evidence sufficient to establish a relevant connection between the pistol and the criminal acts charged, and thus the gun was properly admitted. *Id.* at 47, 203 S.E.2d at 42.

In the present case, T.H.A. testified that the pistol offered into evidence was similar in appearance to the pistol defendant pointed at her on the morning in question. Officer Messenger testified that he saw Sukari Nettles with a .38 pistol in his hand at the mall, that he saw Nettles throw the pistol under a dumpster while fleeing, that Nettles told him that he had thrown the pistol under the dumpster, and that he later retrieved a .38 pistol from under the dumpster. Officer Messenger also testified defendant admitted to him that he had a .38 pistol throughout the incident with T.H.A. and further admitted that he had given the pistol to Nettles. We conclude the evidence was sufficient to show the requisite connection between State's Exhibit 10 and the commission of the charged offenses and the trial court did not abuse its discretion in admitting the pistol into evidence.

IV.

Defendant next argues that the trial court erred in denying his motion to dismiss at the close of all the evidence and in denying his motion for appropriate relief made after the verdicts, because there was insufficient evidence to convict him of all the charges. Defendant presents several issues for our consideration.

A.

[4] First, defendant asserts that the confinement, restraint and removal necessary to convict him of kidnapping were inherent in the commission of the robbery with a dangerous weapon. Therefore, he asserts that he cannot be convicted of both the robbery and the kidnapping for the purpose of committing that felony on the basis of the same confinement, restraint and removal.

Defendant is correct that "[i]f the defendant is convicted of other crimes for actions committed against the kidnapped victim, these same actions cannot be used to satisfy . . . [an] element of the kidnapping conviction to elevate the conviction to first degree." *State v. Stinson*, 127 N.C. App. 252, 257, 489 S.E.2d 182, 185 (1997) (citing *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986)).

Kidnapping is defined in relevant part as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (2) facilitating the commission of any felony or facilitating flight of any person following the commission of a felony.

N.C. Gen. Stat. § 14-39 (1999). Our Supreme Court has noted, in *State v. Irwin*, 304 N.C. 93, 102, 282 S.E.2d 439, 446 (1981), "it was not the legislature's intent in enacting G.S. 14-39(a) to make a restraint which was an inherent, inevitable element of another felony, such as armed robbery or rape, a distinct offense of kidnapping thus permitting conviction and punishment for both crimes." On the facts before that Court, they held that the defendant's forcing the victim at knife point to the back of the store during the attempted robbery was an inherent and integral part of the attempted armed robbery, and was insufficient to support a conviction for a separate kidnapping offense. *Id.*

"The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping 'exposed [the victim] to greater danger than that inherent in the armed robbery itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.' " *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d

555, 561 (1992) (citations omitted). In *Pigott*, evidence showed that defendant first threatened the victim with a gun and then bound his hands. After searching the apartment for money, the defendant came back and bound the victim's hands to his feet and shot the victim in the head. He then continued to search for money. The Court held that "all the restraint necessary and inherent to the armed robbery was exercised by threatening the victim with the gun," so that when defendant bound the victim's hands and feet, he exposed him to greater danger than that inherent in the robbery, and such additional restraint supported the element of restraint necessary for the kidnapping charge. *Id.*

Similarly, in the present case, defendant forced his way into, and took control of, T.H.A.'s car by threatening her with a pistol, completing the force necessary to commit the robbery. By further restraining her in the car and driving her to an isolated park, he exposed her to greater danger than that inherent in the robbery. Such additional restraint and removal is sufficient to support the element of restraint necessary for his conviction of the separate crime of kidnapping.

B.

[5] Defendant next asserts that he cannot be convicted of robbery because there was no evidence that he intended to permanently deprive T.H.A. of her car. When considering a motion to dismiss for insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of defendant being the perpetrator. *State v. Bond*, 345 N.C. 1, 478 S.E.2d 163 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). The court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *Id.*

Robbery is defined as " 'the taking with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation.' " *State v. Lunsford*, 229 N.C. 229, 231, 49 S.E.2d 410, 412 (1948) (quoting Justine Miller, *Handbook of Criminal Law* § 123 (1934)). In the present case, considering the evidence in the light most favorable to the State, a rational trier of fact could find that defendant, by forcing his way into the victim's car at gunpoint, driving the car to another location, and subsequently forcing the victim out of her car and driving away in it, intended to permanently deprive the victim of her car.

The fact that defendant later abandoned the car a short distance away is not dispositive of the intent issue.

> When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one take's it with intent to steal (animus furandi).

State v. Smith, 268 N.C. 167, 173, 150 S.E.2d 194, 200 (1966). " '[An] intent to deprive the owner of his property permanently, or an intent to deal with another's property unlawfully in such a manner as to create an obviously unreasonable risk of permanent deprivation, [is] all that is required to constitute the *animus furandi*—or intent to steal.' " Black's Law Dictionary, at p. 87 (7th ed. 1999) (citations omitted). We find no merit to defendant's argument that there is insufficient evidence to establish the element of intent to permanently deprive T.H.A. of her car; there was sufficient evidence to sustain his conviction of robbery with a dangerous weapon.

C.

[6] Defendant also contends there is insufficient evidence to convict him of the two counts of sexual offense and attempted first degree rape because the events could not have happened as the victim related them. Defendant argues that there was only a fifteen minute lapse between the time that the victim was seen leaving the grocery store on the surveillance tape and the time police records show the call came in reporting the incident. As we have previously stated, it is well settled that

> [w]hen measuring the sufficiency of the evidence, direct or circumstantial, competent or incompetent, the evidence must be considered in the light most favorable to the State. The State must be given the benefit of every reasonable inference to be drawn from the evidence and any contradiction in the evidence are to be resolved in favor of the State.

State v. Bell, 338 N.C. 363, 388, 450 S.E.2d 710, 724 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995). Given T.H.A.'s testimony, the DNA evidence and defendant's own testimony, there was substantial evidence to support defendant's conviction of attempted rape and each of the sexual offense charges.

V.

[7] Finally, defendant argues that he should have been granted a mistrial due to grossly improper remarks by the prosecutor during closing arguments. The arguments were not recorded, but the trial court made findings that during the closing arguments, the prosecutor approached the defense table and, in a loud voice, shouted questions in the direction of defense counsel, apparently in response to an argument advanced by defense counsel in his summation, questioning the victim's actions after the events. The prosecutor shouted rhetorical questions such as "Wouldn't you have wanted to smoke a cigarette, too?", and "How would you like to have to perform oral sex?", while facing in the direction of defense counsel. At the time, the prosecutor was also brandishing the pistol, which had been introduced into evidence, and was apparently agitated. No objection was made to the argument, but the trial court *ex mero motu* instructed the prosecutor to direct his argument to the jury. The following morning, prior to the jury instructions, defense counsel moved for a mistrial. After hearing the positions of both counsel, the trial court determined that while the argument was inappropriate, the case had been hotly contested and, under all the circumstances, defendant had not been prejudiced by the argument. The motion for mistrial was denied, but the trial court instructed the jury to disregard the argument. Defendant assigns error.

Though counsel are permitted wide latitude in the scope of their jury argument, our Supreme Court has observed in *State v. Holmes*, 296 N.C. 47, 50, 249 S.E.2d 380, 382 (1978) that it is a prosecutor's duty to the State which he represents and to the court as its officer "to exercise proper restraint so as to avoid misconduct, unfair methods, or overzealous partisanship which would result in taking unfair advantage of an accused."

> The conduct of a trial and the prevention of unfair tactics by all connected with the trial must be left in a large measure to the discretion of the trial judge, and it is the duty of the trial judge to intervene when remarks of counsel are not warranted by the evidence and are calculated to prejudice or mislead the jury (citations omitted).

Id. In the present case, though no objection was made to the prosecutor's improper argument, the trial court promptly intervened and admonished counsel to address his remarks to the jury rather than

defense counsel. Thereafter, the court instructed the jury to disregard the improper argument.

Where no objection is made to a prosecutor's improper argument, appellate review is limited to the question of whether the improprieties were so gross as to require the trial judge to intervene *ex mero motu*, as the trial judge did in this case. *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). A curative instruction to the jury to disregard the improper argument ordinarily cures the impropriety. *State v. Rupard*, 299 N.C. 515, 263 S.E.2d 554 (1980).

Having intervened to stop the improper argument, the decision to grant or deny a defendant's subsequent motion for mistrial was vested in the trial court's sound discretion. *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991). " 'A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict.' " *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990) (quoting *State v. Laws*, 325 N.C. 81, 105, 381 S.E.2d 609, 623 (1989)); *see* N.C. Gen. Stat. § 15A-1061 (1999). Consequently, a trial court's decision concerning a motion for mistrial will not be disturbed on appeal unless there is a clear showing that the trial court abused its discretion. *Warren*, *supra*.

In this case, the trial judge who heard the argument and knew the atmosphere of the trial, carefully considered the circumstances before concluding "the Court does not feel that the defendant was prejudiced by the argument; that he's not been denied a fair trial." We cannot say that the improper argument was so grossly prejudicial on its face as to entitle defendant to a mistrial as a matter of law, or that the trial judge's denial of the motion was not the result of a reasoned decision, especially in light of the curative instructions given the jury. Therefore, we find no abuse of discretion and no error in the denial of defendant's motion for mistrial.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges WYNN and McGEE concur.

PEACOCK v. SHINN

[139 N.C. App. 487 (2000)]

EDWIN B. PEACOCK, JR., PLAINTIFF, FOR THE BENEFIT OF THE TAXPAYERS OF THE CITY OF CHARLOTTE v. GEORGE SHINN, INDIVIDUALLY; AND GEORGE SHINN SPORTS OF FLORIDA, INC., CHARLOTTE HORNETS NBA LIMITED PARTNERSHIP, SHINN ENTERPRISES, INCORPORATED; AND, CITY OF CHARLOTTE; AND, AUDITORIUM-COLISEUM-CONVENTION CENTER AUTHORITY OF THE CITY OF CHARLOTTE, DEFENDANTS

No. COA99-975

(Filed 15 August 2000)

1. Constitutional Law— standing—taxpayer action—Charlotte Hornets basketball team

Plaintiff had standing as a taxpayer to maintain a public interest taxpayer action against the City of Charlotte, George Shinn, and the Charlotte Hornets arising from the financial agreements for the construction of the Charlotte Coliseum and the use of the Coliseum by the Hornets where plaintiff alleged that he was a resident and taxpayer of Charlotte and attached documentation of extended correspondence which established that neither the City nor the Coliseum Authority intended to take action to recoup allegedly unlawful payments made pursuant to the agreements.

2. Constitutional Law— North Carolina—payments not for a public purpose—Charlotte Hornets basketball team

The trial court properly granted defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) a taxpayer claim that financial arrangements between George Shinn, the general partner of the Charlotte Hornets NBA Limited Partnership, and the Coliseum Authority for the City of Charlotte for use of the Charlotte Coliseum violated Article V, § 2 of the North Carolina Constitution in that payments to Shinn were not for a public purpose. The erection, maintenance, and operation of a public auditorium/coliseum, while not a necessary expense, has long been considered to be for a public purpose and the agreements here reveal a primary public purpose of economic development. The Coliseum Authority has discretion in the manner of implementation where the Authority's primary purpose is for the public benefit, despite an incidental private benefit.

3. Constitutional Law— North Carolina—separate emoluments and privileges—Charlotte Hornets basketball team

The trial court properly granted an N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss a taxpayer claim that payments from

the City of Charlotte's Coliseum Authority to George Shinn, the general partner of the Charlotte Hornets NBA Limited Partnership, violated the prohibition in Article I, § 32 of the North Carolina Constitution on exclusive emoluments or privileges. For purposes of determining whether a benefit has been afforded in violation of the separate emoluments or privileges prohibition, a court must determine whether the benefit was given in consideration of public services, intended to promote the general public welfare, or whether the benefit was given for a private purpose benefitting an individual or select group. The purpose of the agreements under which these payments were made is to promote the public benefit by means of optimum use of the Coliseum.

4. Cities and Towns— agreements between coliseum and professional basketball team—Local Government Bond Act— operating expenses

The trial court properly granted a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of a claim that payments from the City of Charlotte Coliseum Authority to the general partner of the Charlotte Hornets NBA Limited Partnership violated the priority of payments provision of the Local Government Bond Act, N.C.G.S. § 159-47. Under the statute, "operating expenses" are appropriately paid first from the pool of Coliseum revenue and the payment of money to a third party under an agreement to secure the performance of events at the Coliseum is encompassed by the plain and ordinary meaning of "operating expenses." Whether the amounts are reasonable is not before the Court.

Appeal by plaintiff from order entered 25 May 1999 by Judge James E. Lanning in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 April 2000.

Edwin B. Peacock, Jr., pro se, for plaintiff-appellant.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr., and John H. Carmichael, for defendant-appellees George Shinn, individually, George Shinn Sports of Florida, Inc., Charlotte Hornets NBA Limited Partnership and Shinn Enterprises Incorporated.

Assistant City Attorney Robert E. Hagemann, for defendant-appellee City of Charlotte.

Grier & Furr, P.A., by Joseph W. Grier, Jr., and K. Lane Klotzberger, for defendant-appellee Auditorium-Coliseum-Convention Center Authority.

MARTIN, Judge.

Plaintiff Edwin B. Peacock, Jr., ("plaintiff"), a resident and taxpayer of the City of Charlotte, North Carolina, brought this action as a public interest taxpayer action for the benefit of all citizens and taxpayers of Charlotte. Briefly summarized, plaintiff alleges as follows:

In 1985, the City of Charlotte issued general obligation bonds to finance the construction of the Charlotte Coliseum. During the period beginning in March 1987 through December 1991, various agreements were entered into between the Auditorium-Coliseum-Convention Center Authority (the "Authority") for the City of Charlotte (the "City") and George Shinn ("Shinn") and George Shinn Sports, Inc., as general partner of the Charlotte Hornets NBA Limited Partnership ("Hornets") concerning the Hornet's use of the facility. On 6 November 1995, defendants George Shinn, George Shinn Sports of Florida, Inc., and Charlotte Hornets NBA Limited Partnership, (hereinafter collectively "the Shinn defendants") entered into a New Basketball Agreement (the "1995 Agreement") with the Authority for use of the Charlotte Coliseum for Hornets home basketball games. The Agreement required the Authority to pay the Shinn defendants 50% of the Coliseum parking, food, and beverage profits for Hornets home games. Pursuant to the Agreement, and with the City's consent, the Authority paid the Shinn defendants a total of $4,103,157.00 for Coliseum parking, food, and beverage profits for the time period 6 November 1995 through 30 June 1998.

The 1995 Agreement was amended on 13 April 1998 by an additional agreement (the "1998 Amending Agreement"), entered into between the Authority, George Shinn and Shinn Enterprises, Inc., as general partner of the Charlotte Hornets NBA Limited Partnership (hereinafter included within "the Shinn defendants") which requires, *inter alia*, the Authority to pay the Shinn defendants 20% of the first $2,000,000.00 of Coliseum profits, and 80% of the profits over this amount (the "Excess Funds"), regardless of whether the profits result from a Hornets home game. The 1998 Amending Agreement further

provides the Shinn defendants with the naming rights to the Coliseum and the right to retain the first $400,000.00 of annual naming rights revenue.

Plaintiff alleged (1) certain sections of the 1995 Agreement and the 1998 Amending Agreement are in violation of the "public purpose" requirements of the North Carolina Constitution, (2) certain sections of the 1995 Agreement create exclusive or separate emoluments or privileges for the Shinn defendants without the benefit of public service in violation of the North Carolina Constitution, and (3) certain sections of the 1995 Agreement and 1998 Amending Agreement require diversion of funds in violation of the North Carolina Local Government Bond Act, G.S. § 159, *et seq.* Plaintiff seeks relief in the form of repayment of the $4,103,157.00, plus interest, which the Authority paid to the Shinn defendants prior to 30 June 1998; repayment of any unlawful payments, plus interest, which the Authority paid to the Shinn defendants after 30 June 1998; an order prohibiting the Authority from making any such unlawful future payments; and an order taxing costs to the Shinn defendants and requiring their payment of reasonable attorneys' fees to the City.

Plaintiff filed his original complaint, naming only the Shinn defendants, on 16 October 1998. On 15 December 1998 the Shinn defendants answered plaintiff's complaint and filed motions to dismiss pursuant to G.S. § 1A-1, Rules 12(b)(6) for failure to state a claim upon which relief may be granted and 12(b)(7) for failure to join as necessary parties the City and the Authority. Plaintiff amended his complaint on 12 March 1999 to join the City and the Authority as defendants. The Shinn defendants renewed their motions to dismiss on 13 April 1999 following plaintiff's amendment of the complaint, and filed an additional motion to dismiss the amended complaint pursuant to Rule 12(b)(6). On 9 April 1999 the City and Authority filed Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief may be granted, including the basis that plaintiff lacks standing to bring this action.

The trial court entered an order on 25 May 1999 granting all motions to dismiss pursuant to Rule 12(b)(6) for "the failure of the plaintiff to state a claim upon which relief may be granted as to all defendants." Plaintiff appeals.

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[1] Defendants asserted, in their motions to dismiss, that plaintiff lacks standing to maintain this action. A lack of standing is properly

challenged by a 12(b)(6) motion. *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 525 S.E.2d 441 (2000). The trial court's order granting defendants' Rule 12(b)(6) motions does not indicate whether standing was a grounds for dismissal and we must, therefore, address the issue of standing as subject matter jurisdiction exists only if a plaintiff has standing. Issues of subject matter jurisdiction may be raised at any time, including on appeal. *Union Grove Milling and Manufacturing Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 478 (citations omitted), *affirmed*, 335 N.C. 165, 436 S.E.2d 131 (1993).

It is well-established that " 'a taxpayer [may] bring a taxpayer's action on behalf of a public agency or political subdivision for the protection or recovery of the money or property of the agency or subdivision in instances where the proper authorities neglect or refuse to act.' " *Guilford County Bd. of Comrs. v. Trogdon*, 124 N.C. App. 741, 747, 478 S.E.2d 643, 647 (1996), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 52 (1997) (quotation omitted). In order to bring such an action, a taxpayer must show that he is a taxpayer of the particular public agency or political subdivision, and either, "(1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the agency or subdivision; or (2) a demand on the proper authorities would be useless." *Id.* (citation omitted).

In the present case, plaintiff alleges that he is a resident and taxpayer of the City of Charlotte, and he has attached documentation of his extended correspondence with attorneys for both the City and the Authority, the State Treasurer, and the Special Deputy Attorney General to the North Carolina Local Government Commission. In such correspondence, plaintiff informed the City and the Authority of his belief that the 1995 Agreement and 1998 Amending Agreement are unlawful for the reasons plaintiff has alleged in this action, and that he intended to file a public interest taxpayer suit should the City and Authority not seek repayment of funds paid pursuant to the Agreements. Attorneys for both the City and the Authority responded to plaintiff, informing him that neither believed the Agreements to be unlawful, and the correspondence establishes that neither the City nor the Authority intended to take action to recoup allegedly unlawful payments made pursuant to the Agreements. We hold such allegations sufficient to establish plaintiff's standing as a taxpayer to maintain this action.

II.

Plaintiff's second, third, and fourth assignments of error allege that the trial court improperly dismissed each of his three substantive claims for relief for failure of the complaint and amended complaint to state any claim upon which relief may be granted. A motion to dismiss a complaint pursuant to G.S. § 1A-1, Rule 12(b)(6) challenges the legal sufficiency of the complaint, taking all of its factual allegations as true. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). A complaint cannot withstand a motion to dismiss where an insurmountable bar to recovery appears on its face. *Al-Hourani v. Ashley*, 126 N.C. App. 519, 521, 485 S.E.2d 887, 889 (1997) (citation omitted). "Such an insurmountable bar may consist of an absence of law to support a claim, an absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily defeats the claim." *Id.* (citation omitted).

A. "Public Purpose"

[2] In his first claim for relief, plaintiff alleges the provisions of the 1995 Agreement and 1998 Amending Agreement requiring the Authority to pay the Shinn defendants 50% of Coliseum parking, food, and beverage profits, as well as the "Excess Funds" and Hornets' yearly Coliseum "Marketing Expenses" violate article V, § 2 of the North Carolina Constitution in that such payments are not made for a "public purpose." Article V, § 2 provides, in relevant part, that state and local governments may only exercise the power of taxation for "public purposes" and may only "contract with and appropriate money to any person, association or corporation for the accomplishment of public purposes." N.C. Const. art. V, § 2(7).

In interpreting the "public purpose" language of this section, our Supreme Court has held that the two guiding principles for determining whether a municipality has acted with a public purpose are, (1) whether the action " 'involves a reasonable connection with the convenience and necessity of the particular municipality,' " and (2) whether the action "benefits the public generally, as opposed to special interests or persons." *Maready v. City of Winston-Salem*, 342 N.C. 708, 722, 467 S.E.2d 615, 624 (1996) (quotations omitted). "The determination of whether a particular function or activity constitutes a public purpose is a legal issue to be decided by the court." *Madison Cablevision Inc. v. City of Morganton*, 325 N.C. 634, 653, 386 S.E.2d 200, 211 (1989).

Whether an activity involves a reasonable connection to community needs may be evaluated "by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action." *Maready*, 342 N.C. at 722, 467 S.E.2d at 624. Our Supreme Court has recognized that cases addressing which activities should be classified as having a public purpose "demonstrate the expanding scope of the concept of 'public purpose' in a modern society which ' 'requires governmental operation of facilities which were once considered exclusively private enterprises . . . and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public.' ' " *Madison Cablevision Inc.*, 325 N.C. at 651, 386 S.E.2d at 210 (quotation omitted).

As early as 1925, our Supreme Court determined that "[t]he erection of a public auditorium, while it may not be a necessary expense, is to our minds undoubtedly a public purpose . . . ." *Adams v. City of Durham*, 189 N.C. 232, 126 S.E. 611, 612 (1925). Moreover, the acquisition, establishment *and operation* of auditoriums, playgrounds and recreation centers, while not necessary expenses, have been held to be, as a matter of law, public purposes. *City of Greensboro v. Smith*, 241 N.C. 363, 367, 85 S.E.2d 292, 295 (1955) (citations omitted) (emphasis added); *see also Madison Cablevision Inc.*, 325 N.C. at 651, 386 S.E.2d at 210 (governmental functions held to be for public purpose include "municipal ownership of facilities used for communication and recreation [including parks, auditoriums, libraries, and fairs] . . . ."); *Nash v. Town of Tarboro*, 227 N.C. 283, 287, 42 S.E.2d 209, 212 (1947) (listing expenditures which Supreme Court has held to be for public purpose as including market houses, municipal buildings, playgrounds, auditoriums, hospitals, railroads, fairs, and airports); *Henderson v. City of Wilmington*, 191 N.C. 269, 132 S.E. 25, 30 (1926).

Under the second prong of the public purpose guidelines, activities are considered constitutional so long as they *primarily* benefit the public and not a private party:

> 'It is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community.' *Briggs v. City of Raleigh*, 195 N.C. 223, 226, 141 S.E. 597, 599-600. Moreover, an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.

Maready, 342 N.C. at 724, 467 S.E.2d at 625; *see also Wood v. Commissioners of Oxford*, 97 N.C. 227, 231, 2 S.E. 653, 655 (1887). In holding that legislation authorizing local governments to make economic development incentive grants to private businesses did not violate article V, § 2, the *Maready* court noted that, "[w]hile private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental. It results from the local government's efforts to better serve the interests of its people." *Maready*, 342 N.C. at 725, 467 S.E.2d at 625-26.

Applying these principles to the present case, plaintiff has failed, as a matter of law, to state a claim for relief under N.C. Const. art. V, § 2. Plaintiff has incorporated both the 1995 Agreement and the 1998 Amending Agreement into his complaint, and we therefore consider them in determining whether they are for a public purpose. Both plaintiff's allegations and provisions of the agreements themselves establish that the agreements are for the City's operation of a public auditorium/coliseum. The precedent cited above establishes unequivocally that the erection, maintenance, and operation of such a facility, while not a necessary expense, has long been considered by our Supreme Court to be for a public purpose. Thus, on the face of plaintiff's complaint, the first prong of the guidelines for determining the agreements' constitutional validity is met.

As to the second prong, plaintiff alleges the challenged provisions of the 1995 Agreement and 1998 Amending Agreement were incorporated to subsidize the Shinn defendants, increase the Shinn defendants' own revenue, and make the Hornets a more competitive basketball team. Even taking such allegations as true, however, they are insufficient to state a claim under N.C. Const. art. V, § 2; the fact that a private individual benefits from a particular municipal transaction is insufficient to make out a claim under article V, § 2. *See Wood*, 97 N.C. at 231, 2 S.E. at 655. Rather, the test is whether the transaction will promote the welfare of the local government and results from the local government's efforts to better serve the interests of its people. *See Maready*, 342 N.C. at 724, 467 S.E.2d at 625.

In the present case, the 1998 Amending Agreement states that the "parties desire to promote the more efficient and profitable ownership, operation, and management of the Coliseum . . ." and that its purpose "is to establish a framework for an operating arrangement of the Coliseum to maximize the profitability and use of the Coliseum . . . ." The face of the 1995 Agreement likewise reveals a pur-

pose of profitable use of the Coliseum by means of renting the Coliseum "for the purpose of staging NBA basketball games . . . ." In short, the face of the agreements themselves reveal a primary public purpose of the City's economic development through use of the Coliseum by a successful, competitive home basketball team. "Economic development has long been recognized as a proper governmental function." *Maready*, 342 N.C. at 723, 467 S.E.2d at 624 (citation omitted). Here, as in *Maready*, a private party ultimately conducts activities which, while providing incidental private benefit, serve a primary public goal. Despite the Shinn defendants' benefit from the provisions of the agreements which plaintiff has singled out, where the Authority's primary purpose is for the public benefit, the Authority has discretion as to the manner of implementation.

The face of plaintiff's complaint, along with the incorporated agreements, when all allegations are taken as true, not only reveals an absence of facts to support a claim under N.C. Const. art. V, § 2, but also discloses facts which necessarily defeat the claim. The claim was properly dismissed. *See Al-Hourani*, 126 N.C. App. at 521, 485 S.E.2d at 889.

B. "Exclusive or separate emoluments or privileges"

[3] In his second claim for relief, plaintiff alleges that the provisions of Sections 11.1 and 11.2 (payment of parking profits) and Sections 13.1 and 13.2 (payment of food and beverage concession profits) of the 1995 Agreement requiring the Authority to pay the Shinn defendants 50% of Coliseum parking, food, and beverage profits violate the prohibition on exclusive or separate emoluments or privileges found in article I, § 32 of the North Carolina Constitution. Article I, § 32 provides that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

Much of the case law interpreting article I, § 32 addresses challenges to statutes providing exemptions or benefits to certain individuals or select groups. In addressing whether a particular statute violates article I, § 32, courts have applied a two-part test to the exemption or benefit: whether, (1) the exemption or benefit is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude that the granting of the exemption or benefit serves the public interest. *Crump v. Snead*, 134 N.C. App. 353, 357, 517 S.E.2d 384, 387, *disc. review denied*, 351 N.C. 101, 541 S.E.2d 143 (1999)

(quoting *Town of Emerald Isle v. State*, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987)).

Thus, in determining whether a benefit has been afforded in violation of article I, § 32, a court must determine whether the benefit was given in consideration of public services, intended to promote the general public welfare, or whether the benefit was given for a private purpose, benefitting an individual or select group. For the same reasons stated in part A of this opinion, we conclude that the purpose of the agreements, all provisions included, is to promote the public benefit by means of optimum use of the Coliseum. Thus, considering all of the allegations of the complaint, including the contents of the 1995 Agreement which is incorporated in its entirety, it is apparent as a matter of law that the Agreement, including the provisions contested by plaintiff, was intended to promote the public benefit and plaintiff's second claim must fail on its face, even though a benefit resulted, as well, to the Shinn defendants. Therefore, defendants' Rule 12(b)(6) motion to dismiss was properly allowed.

C. Local Government Bond Act

[4] Plaintiff's third claim for relief alleges Sections 11.1 and 11.2 (payments for parking profits) and Sections 13.1 and 13.2 (payments of food and beverage concession profits) of the 1995 Agreement and Section 3.3.3 (payments for Hornets "marketing expenses") of the 1998 Amending Agreement violate the Local Government Bond Act ("Bond Act"), G.S. § 159-43 to 159-79. Specifically, plaintiff argues that any payments made to the Shinn defendants pursuant to these provisions violate the priority of payments outlined in G.S. § 159-47, providing, *inter alia*, that,

> (a) The revenues of a utility or public service enterprise owned or leased by a unit of local government shall be applied in accordance with the following priorities:
>
> (1) First, to pay the operating, maintenance, and capital outlay expenses of the utility or enterprise.
>
> (2) Second, to pay when due the interest on and principal of outstanding bonds issued for capital projects that are or were a part of the utility or enterprise.
>
> (3) Third, for any other lawful purpose.

N.C. Gen. Stat. § 159-47 (1999).

Plaintiff's complaint and amended complaint allege that the Coliseum is a "public service enterprise" subject to the Bond Act; that the agreements at issue require the Authority to pay money to the Shinn defendants, and that the Authority has made such payments; that the required payments have been classified as "revenue sharing" in Authority monthly financial statements, auditors' reports, and annual proposed budgets; that general obligation bonds to construct and equip the Coliseum were issued by the City in 1985, were refunded in 1986, and again in 1992; and that these general obligation bonds are subject to the Bond Act.

Defendants argue, however, that payments made to the Shinn defendants under the agreements constitute "operating expenses" which, under G.S. § 159-47(a)(1), are appropriately paid first from the pool of Coliseum revenue. Defendants argue that such payments can only be characterized as "operating expenses" where the Authority must have freedom to enter into leases and performance contracts with prospective performers, such as the Hornets, in order to operate the Coliseum in the manner in which it was intended.

The phrase "operating expenses" has not been construed by the courts of this State within the context of the Bond Act. We must determine, applying the applicable canons of construction, whether "operating expenses" within the meaning of G.S. § 159-47(a)(1) was intended by the legislature to encompass money paid to a third party under an agreement to secure the performance of events at a Coliseum. *See State ex rel. Utilities Com'n v. Thornburg*, 325 N.C. 463, 475, 385 S.E.2d 451, 457 (1989) (where statutory scheme of utility regulation does not contain a definition of "reasonable operating expenses" within meaning of statute, interpretation of statute necessary to determine whether Commission exceeded authority in allowing recovery of certain costs as reasonable operating expense). The interpretation of statutory language is a matter of law, and thus, appropriately resolved upon a Rule 12(b)(6) motion. *See Taylor Home of Charlotte Inc. v. City of Charlotte*, 116 N.C. App. 188, 195, 447 S.E.2d 438, 443, *disc. review denied*, 338 N.C. 524, 453 S.E.2d 170 (1994).

The primary purpose of statutory interpretation is to give effect to the intent of the legislature, and "[w]here a statutory provision is clear and unambiguous, it must be interpreted in accordance with its plain and ordinary meaning." *Medical Mutual Ins. Co. of North Carolina v. Mauldin*, 137 N.C. App. 690, 696, 529 S.E.2d 697, 701 (2000) (citation omitted); *see also Patel v. Stone*, 138 N.C. App. 693,

531 S.E.2d 879 (2000) (citation omitted) (consulting dictionary for plain and ordinary meaning of statutory term, noting "[w]ords in the statute must be taken in their plain and ordinary meaning unless there is something in the statute requiring a different interpretation.").

In the present case, the legislature set forth the purpose of the Bond Act in G.S. § 159-43: "It is the intent of the General Assembly by enactment of this Article to prescribe a uniform system of limitations upon and procedures for the exercise by all units of local government in North Carolina of the power to borrow money secured by a pledge of the taxing power." N.C. Gen. Stat. § 159-43(b). Moreover, sections 6 and 7 of the 1987 Session Laws, c. 796, provided that,

> [t]his act shall be construed liberally to effectuate the legislative intent and the purposes as complete and independent authority for the performance of each and every act and thing authorized by this act, and all powers granted shall be broadly interpreted to effectuate the intent and purposes and not as a limitation of powers.

1987 N.C. Sess. Laws, c. 796.

With the backdrop of the legislature's intent to provide an appropriate framework for local government use of bonds, to be interpreted liberally and not as a limitation of powers, we turn to the plain meaning of "operating expenses." According to The American Heritage College Dictionary (3d. ed. 1997), the term "operating" means "to perform a function; work . . . to control the functioning of; run . . . to conduct the affairs of; manage. . . ." An "expense" is defined as "something spent to attain a goal or accomplish a purpose; an expenditure of money. . . ." Moreover, according to Black's Law Dictionary (7th ed. 1999), the phrase "operating expense" is defined as "[a]n expense incurred in running a business and producing output."

Given these definitions, it is apparent that the plain and ordinary meaning of the phrase "operating expenses" encompasses money paid to a third party under an agreement to secure the performance of events at the Coliseum. The Authority's duty to operate the Coliseum may certainly be classified as "controlling the functioning of" the Coliseum or "managing the affairs of" the Coliseum. The money paid to performers necessary to "attain this goal" or "accomplish this purpose" is clearly an "expense." Moreover,

the paying of money to secure performances in the Coliseum, which, indeed, is an integral part, if not the sole purpose of, such a facility, is "[a]n expense incurred in running" the Coliseum and "producing output" from the Coliseum, consistent with the ordinary meaning of the phrase "operating expense" as defined by Black's Law Dictionary.

Moreover, because the securing of performances for the Coliseum is a vital part of the functioning, operation, and profitability of the Coliseum, we do not construe the legislative intent of G.S. § 159-47 as requiring that the Authority pay the principal and interest on Coliseum bonds prior to having the authorization or power to take such steps as are necessary to attract performances and to generate profits from the Coliseum. *See State ex rel. Utilities Com'n v. Thornburg*, 325 N.C. at 477, 385 S.E.2d at 459 (where narrow construction of "operating expense" element of regulatory act would frustrate purposes of promoting adequate utility services, term should be liberally interpreted and applied). Therefore, construing the phrase "operating expenses" liberally in order to effectuate legislative intent, we hold, as a matter of law, that the money paid to the Shinn defendants under the agreements falls within the ordinary meaning of the phrase "operating expenses." Whether the amounts paid to the Shinn defendants under the agreements are, in fact, reasonable is not an issue properly before us; the legislature did not include the term "reasonable" to modify "operating, maintenance, and capital outlay expenses" as used in the statute. Thus, we conclude only that such payments fall within the classification of the operating expenses of the Coliseum.

The order of the trial court dismissing plaintiff's claims pursuant to Rule 12(b)(6) is hereby affirmed.

Affirmed.

Judges LEWIS and WALKER concur.

EARL NEALY, PLAINTIFF v. ZEB GREEN, DEFENDANT

No. COA99-96

(Filed 15 August 2000)

Negligence— pedestrian-motor vehicle accident—last clear chance—sufficiency of evidence

The trial court erred by failing to submit last clear chance to the jury in an action arising from a pedestrian being struck by a vehicle. The first element of last clear chance is satisfied by evidence that plaintiff placed himself in a dangerous position from which he could not extricate himself by walking with his back to traffic and not turning when defendant's vehicle approached; the second element was satisfied in that defendant either actually observed plaintiff's peril or owed plaintiff a duty to discover his peril; the jury might reasonably infer from the circumstances the third element, that defendant had adequate time to avoid the accident had he been maintaining a proper lookout, although some contradictory evidence was introduced; and the jury might also reasonably infer that defendant did not slow down or apply his brakes until after the impact and that the accident might have been avoided by either action.

Appeal by plaintiff from judgment entered 21 September 1998 by Judge Wiley F. Bowen in Columbus County Superior Court. Heard in the Court of Appeals 15 November 1999.

T. Craig Wright for plaintiff-appellant.

Johnson & Lambeth, by Maynard M. Brown, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals judgment entered upon a jury verdict finding defendant negligent and plaintiff contributorily negligent. Plaintiff argues the trial court erred in not submitting the issue of last clear chance to the jury. We agree and award plaintiff a new trial.

Pertinent facts and procedural history include the following: At approximately 12:45 a.m. on 6 February 1993, plaintiff Earl Nealy and two companions left the residence of Mike Nealy (Mike), plaintiff's brother, intending to walk the approximately seven hundred yard distance to plaintiff's home along Rural Paved Road 1300

(RPR 1300) in Columbus County. Both houses were located on the south side of RPR 1300, and plaintiff was walking along the south side of the roadway with his back to south-bound traffic. Plaintiff's wife, Deborah Nealy (Deborah), left Mike's residence in her automobile shortly after plaintiff, passed him on the road, and pulled into their driveway.

At the same time, defendant Zeb Green was operating a pick-up truck in a southerly direction on RPR 1300. Just after Deborah had entered the driveway and as defendant passed plaintiff, the side mirror on defendant's truck struck plaintiff in the head, rendering him unconscious.

Plaintiff timely filed suit, alleging defendant's negligence was the proximate cause of plaintiff's injuries, including "head injuries and lacerations in the right occipital region and . . . abrasions to the right temple." Defendant answered alleging, *inter alia*, that plaintiff was contributorily negligent in that he "walked with his back toward oncoming traffic" and "walked . . . in the lane of travel of the [d]efendant's vehicle." In his subsequent reply, plaintiff asserted defendant had the last clear chance to avoid the accident.

Trial commenced 8 September 1998 and the following relevant evidence was elicited: Plaintiff testified he walked "on the shoulder, on the grass" at all times and not on the surface of the road as alleged by defendant. He further stated there were lights along each yard between his residence and that of his brother, and that the area where he was walking thus was well illuminated. After Deborah had driven by, plaintiff saw vehicles approaching traveling north on RPR 1300, and then heard "a truck coming, or a car" from behind him. Plaintiff did not hear a horn and did not look back or move further over onto the shoulder.

In her testimony, Deborah confirmed that lights were in each yard "almost at the road," noted the weather was "clear" on the night in question, and stated she was able to see persons and objects while driving along the road at the point where plaintiff was struck. Deborah specifically testified she saw plaintiff from her vehicle and that he was walking on the grass as she passed.

Plaintiff's twenty-one year old son, observing his father from the doorway of their home, related that plaintiff was walking on the grass, that there were no obstructions on the roadway or "anything blocking anybody's view coming up and down that road," and that he

saw defendant's truck go "off the road a little bit, on the grass," before it struck plaintiff.

In a video-taped deposition, defendant's wife, Estell Green (Estell), testified she was a passenger in defendant's truck on the night of the accident. According to Estell, the weather was "fair" and the road straight in the area where plaintiff was struck, and there was nothing "on the side of the road to keep [her] from seeing." Defendant's vehicle was "on the road" when the accident occurred, she continued, and he was driving below the posted speed limit of fifty-five miles per hour at "between 45 and 50." Estell also testified she saw no lights along the road.

Estell recounted the accident as follows:

> A: All I remember is seeing those two trucks coming down the road just before the accident, but they were two trucks coming from towards Tabor City and we were going [the other] way.
>
> . . . .
>
> Q [Plaintiff's attorney]: And you say you saw [plaintiff]?
>
> A Yeah. I saw [plaintiff] when he was right at the truck. Right about where the antenna on the truck was at, he was right close to there. And after I saw him right at the truck, that's when the mirror hit him.

Defendant's testimony generally corroborated that of his wife regarding the weather and road conditions and his speed at the time of the accident. Defendant added he had driven RPR 1300 "[m]any times," and that it was a narrow "farm to market road." He recounted his observations as follows:

> A: Well, I was going along the—the road and I was meeting them trucks. I dimmed my lights. And as soon as them trucks passed I seen [plaintiff] . . . approximately about ten foot, enough to where I could whip the truck. I cut it to the left and just about time I cut it to the left, the mirror hit [plaintiff].
>
> Q [Defendant's attorney]: . . . The two trucks coming the other way passed by you; is that correct?
>
> A: Yes, sir.
>
> Q: All right. And that's when you first saw the [plaintiff]?
>
> A: Well, the trucks had passed.

Q: Right.

A: And then, after I got to—Well, I seen him . . . just a split second. If I hadn't have seen [him] I'd have hit [him] with the front of my truck.

Q: Okay. Now, where was [plaintiff] in relation to the road?

A: He was walking on that white line. On—

Q: All right. And could you see his face?

A: No, sir.

. . . .

Q [Plaintiff's attorney]: When you were meeting the trucks, did that affect your ability to see at all?

A: No, sir.

. . . .

Q: . . . But you could still plainly see the lane you were in, even on up the road?

A: [Yes].

Q: And yet you didn't see anybody there until you were right on him?

A: No I didn't—I didn't see him—I didn't—did not see [plaintiff] till I was in about ten foot of [him].

. . . .

Q: Do you remember seeing any other vehicles coming that way after [the two trucks passed]?

A: Well, after the accident they—they kept coming some along, you know. After—When I was sitting in my truck, had got—they put me in my truck. And they—they had met sitting in the middle of the road in the truck, and all the traffic was coming down there and everything. . . .

Q: Yes, sir. But right after the accident you don't—see no vehicles coming by about the same time you collided with [plaintiff]?

A: No, sir.

. . . .

> Q: When you whipped your truck, did you—and I know you say you were trying to avoid [plaintiff], when you whipped your truck did you go into the other lane all the way, halfway, what?
>
> A: Well, I went into the other lane some, yeah.

Defendant also stated he traveled "fifty or sixty" feet before coming to a stop following impact.

Following presentation of the evidence, plaintiff requested that the issue of last clear chance be submitted to the jury. After hearing argument from both parties, the trial court denied the request.

The jury subsequently returned a verdict finding plaintiff had been "injured by the negligence of the defendant," but that plaintiff "by his own negligence, contribute[d] to his injuries," thereby precluding any recovery by plaintiff. Plaintiff timely appealed.

The issue of last clear chance

> [m]ust be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine.

Bowden v. Bell, 116 N.C. App. 64, 68, 446 S.E.2d 816, 819 (1994). Failure to submit the issue when proper is reversible error requiring a new trial. *Hales v. Thompson*, 111 N.C. App. 350, 356, 432 S.E.2d 388, 392 (1993). Further,

> [w]hether the evidence is sufficient to require submission of the case to the jury on the last clear chance doctrine depends on the facts of the individual case.

Wray v. Hughes, 44 N.C. App. 678, 682, 262 S.E.2d 307, 310, *disc. review denied*, 300 N.C. 203, 269 S.E.2d 628 (1980).

When, as in the instant case,

> an injured pedestrian who has been guilty of contributory negligence invokes the last clear chance . . . doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discov-

> ered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

Wade v. Sausage Co., 239 N.C. 524, 525, 80 S.E.2d 150, 151 (1954); *accord*, *Vancamp v. Burgner*, 328 N.C. 495, 498, 402 S.E.2d 375, 376-77 (1991) (quoting *Wade*). We address in turn the evidence *sub judice* pertinent to each of the four elements.

> The first element is satisfied by a showing that plaintiff's
>
> prior contributory negligence ha[d] placed [him] in a position from which [he was] powerless to extricate [him]self.
>
> . . . .
>
> The situation is not one of true helplessness, as the injured party is in a position to escape. Rather, the negligence consists of failure to pay attention to one's surroundings and discover his own peril.

Williams v. Odell, 90 N.C. App. 699, 704, 370 S.E.2d 62, 66, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 557 (1988).

Cases discussing this first element have consistently distinguished between situations in which the injured pedestrian was facing oncoming traffic and those in which the pedestrian was not. Accordingly, an instruction on last clear chance was held not warranted when a pedestrian was facing traffic and, "by the exercise of reasonable care, [could have] extricated herself from the position of peril in which she had negligently placed herself." *Id.* (pedestrian standing at rear of her vehicle facing traffic when accident occurred and had witnessed three vehicles "nearly collide with her vehicle," but failed to move to shoulder of road); *see also Clodfelter v. Carroll*, 261 N.C. 630, 635, 135 S.E.2d 636, 639 (1964) (pedestrian walking with one foot on road, one foot on shoulder, facing traffic, and observed defendant's vehicle approach prior to impact).

On the other hand, evidence tending to show the injured pedestrian either was not facing oncoming traffic or did not see the

approaching vehicle has been found sufficient to satisfy the first element, our courts reasoning that the pedestrian who did not apprehend imminent danger "could not reasonably have been expected to act to avoid injury." *Watson v. White*, 309 N.C. 498, 505, 308 S.E.2d 268, 272 (1983) (pedestrian who did not see defendant's vehicle approach injured while crossing highway); *see also Williams v. Spell*, 51 N.C. App. 134, 136, 275 S.E.2d 282, 284 (1981) (pedestrian walking with back to traffic "placed himself in a position of helpless peril").

In the present case, the pleadings as well as the parties' undisputed testimony indicated plaintiff was walking with his back to traffic and did not turn when defendant's vehicle approached. Evidence sufficient to support a reasonable inference, *see Bowden*, 116 N.C. App. at 68, 446 S.E.2d at 819, was thus presented that plaintiff, by failing to "pay attention to [his] surroundings and discover his own peril," *Odell*, 90 N.C. App. at 704, 370 S.E.2d at 66, thereby placed himself in a dangerous position from which he could not extricate himself. Therefore, the first requisite element for a last clear chance jury instruction was satisfied. *See Wade*, 239 N.C. at 525, 80 S.E.2d at 151.

Regarding the second element, *i.e.*, discovery by the defendant of the plaintiff's perilous position before occurrence of the injury, *see id.*, the testimony of defendant reflected he noticed plaintiff prior to impact, that plaintiff was standing "on th[e] white line" of the road, and that defendant could not see plaintiff's face. Viewed in the light most favorable to plaintiff, this evidence was adequate to support a reasonable inference, *Bowden*, 116 N.C. App. at 68, 446 S.E.2d at 819, that defendant knew plaintiff was walking on the road with his back towards traffic, that plaintiff could not see defendant, and that plaintiff thus was in a position of peril.

Further, it is well established that

> a motorist upon the highway . . . owe[s] a duty to all other persons using the highway, including its shoulders, to maintain a lookout in the direction in which the motorist is traveling.

Exum v. Boyles, 272 N.C. 567, 576, 158 S.E.2d 845, 852-53 (1968). Accordingly, even if not actually recognizing plaintiff's peril, defendant owed plaintiff a duty to maintain a proper lookout whereby, through "the exercise of reasonable care, [he] could have discovered plaintiff's perilous position," *Watson*, 309 N.C. at 505, 308 S.E.2d at

272-73 (if defendant did not actually know of plaintiff's peril, doctrine of last clear chance imposes liability only if defendant owed a duty to plaintiff to maintain lookout), had such lookout been maintained, *see id.* We conclude that the evidence considered in the light most favorable to plaintiff was sufficient to support a reasonable inference, *see Bowden*, 116 N.C. App. at 68, 446 S.E.2d at 819, that defendant, had he maintained a proper lookout, could in the exercise of reasonable care have "discovered plaintiff's perilous position," *Watson*, 309 N.C. at 505, 308 S.E.2d at 273.

Therefore, under either mode of reasoning—that defendant actually observed plaintiff's perilous position or owed a duty to plaintiff to discover the latter's position of peril—the second element of the *Wade* test was satisfied. *See Wade*, 239 N.C. at 525, 80 S.E.2d at 151.

To meet the third element, evidence must be presented tending to show

> that defendant had the time and the means to avoid the injury to the plaintiff by the exercise of reasonable care after [he] discovered or should have discovered plaintiff's perilous position.

Watson, 309 N.C. at 505-06, 308 S.E.2d at 273.

As to this issue, the record reflects evidence that plaintiff was walking next to a narrow road with his back to traffic, and at the time of impact had traveled two thousand feet from his brother's residence to within approximately one hundred feet of his own home. The roadway was straight over the entire distance and the area was well lighted. Further, defendant had driven RPR 1300 "many times," and on this occasion was traveling at 45 mph. There were no obstructions in the road, the weather was clear, and although defendant had just passed two oncoming trucks, this did not affect his ability to see "on up the road." Defendant did not actually see plaintiff until traveling within ten feet of him and pulled only slightly to his left "into the other lane some" in an attempt to avoid striking plaintiff, even though that lane was clear and no oncoming traffic was approaching. Finally, defendant's vehicle traveled fifty or sixty feet before coming to a stop in the middle of the road.

Considered in the light most favorable to plaintiff, the evidence was adequate to raise a reasonable inference that defendant might have avoided the accident. *See Bowden*, 116 N.C. App. at 68, 446

S.E.2d at 819. Defendant pulled into the left lane only slightly notwithstanding that such lane was free of oncoming traffic and defendant could safely have proceeded farther. *See Thacker v. Harris*, 22 N.C. App. 103, 108, 205 S.E.2d 744, 747 (1974) (pedestrian, walking with back to traffic, struck from behind by defendant; as there was no approaching traffic, defendant had "opportunity to turn her car toward the center or left-hand portion of the street" so as to avoid striking pedestrian); *see also Spell*, 51 N.C. App. at 136, 275 S.E.2d at 284 (defendant had means to avoid hitting pedestrian where evidence indicated lack of oncoming traffic and defendant conceded he could have moved had he seen plaintiff).

Further, defendant's testimony—that he slowed down to forty-five miles per hour upon meeting the two trucks, but upon noticing plaintiff after the trucks had passed, he simply "whipped the truck" to the left—contained no assertion he decreased his speed or applied his brakes upon seeing plaintiff:

> Q [Defendant's attorney]: And when you saw [plaintiff], what did you do, sir?
>
> A: I whipped the truck.
>
> . . . .
>
> Q: All right. What did you do after the accident?
>
> A: Well, my wife jumped out of the—the—
>
> Q: Well, did you bring your vehicle to a stop first?
>
> A: Yes, sir.

From the foregoing testimony, viewed in the light most favorable to plaintiff, a jury might reasonably infer that defendant did not slow down or apply his brakes until after impact with plaintiff, and that the accident might have been avoided had he attempted either. *See Bowden*, 116 N.C. App. at 68, 446 S.E.2d at 819.

Although a closer question, a jury might also reasonably infer from the instant circumstances, *see id.*, that defendant had adequate time to avoid the accident. Defendant's recollection in his testimony was that he saw plaintiff within ten feet of his vehicle just after the trucks had passed and that he immediately swerved to the left, but nonetheless struck plaintiff with his side mirror. At first blush, it might appear defendant was unable to act to avoid the accident.

However, defendant owed a duty to plaintiff to maintain a proper lookout. *Watson*, 309 N.C. at 505, 308 S.E.2d at 273. Although passed by two trucks just prior to the accident, defendant specifically testified that neither his visibility nor his vision were affected and that he was able to see "on up the road." However, defendant failed to see plaintiff until a "split second" before impact.

Given defendant's duty to maintain a proper lookout and the circumstances that the area was well-lighted, the weather was clear, the road was straight, there were no obstructions in the road, and that defendant himself testified that his visibility and vision had not been affected by the passing of two trucks traveling in the opposite direction, a jury might reasonably conclude

> that defendant had the time . . . to avoid the injury to the plaintiff by the exercise of reasonable care after [he] . . . *should have discovered* plaintiff's perilous position.

Watson, 309 N.C. at 505-06, 308 S.E.2d at 273 (emphasis added); *see also Harrison v. Lewis*, 15 N.C. App. 26, 33-34, 189 S.E.2d 662, 666 (1972) ("had the defendant maintained [a proper] lookout, he could have observed the plaintiff" in time to avoid hitting him).

Further, there was no evidence defendant attempted to slow his vehicle or apply the brakes until after plaintiff had been struck. Had defendant been maintaining a proper lookout and seen plaintiff prior to a "split second" before impact, a jury might reasonably infer he could have attempted to slow his vehicle and avoided injury to plaintiff. *See id.*, and *Bowden*, 116 N.C. App. at 68, 446 S.E.2d at 819.

We note that our courts have generally found evidence on the third element lacking in instances involving a sudden movement by the pedestrian thereby placing himself in harm's way, *see Grogan v. Miller Brewing Co.*, 72 N.C. App. 620, 624, 325 S.E.2d 9, 11 (defendant had no time to avoid accident as pedestrian-plaintiff suddenly darted out into path of forklift), *disc. review denied*, 313 N.C. 600, 330 S.E.2d 609 (1985); *Hughes v. Gragg*, 62 N.C. App. 116, 118, 302 S.E.2d 304, 305-06 (1983) (pedestrian "jumped in front of [defendant's] car" immediately prior to impact), or in which the motorist otherwise lacked sufficient opportunity to react, *see Watson*, 309 N.C. at 506, 308 S.E.2d at 273 (defendant lacked time to avoid accident which occurred immediately after defendant rounded curve). In the instant case, however, no evidence suggested plaintiff had moved suddenly

or that road conditions or any other factor in any way limited defendant's reaction time.

Two prior decisions support our view of the present case. In *Bowden*, 116 N.C. App. 64, 446 S.E.2d 816, the pedestrian-plaintiff was crossing a street with his dog when he was struck by the automobile of driver-defendant. Other facts surrounding the accident are strikingly similar to that *sub judice*.

> When viewed in the light most favorable to plaintiff, the evidence tended to show that defendant was driving within the speed limit of thirty-five miles per hour, that he had his headlights on, and that visibility was good. . . . [T]he area was lit with streetlights and [a policeman at the scene] "had no problem seeing anybody or anything" in the street when he arrived. Defendant testified that he had driven through the area on many occasions. . . . At no time did defendant sound his horn. Defendant also testified that when he saw plaintiff, plaintiff was standing still in the highway. Finally, defendant's tires left skid marks on the highway measuring approximately twenty feet. We conclude that this evidence was sufficient to support a reasonable inference that after defendant discovered, or should have discovered, plaintiff's peril, he had the time and means to avoid the injury to plaintiff.

Id. at 68, 446 S.E.2d at 819-20.

Bowden cited *Earle v. Wyrick*, 286 N.C. 175, 209 S.E.2d 469 (1974). In *Earle*, as herein, the pedestrian was walking with her back to traffic when struck from behind by the defendant's automobile. The road "was straight and permitted an unobstructed view," and "there was no interfering traffic." *Id.* at 176, 209 S.E.2d at 469. Further,

> [t]he defendant was driving approximately twenty-five to thirty miles per hour. It was nighttime, but the street was well lighted. The defendant saw the plaintiff only a split second before impact and did not sound the horn. The defendant's tires left skid marks measuring twenty-six feet. The Court concluded that this evidence was sufficient to warrant the submission of the issue of last clear chance to the jury.

Bowden, 116 N.C. App. at 69, 446 S.E.2d at 820.

Similarly, the evidence *sub judice*, viewed in the light most favorable to plaintiff, was sufficient to support a jury's reasonable infer-

ence, *see id.* at 68, 446 S.E.2d at 819, that defendant was traveling within the speed limit in a well-lighted area, failed to sound his horn, and after hitting plaintiff, traveled fifty to sixty feet before coming to a stop. Defendant had driven RPR 1300 many times, as in *Bowden*, the road was straight with no obstructions or interfering traffic, and defendant failed to see plaintiff until a "split second" prior to impact. In addition, in the instant case evidence was presented that defendant did not slow down before hitting plaintiff and could have avoided the collision by pulling farther over to the left side of the highway, which was devoid of oncoming traffic.

> Thus, from plaintiff's evidence a jury reasonably could infer both that defendant had the time and means to avoid the collision, and that defendant negligently failed to use the available time and means to avoid injury to plaintiff,

Vancamp, 328 N.C. at 500, 402 S.E.2d at 378, satisfying both the third and fourth elements of the last clear chance test, *see Wade*, 239 N.C. at 525, 80 S.E.2d at 151.

In closing, we emphasize that our holding the evidence to have been sufficient to require submission of a last clear chance issue to the jury does not compel an affirmative answer to the issue by the jury, *see Thacker*, 22 N.C. App. at 109, 205 S.E.2d at 748, as some contradictory evidence was introduced. For example, both defendant and his wife claimed the area surrounding the accident scene was not well-lighted. However, such "contradictions [are] for jury determination." *Harrison*, 15 N.C. App. at 32, 189 S.E.2d at 665. Given that plaintiff presented evidence supporting a reasonable inference of each element of the last clear chance doctrine, *see Bowden*, 116 N.C. App. at 68, 446 S.E.2d at 819, the trial court erred by failing to submit the issue to the jury and plaintiff is entitled to a new trial, *see Hales*, 111 N.C. App. at 356, 432 S.E.2d at 392.

New Trial.

Chief Judge EAGLES and Judge EDMUNDS concur.

STATE OF NORTH CAROLINA v. CLARENCE LEE WALKER

No. COA99-720

(Filed 15 August 2000)

1. Rape— attempted first-degree—insufficiency of evidence

The trial court erred in denying defendant's motion to dismiss the charge of attempted first-degree rape because: (1) the evidence of defendant's attempt is, at most, ambiguous; (2) the only suggestions of a sexual component was defendant's persistent attempts to have the victim roll onto her stomach, which was not substantial evidence allowing a reasonable conclusion that defendant had an intent to gratify his passion on the victim notwithstanding her resistance; and (3) there was insufficient evidence that defendant manifested, by an overt act, a sexual motivation for his attack on the victim.

2. Evidence— police officer testimony—victim's statement consistent

The trial court did not commit plain error by allowing a police witness to testify that the victim's statement to him about the attack was consistent with statements she gave to other officers and with her trial testimony, without requiring that the officer also testify about the contents of the statement, because: (1) the jury had already heard the victim's testimony, one officer's testimony reciting the victim's statement to him, and a second officer's similar recitation of the statement the victim made to him; (2) the victim's statements to these two officers were generally consistent with each other and with her trial testimony; (3) defendant did not challenge either officers' testimony through cross-examination; and (4) consequently, any error in allowing a third police witness to state his conclusion that the victim's pretrial statement to him was consistent with her testimony and her statements to other officers was harmless.

3. Evidence— cross-examination—underlying facts of previous conviction—objection sustained

Defendant was not prejudiced by the State's cross-examination of him about underlying facts of his previous conviction for armed robbery, specifically whether he wore the same clothes to commit that crime as he wore to attack the victim in this case, because the trial court sustained defendant's objection

and no motion was made to strike defendant's fragmentary response.

4. Evidence— cross-examination—prior testimony in trial—credibility

The trial court did not commit plain error by allowing the prosecutor to cross-examine defendant about testimony provided by a witness for the State earlier in the trial, because: (1) the prosecutor did not assume that the witness's testimony was truthful, but instead pointed out that defendant's testimony contained factors that were additional to and sometimes inconsistent with the witness; and (2) this probing was appropriate to challenge defendant's credibility.

5. Evidence— attorney testimony—defendant's prior charges—use of other names

The trial court did not commit plain error by allowing an attorney who had represented defendant on prior charges to testify at the habitual felon stage of his trial about defendant's use of other names, because: (1) the conviction and the name used by the person convicted were matters of public record and not matters divulged in confidence; (2) the attorney's testimony only confirmed that defendant was the same individual whom he had previously represented on a felony charge and who had been convicted of that felony; (3) a clerk of court who was present at the prior conviction and who recalled defendant would have been equally capable of establishing a foundation to admit the judgment from the earlier case; and (4) the prosecutor could have shown the attorney the judgment from the earlier conviction and asked if he had been involved in that case without ever saying the name used by defendant from the earlier conviction.

6. Appeal and Error— mootness—underlying conviction vacated

Although defendant argues he was subjected to double jeopardy by being convicted of attempted first-degree rape and assault with a deadly weapon inflicting serious injury, this issue is moot because the Court of Appeals vacated the attempted first-degree rape conviction.

7. Constitutional Law— effective assistance of counsel—no showing of a different result

Although defendant alleges that he received ineffective assistance of counsel, defendant cannot show that there was a

reasonable probability that, even in the absence of the alleged deficiencies, a different result would have been obtained.

Appeal by defendant from judgments entered 6 January 1999 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 25 April 2000.

Michael F. Easley, Attorney General, by Jane Ammons Gilchrist, Assistant Attorney General, for the State.

Clifford Clendenin O'Hale & Jones, LLP, by Walter L. Jones, for defendant-appellant.

EDMUNDS, Judge.

Defendant Clarence Lee Walker appeals his convictions of attempted first-degree rape and assault with a deadly weapon inflicting serious injury. We vacate the attempted rape conviction but find no error in the assault conviction.

The victim in this case was employed as a Deputy Clerk of Court of Guilford County, working in the courthouse in High Point. At approximately 9:30 a.m. on 31 March 1998, she went to the public restroom on the second floor of the courthouse. While in one of the stalls, she heard the men's restroom door open, then almost immediately heard the women's restroom door open. Unsure what was happening, she waited a moment before exiting the stall. As she walked toward one of the bathroom sinks, she saw a man, whom she later identified as defendant, standing against a wall peeking around a partition. He was wearing a yellow, hooded sweatshirt. Defendant turned off the lights in the bathroom, then came toward the victim, grabbed her by the shoulders or arms, and threw her to the floor. The victim landed on her buttocks and back but quickly turned onto her side.

Defendant also fell when he threw down the victim. She testified that "[w]hen I rolled over, he was laying completely on top of me. He was straddling me but he was laying—laying on me." While defendant tried to cover the victim's mouth with his right hand to stifle her screams, she kept moving her head to thwart his efforts. At the same time, defendant was striking the victim in her head and face with his left hand. Defendant said "shut up bitch" and told her to roll onto her stomach.

Because defendant continued to hit her and no one came to her aid, the victim stopped screaming and asked defendant what he

wanted. He responded that he wanted her to roll over onto her stomach. The victim added:

> His hands came away from my head area where they had been where he had been trying to hold my mouth and when he was beating me. His hands did come away. I felt them touch my side. And it may have just been his right hand touch my side.

The victim began screaming again, and defendant resumed beating her in the face and attempting to cover her mouth with his hand. After approximately one minute, defendant got up and ran away. The victim made her way out of the bathroom and was escorted to the district attorney's office. There, she gave Police Officer Brewer a description of her assailant including his height, weight, and clothing. In turn, the officer relayed the description over police radio.

Guilford County Mental Health case worker Arthur Carlton Montsinger (Montsinger) worked in the Mental Health Building beside the courthouse and was acquainted with defendant. Sometime between 9:30 and 10:00 a.m. on the morning of the assault, he saw defendant at the Mental Health Building. He was perspiring heavily and was wearing a "yellowish, gold" hooded sweatshirt, which matched the description provided by the victim. Defendant said that he had misplaced his Social Security card and asked Montsinger to take him to his aunt's house to retrieve it. They left the Mental Health Building in a county vehicle but were stopped by the police. Defendant was returned in a police car to the courthouse parking area. Officers removed defendant from the police car, and the victim, observing defendant from a vantage point in the courthouse, identified him as her assailant.

Defendant was arrested, waived his rights, and spoke with a police detective. He initially denied being at the courthouse, then changed his account and told the detective that he had been on the second floor of the courthouse. He said he had been near the public restrooms but denied going into the restrooms or touching the victim.

At trial, defendant testified that he came to the courthouse on the day of the assault and spoke to someone about obtaining a copy of his birth certificate. When he was told that it would cost $10.00, he left to see Montsinger. Defendant testified that he made his inquiry about his birth certificate on the first floor of the courthouse and that he never went to the second floor.

Defendant was convicted of attempted first-degree rape and assault with a deadly weapon inflicting serious injury. Thereafter, the jury found defendant to be an habitual felon. As to the charge of attempted first-degree rape, he was sentenced for the substantive offense alone and received a sentence of 313 to 385 months. The court also imposed a consecutive sentence of 168 to 211 months for committing assault with a deadly weapon inflicting serious injury while being an habitual felon. Defendant appeals.

I.

[1] Defendant first contends that the trial court erred in denying his motion to dismiss the charge of attempted first-degree rape based on insufficiency of the evidence. In ruling on such a motion, the trial court must view the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference. *See State v. Hall*, 85 N.C. App. 447, 452, 355 S.E.2d 250, 253 (1987). If the trial court then finds substantial evidence of each element of the offense, it must submit the case to the jury. *See id.* Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

"In order to prove attempted first-degree rape, the State must prove that the defendant had the intent to commit the crime and committed an act which went beyond mere preparation, but fell short of actual commission of the first-degree rape." *State v. Montgomery*, 331 N.C. 559, 567, 417 S.E.2d 742, 746 (1992) (citation omitted). In the case at bar, because the evidence of defendant's overt behavior is quite clear, the only issue is defendant's intent at the time he attacked the victim. To prove intent to commit rape,

> [t]he State is not required to show that the defendant made an actual physical attempt to have intercourse . . . . The element of intent as to the offense of attempted rape is established if the evidence shows that defendant, at any time during the incident, had an intent to gratify his passion upon the victim, notwithstanding any resistance on her part.

State v. Schultz, 88 N.C. App. 197, 200, 362 S.E.2d 853, 855-56 (1987) (internal citations omitted), *aff'd per curiam*, 322 N.C. 467, 368 S.E.2d 286 (1988).

The defendant in *Schultz* was convicted of attempted second-degree rape. The evidence in that case indicated that the defendant

inveigled his way into the victim's home, then grabbed her from behind and asked her for money. On appeal, we noted that the defendant, who was behind the victim as they struggled, dragged her toward a bedroom, then reached over her shoulder, down her shirt, and touched her breasts. Affirming the conviction, this Court cited other cases where an attempted rape conviction was allowed to stand and noted that "[i]n each of these cases where the evidence of intent was found sufficient, the defendant manifested his sexual motivation by some overt act." *Id.* at 201, 362 S.E.2d at 856; *see State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514 (1986) (defendant verbalized his intent to commit cunnilingus with the victim); *Hall*, 85 N.C. App. 447, 355 S.E.2d 250 (defendant pulled the victim's shirt down and touched her breasts); *State v. Norman*, 14 N.C. App. 394, 188 S.E.2d 667 (1972) (defendant touched the victim on one of her breasts).

Defendant cites cases where this Court found insufficient evidence of intent to rape. In *State v. Brayboy*, 105 N.C. App. 370, 413 S.E.2d 590 (1992), the defendant and a co-defendant were fishing when they were joined by the victim and her boyfriend. The co-defendant shot and wounded the victim's boyfriend. When the victim walked toward the sound of the shot, the defendant "grabbed her from behind, put his hand over her mouth and pinned her to the ground." *Id.* at 372, 413 S.E.2d at 591. The defendant repeatedly told the victim to shut up or he would kill her and raised his fist as if to strike. The co-defendant approached the struggling victim and the defendant and said to the defendant, " 'Go on and do what you want to do with her.' " *Id.* However, the defendant never touched the victim's private parts, nor did she complain of being sexually assaulted. *See id.* In holding this evidence insufficient to support a charge of attempted rape, we said:

> There is no evidence that defendant forced himself upon her in a sexual manner or indicated that it was his intent to engage in forcible, nonconsensual intercourse with her. The evidence merely shows that defendant grabbed [the victim], forced her to the ground, pinned her arms behind her back and then straddled her following [co-defendant's] shooting [the victim's boyfriend]. The only evidence which could give any indication that defendant might have intended to commit some sexual act upon [the victim] is [co-defendant's] statement, "Go on and do what you want to do with her." This evidence allows one only to speculate exactly what defendant may have intended to "do" . . . .

Id. at 374-75, 413 S.E.2d at 593.

In *State v. Nicholson*, 99 N.C. App. 143, 392 S.E.2d 748 (1990), the defendant first came to the victim's door and asked for a bandage, then returned twenty minutes later seeking matches. While the victim was trying to help, the defendant entered the victim's house, grabbed her around the neck and shoulder, and pointed a pistol at her head. He threatened to kill her and forced her to walk to another room, where the victim fell to the floor and asked the defendant why he was attacking her. The defendant did not respond but placed his hands under her legs, picked her up, and carried her toward a bedroom. When the victim screamed, she either fell or was dropped, and the defendant "slammed himself down on top of her." *Id.* at 145, 392 S.E.2d at 750. The defendant then began to cry, and the victim ran outside. The defendant followed, telling her that he was sorry, and handed her the gun. This Court vacated the defendant's conviction for attempted first-degree rape because we could not "discern any evidence that would give rise to a reasonable inference that the attack on the victim was sexually motivated or that defendant at any time had the intent to gratify his passion on the victim." *Id.* at 146, 392 S.E.2d at 750.

In the case at bar, the evidence of defendant's intent is, at most, ambiguous. As vicious as the attack was, the only suggestion of a sexual component was defendant's persistent attempts to have the victim roll onto her stomach. Defendant's behavior allows speculation as to why he wanted the victim prone rather than supine or on her side. However, this behavior is not substantial evidence allowing a reasonable conclusion that defendant had an intent to gratify his passion on the victim notwithstanding her resistance; like *Brayboy* and *Nicholson*, and unlike *Schultz*, *Whitaker*, *Hall*, and *Norman*, there was insufficient evidence that defendant manifested, by an overt act, a sexual motivation for his attack on the victim. Accordingly, the trial court erred in failing to dismiss this count.

II.

[2] Defendant argues that the trial court erred by allowing a police witness to testify that the victim's statement to him about the attack was consistent with statements she gave to other officers, and with her trial testimony. The questioned testimony is as follows:

> [DISTRICT ATTORNEY:] Detective O'Connor, while [the jury] is looking at [the yellow sweatshirt], we'll do two things at once. You say you went to the hospital and got a statement from the victim . . . ?

[WITNESS:] Yes, sir.

[DISTRICT ATTORNEY:] And was the statement she gave you substantially consistent with the statement she had given in court and the one you heard she gave to Officer Brewer?

[WITNESS:] Yes, it is.

[DISTRICT ATTORNEY:] And the one she gave to Officer Willis?

[WITNESS:] Yes, sir.

[DISTRICT ATTORNEY:] That's all the questions I have of this witness at this time, Your Honor.

Because defendant failed to object to this testimony, we review for plain error. *See* N.C. R. App. P. 10(b)(1).

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

State v. Black, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983) (alterations and ellipsis in original) (citations omitted).

Assuming without deciding that the trial court erred in admitting this testimony without requiring that the officer also testify about the contents of the statement, *see State v. Norman*, 76 N.C. App. 623, 334 S.E.2d 247 (1985) (holding that trial court erroneously admitted investigator's testimony that co-conspirator's statement to investigator was consistent with the co-conspirator's trial testimony, where contents of statement not presented to jury), there was no plain error. The challenged testimony was the final evidence presented before the State rested its case in chief. The jury already had heard (1) the victim's testimony, (2) Officer Brewer's testimony reciting the victim's statement to him, and (3) Officer Willis' similar recitation of the statement the victim made to him. The victim's statements to these

officers were generally consistent with each other and with her trial testimony. Defendant did not challenge either officers' testimony through cross-examination. Consequently, any error in allowing a third police witness to state his conclusion that the victim's pretrial statement to him was consistent with her testimony and her statements to other officers was harmless. This assignment of error is overruled.

III.

[3] Defendant argues that the trial court erred by allowing the State to cross-examine defendant about "certain underlying facts of previous convictions." While the State was cross-examining defendant about a past conviction for armed robbery, the prosecutor attempted to ask defendant whether he wore the same clothes to commit the armed robbery as he wore to attack the victim. Although defense counsel objected, the witness began to respond by saying, "I wasn't wearing the same—" before the trial court interceded to sustain the objection. When both the trial court and the prosecutor informed defendant he did not have to answer the question, he responded, "I'd like to answer it." Nevertheless, the trial court instructed the prosecutor to ask another question, and the district attorney's subsequent questions proceeded in a different direction.

The trial court sustained defendant's objection, and no motion was made to strike defendant's fragmentary response. Consequently, defendant was not prejudiced. *See State v. Call*, 349 N.C. 382, 508 S.E.2d 496 (1998). This assignment of error is overruled.

IV.

[4] Defendant argues that the trial court erred by allowing the prosecutor to cross-examine defendant about testimony provided by a witness for the State earlier in the trial. Mental health case worker Montsinger testified as part of the State's case in chief that he first saw defendant between 9:30 and 10:00 a.m. the morning of the assault and that he and defendant were stopped by police as they drove out of the Mental Health Building parking lot. However, when defendant took the stand, he testified that he saw Montsinger between 8:15 and 8:30 that morning and that Montsinger drove him to the "south side" where they picked up some other individuals before returning to the Mental Health Building. While cross-examining defendant, the prosecutor asked defendant such details of his drive with Montsinger as the names and descriptions of those individuals Montsinger picked

up, then asked defendant if Montsinger had testified about transporting these individuals. No objection was made, and defendant responded by pointing out that the prosecutor had not asked Montsinger about those details. After some further fencing, the prosecutor proceeded to another line of questions.

In the absence of an objection, we again review for plain error. Defendant contends that this cross-examination was improper under the hearsay rule. *See* N.C. Gen. Stat. § 8C-1, Rule 802 (1999). However, Montsinger's original testimony was provided while testifying at the trial, so any classification of that testimony as hearsay is doubtful. *See* 2 Kenneth S. Broun, *Brandis & Broun* on *North Carolina Evidence* § 192, at 3 n.1 (5th ed. 1998); N.C. Gen. Stat. § 8C-1, Rule 801 (1999). Defendant argues that the prosecutor's references to that testimony was hearsay because the prosecutor's questions assumed that Montsinger's testimony was truthful. However, the prosecutor did not refer to Montsinger's testimony to "prove the truth of the matter asserted" therein, N.C. Gen. Stat. § 8C-1, Rule 801(c), but for the proper purpose of challenging defendant's credibility, *see* N.C. Gen. Stat. § 8C-1, Rule 611(b) (1999).

An analogous situation arose in *State v. Freeman*, 319 N.C. 609, 356 S.E.2d 765 (1987), where the defendant was accused of first-degree rape. Part of the evidence against the defendant consisted of pubic and head hair from the defendant and victim that had been found at the scene of the offense. While being cross-examined, the defendant stated his belief that the hair had been planted by the technician who had testified earlier about finding the hair. In response, the prosecutor posed additional cross-examination questions that suggested some skepticism of the defendant's theory. On appeal, the defendant claimed that this cross-examination "improperly assumed the truth of the state's evidence which defendant was called on to explain." *Id.* at 616, 356 S.E.2d at 769. Affirming the defendant's conviction, our Supreme Court held:

> [W]hen a defendant chooses to testify in his own defense he subjects himself to cross-examination "on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611(b) [(1999)].
>
> . . . .
>
> Cross-examination may be employed to test a witness's credibility in an infinite variety of ways. "The largest possible scope

should be given," and "almost any question" may be put "to test the value of his testimony." 1 Brandis on North Carolina Evidence § 42 (1982). . . .

Defendant here testified in his own behalf and denied his guilt. It was thus appropriate for the state to ask him to explain, if he could, the state's evidence which was inconsistent with this denial. This kind of cross-examination properly went to the credibility of defendant's denial of guilt and his testimony tending to support this denial. The cross-examination . . . did [not] assume the truth of the state's evidence. . . . The cross-examination properly challenged defendant's credibility, which ultimately was a question for the jury.

Id. at 616-17, 356 S.E.2d at 769.

In the case at bar, the import of defendant's testimony was that he was riding with Montsinger at the time the victim was attacked. The prosecutor's questions did not assume that Montsinger's testimony was truthful; instead the questions pointed out that defendant's testimony contained factors that were additional to and sometimes inconsistent with Montsinger's. Such probing was appropriate to challenge defendant's credibility. This assignment of error is overruled.

V.

[5] Defendant contends it was plain error for the trial court to allow an attorney who had represented him on prior charges to testify at the habitual felon stage of his trial. During the trial of the substantive offenses, the prosecutor cross-examined defendant about his use of other names, and defendant admitted that he had a prior conviction under the name "Clarence Marshall." (Defendant stated that he did not use the name, but conceded that court officials thought that was his name, despite his attempts to tell them otherwise.) Later, during the portion of the trial in which defendant's habitual felon status was established, in order to prove one of defendant's prior felony convictions, the State called the attorney who had represented defendant on that charge to testify that defendant had been convicted under the name "Clarence Marshall." The attorney, after consulting with the North Carolina State Bar, testified that when he represented defendant, he knew him as "Clarence Marshall," "Clarence Walker," or "Clarence Demella." The attorney also identified a document as being the judgment rendered in the earlier felony case and confirmed that defendant in the case at bar was the same individual as the defendant

named in the earlier felony judgment as "Clarence Marshall." Defendant did not object to this testimony.

Despite his grudging admission under cross-examination that he had a prior conviction under the name "Clarence Marshall," defendant contends that his former counsel's testimony about his name usage disclosed confidential information. Although situations arise where knowledge that a former client employed an alias would be confidential, in the case at bar, the conviction and the name used by the person convicted were matters of public record, not matters divulged in confidence. The attorney's testimony only confirmed that defendant was the same individual whom he had previously represented on a felony charge and whom had been convicted of that felony. A clerk of court who was present at the prior conviction and who recalled defendant would have been equally capable of establishing a foundation to admit the judgment from the earlier case. Similarly, the prosecutor could have shown the attorney the judgment from the earlier conviction and asked if he had been involved in that case. Upon receiving an affirmative response, the prosecutor could have asked if the defendant in that case was then present in the courtroom. The attorney could again have answered in the affirmative and identified defendant without ever speaking the name used by defendant for that earlier conviction. Such a process unquestionably does not reveal any confidential information provided to the attorney during the attorney-client relationship. Defendant does not challenge, and we do not address, the propriety of testimony as to names other than "Clarence Marshall." This assignment of error is overruled.

VI.

[6] Defendant argues he was subjected to double jeopardy by being convicted of attempted first-degree rape and assault with a deadly weapon inflicting serious injury. However, in light of our holding in part I above, this issue is moot. *See Nicholson*, 99 N.C. App. 143, 392 S.E.2d 748. This assignment of error is overruled.

VII.

[7] Finally, defendant contends that he did not receive effective assistance of counsel at trial. To establish ineffective assistance of counsel, a defendant must satisfy a two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). *See State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985).

> Under this two-prong test, the defendant must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms. This means that defendant must show that his attorney made " 'errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' " Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Lee, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998) (internal citations omitted). It is permissible to proceed directly to the second prong of the test. "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

The record reveals overwhelming evidence that defendant perpetrated the attack. The victim observed defendant at close range, gave the investigating officers consistent and accurate descriptions of her assailant, and identified him shortly after the attack. Defendant was wearing the same distinctive sweatshirt when he was apprehended that the victim observed during the assault. Defendant gave a number of contradictory statements, which, where credible, were somewhat incriminating. Without deciding whether defense counsel was ineffective, we hold that defendant cannot show there was a reasonable probability that, even in the absence of the alleged deficiencies of trial counsel, a different result could have been obtained at trial. This assignment of error is overruled.

Defendant's conviction of attempted first-degree rape is vacated. We find no error in defendant's conviction of assault with a deadly weapon. This case is remanded to the trial court for reentry of judgment in accordance with this opinion.

Vacated and remanded in part, no error in part.

Judges GREENE and McGEE concur.

RPR & ASSOCIATES, INC., A SOUTH CAROLINA CORPORATION, PLAINTIFF v. THE STATE OF NORTH CAROLINA, THE UNIVERSITY OF NORTH CAROLINA-CHAPEL HILL AND THE NORTH CAROLINA DEPARTMENT OF ADMINISTRATION, DEFENDANTS

No. COA98-1581

(Filed 15 August 2000)

1. Appeal and Error— appealability—interlocutory order—denial of motion to dismiss—sovereign immunity defense—substantial right

Although the denial of a motion to dismiss is generally not immediately appealable based on the fact that it is an interlocutory order, the Court of Appeals allowed an immediate appeal because the denial of defendants' motions to dismiss based upon the defense of sovereign immunity affects a substantial right.

2. Immunity— sovereign—contract claim

The trial court did not err in concluding that plaintiff-contractor followed the statutory procedures provided under N.C.G.S. § 143-135.3 in order to have defendants' sovereign immunity waived in an action involving contract claims against the State and its agencies, because: (1) the statute provides that the contractor must first submit its claim to the director of the Office of State Construction and await the director's decision, which plaintiff did; (2) if a contractor is displeased with the director's decision, it may then appeal that decision by either instituting a contested case hearing before an ALJ, or in lieu of that option, by filing a complaint in superior court; and (3) in the instant case, plaintiff initially chose the contested case option but never availed itself of any of those proceedings before it then opted to proceed in superior court instead, as allowed by the statute.

3. Process and Service— state agency—registered agent receiving service

Although the long-standing rule in this State is that a summons should direct service upon defendant itself and not upon its process agent, the trial court did not err in denying defendant-UNC-CH's motions to dismiss for insufficient service of process based on the summons directing service only upon the state agency's registered agent, because: (1) N.C.G.S. § 1A-1, Rule 4(b) is leniently applied in the context of corporations and state agencies when the caption listed on the summons, together with the complaint attached to that summons, clearly demonstrates that it

is the corporate defendant, not its agent, that is being sued; and (2) the fact that the summons does not state that the person listed is the process agent is immaterial.

Judge McGEE dissenting.

Appeal by defendants University of North Carolina-Chapel Hill and North Carolina Department of Administration from order entered 16 July 1998 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 6 October 1999.

Wilson & Waller, P.A., by Brian E. Upchurch and Betty S. Waller, for plaintiff-appellee.

Attorney General Michael F. Easley, by Associate Attorney General Thomas J. Pitman, for defendant-appellant University of North Carolina-Chapel Hill.

Attorney General Michael F. Easley, by Assistant Attorney General D. David Steinbock, for defendant-appellant North Carolina Department of Administration.

LEWIS, Judge.

RPR & Associates, Inc. ("RPR") entered into a written construction contract with the State of North Carolina ("State"), through the University of North Carolina at Chapel Hill ("UNC-CH"), to construct the George Watts Hill Alumni Center ("Alumni Center") on the UNC-CH campus. Following the completion of the Alumni Center, on 22 November 1994, plaintiff filed a verified claim against UNC-CH with the Office of State Construction ("OSC") pursuant to N.C. Gen. Stat. § 143-135.3(c), seeking to recover costs incurred and an extension of time for completion associated with the delayed construction of the Alumni Center. The Director of the OSC held an informal hearing on 21 March 1995 on plaintiff's claim. By letter dated 14 July 1997, the Director issued his decision awarding plaintiff an additional payment of $104,468 and an eighty-day extension for completion.

On 12 September 1997, pursuant to N.C. Gen. Stat. § 143-135.3(c) and (c1), plaintiff filed a petition with the Office of Administrative Hearings ("OAH") for a contested case hearing against defendants UNC-CH and the Department of Administration ("DOA"), seeking review of the decision of the OSC. But before any hearing or other action had occurred before the OAH, plaintiff decided to proceed in superior court, pursuant to N.C. Gen. Stat. § 143-135.3(d), instead.

Thus, on 15 January 1998 plaintiff filed a complaint in Wake County Superior Court, alleging breach of contract and breach of warranty. The following day, plaintiff filed a motion with the OAH seeking "an Order of the Administrative Law Judge allowing it to voluntarily dismiss its pending contested case herein without prejudice to its right to proceed in a civil action pursuant to N.C. Gen. Stat. § 143-135.3 in Wake County Superior Court." The administrative law judge ("ALJ") then dismissed plaintiff's petition for a contested case hearing "without prejudice to [plaintiff's] right to proceed in accordance with N.C. Gen. Stat. § 143-135.3 in Wake County Superior Court."

All three defendants thereafter filed motions to dismiss plaintiff's complaint in superior court pursuant to North Carolina Rules of Civil Procedure 12(b) (1), (2), (4), (5) and (6). After a hearing on the motions, the trial court entered an order granting the State's motion to dismiss pursuant to Rule 12(b)(5) for insufficient service of process because a summons was never served upon the Attorney General or a deputy or assistant attorney general as required by Rule 4(j)(3). The trial court, however, denied UNC-CH's and the DOA's motions to dismiss. From this order denying their motions to dismiss, UNC-CH and the DOA now appeal.

[1] At the outset, we must determine whether this appeal is properly before us. Generally, the denial of a motion to dismiss is not immediately appealable because it is an interlocutory order. *Fraser v. Di* Santi, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985). However, when that denial affects some substantial right of the appellant, this Court will entertain an immediate appeal. N.C. Gen. Stat. § 7A-27(d) (1999).

Here, defendants' motions to dismiss were based, in part, on the doctrine of sovereign immunity. Although our Supreme Court has never specifically addressed the issue, this Court has held that the denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable. *Anderson v. Town of Andrews*, 127 N.C. App. 599, 601, 492 S.E.2d 385, 386 (1997); *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 365, 424 S.E.2d 420, 423, *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993). The rationale for such an exception derives from the nature of the immunity defense. *Slade v. Vernon*, 110 N.C. App. 422, 425, 429 S.E.2d 744, 746 (1993). "A valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit." *Id.* In other words, immunity would be effectively lost if the case were erroneously allowed to proceed to

trial. *Id.* Because the trial court's denial of the motions to dismiss affected a substantial right of defendants, we hold that their appeal is properly before this Court. We therefore turn to the merits of their appeal.

It is well settled in North Carolina that the State is immune from suit unless it has expressly consented to be sued. *Smith v. State*, 289 N.C. 303, 309, 222 S.E.2d 412, 417 (1976). This immunity extends not only to suits where the State is a named defendant but also to suits against departments, institutions, and agencies of the State. *Jones v. Pitt County Mem. Hospital*, 104 N.C. App. 613, 616, 410 S.E.2d 513, 514 (1991).

Our legislature has adopted a limited waiver of the sovereign immunity doctrine for actions involving contract claims against the State and its agencies. N.C. Gen. Stat. § 143-135.3 (1999). However, just because a statute provides for suit against the State or one of its agencies, a plaintiff may not proceed with his suit in any manner it pleases. The State's sovereign immunity is only waived to the extent that the procedures prescribed by the statute are strictly followed. *Guthrie v. State Ports Authority*, 307 N.C. 522, 539, 299 S.E.2d 618, 628 (1983). Our Supreme Court has explained, " 'The right to sue the State is a conditional right, and the terms prescribed by the Legislature are conditions precedent to the institution of the action.' " *Id.* (quoting *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 173, 118 S.E.2d 792, 795 (1961)). Furthermore, because any such statute is in derogation of the sovereign right to immunity, its terms must be strictly construed. *Id.* at 537-38, 299 S.E.2d at 627. *But see Shipyard, Inc. v. Highway Comm.*, 6 N.C. App. 649, 652-53, 171 S.E.2d 222, 224-25 (1969) (discussing the origins of the strict construction rule and questioning whether it is in fact the rule in North Carolina).

[2] Defendants argue that plaintiff has failed to comply with all the statutory requirements of N.C. Gen. Stat. § 143-135.3 and that their sovereign immunity has thus not been waived. The pertinent portion of N.C. Gen. Stat. § 143-135.3 provides:

> (c) A contractor who has completed a contract with a board for construction or repair work and who has not received the amount he claims is due under the contract may submit a verified written claim to the Director of the [OSC] of the Department of Administration for the amount the contractor claims is due. . . .

> . . . The Director may allow, deny, or compromise the claim, in whole or in part. The Director shall give the contractor a written statement of the Director's decision on the contractor's claim.
>
> . . . .
>
> (c1) A contractor who is dissatisfied with the Director's decision on a claim submitted under subsection (c) of this section may commence a contested case on the claim under Chapter 150B of the General Statutes. The contested case shall be commenced within 60 days of receiving the Director's written statement of the decision.
>
> (d) As to any portion of a claim that is denied by the Director, the contractor may, *in lieu of the procedures set forth in the preceding subsection of this section*, within six months of receipt of the Director's final decision, institute a civil action for the sum he claims to be entitled to under the contract by filing a verified complaint and the issuance of a summons in the Superior Court of Wake County or in the superior court of any county where the work under the contract was performed. The procedure shall be the same as in all civil actions except that all issues shall be tried by the judge, without a jury.

(Emphasis added).

The preceding provisions thus outline a two-tiered process for recovering on contract claims against state agencies. The contractor must first submit its claim to the director of the OSC and await the director's decision. N.C. Gen. Stat. § 143-135.3(c). Plaintiff did so here. If a contractor is displeased with the director's decision, it may then appeal that decision in one of two ways: (1) by instituting a contested case hearing before an ALJ; or (2) "in lieu of" that option, by filing a complaint in superior court. N.C. Gen. Stat. § 143-135.3(c1), (d). As pointed out earlier, this process must be strictly followed before sovereign immunity will be waived. *Guthrie*, 307 N.C. at 539, 299 S.E.2d at 628. Here, plaintiff initially chose the contested case route, but then opted to proceed in superior court instead. Defendants contend that because plaintiff had already initiated a contested case hearing when it filed a complaint in superior court, it did not proceed in superior court "in lieu of" a contested case hearing. Thus, according to defendants, plaintiff did not strictly follow the statutory procedures in order to have sovereign immunity

waived. We do not believe strict adherence to the provisions of N.C. Gen. Stat. § 143-135.3 necessitates such a result.

Prior versions of section 143-135.3 only provided one avenue for a dissatisfied contractor to appeal from the decision of the Director of the OSC. That avenue was by filing a claim in superior court. N.C. Gen. Stat. § 143-135.3 (amended 1983). The present statute has now added a second avenue of appeal: commencing a contested case hearing. N.C. Gen. Stat. § 143-135.3(c1) (1999). Our legislature has thus expressed a desire to *benefit* contractors and allow them increased options to proceed. In their suggested application of the phrase "in lieu of," however, defendants have essentially used this benefit to *penalize* the contractor. Specifically, because there are now more potential procedures for a contractor to follow in appealing its claim, and because these procedures should be strictly followed, the non-compliance as to one potential procedure forecloses the contractor's ability to appeal via the other. In essence, defendants' interpretation would engraft into the statute a provision to the following effect: "The mere initiation of one avenue forever forecloses the right to pursue the other." We do not believe that, by adding a second avenue of appeal, our legislature intended to create such a result.

Rather, through subsections (c1) and (d), our legislature was simply trying to create alternate methods of appeal. By using the phrase "in lieu of," our legislature is merely prohibiting a contractor from appealing via a contested case hearing, waiting to see whether it likes the decision handed down by the OAH, and then initiating an appeal in superior court as well if it does not like the decision. In other words, a contractor cannot use one avenue of appeal as a "trial run" before proceeding with the other.

Here, plaintiff initially started the contested case hearing process, but plaintiff never availed itself of any of those proceedings. Rather, *before any hearing or other action had occurred before the OAH*, plaintiff decided to proceed in superior court instead. Plaintiff then immediately withdrew its claim before the OAH. Under these facts, we hold that plaintiff complied with the statutory procedures outlined, and defendants' sovereign immunity has thereby been statutorily waived.

[3] Next, defendant UNC-CH argues the trial court erred in denying its motions to dismiss for insufficient service of process. Although this question again is interlocutory in nature, we choose to address it, given that defendants' sovereign immunity argument is properly

before us. After all, to address but one interlocutory or related issue would create fragmentary appeals. *See generally Colombo v. Dorrity*, 115 N.C. App. 81, 84, 443 S.E.2d 752, 755 ("We believe that allowing an immediate appeal only from the order denying the City's motion for summary judgment on the grounds of governmental immunity would create a fragmentary appeal. As such, we allow an immediate appeal from both orders denying the City's motion for summary judgment."), *disc. review denied*, 327 N.C. 689, 448 S.E.2d 517 (1994). Accordingly, we consider the merits of this argument as well.

Plaintiff attempted to serve defendant UNC-CH on 15 January 1998. On its civil summons, plaintiff listed the name and address of the party to be served as follows:

> Susan Ehringhaus, Esq.
> 103 S. Bldg., UNC Chapel Hill
> Chapel Hill, NC 27599

Ms. Ehringhaus is the duly-appointed process agent for UNC-CH. Defendant UNC-CH contends that, because plaintiff's summons is directed to Ms. Ehringhaus (rather than to UNC-CH itself) and nowhere states that Ms. Ehringhaus is being served as an agent of UNC-CH, defendant UNC-CH was never properly served. We fully acknowledge that it would have been better practice for plaintiff to have directed service as follows:

> University of North Carolina-Chapel Hill
> c/o Susan Ehringhaus, Esq. (Registered Agent)
> 103 S. Bldg., UNC Chapel Hill
> Chapel Hill, NC 27599

Nonetheless, we conclude plaintiff has adequately complied with the service of process requirements outlined in Rule 4(b) and (j).

The long-standing rule in this State is that a summons should direct service upon the defendant itself, not upon its process agent. *Wiles v. Construction Co.*, 295 N.C. 81, 83, 243 S.E.2d 756, 757 (1978). In the context of corporations, however, our Supreme Court has expressed leniency in the application of this rule. Specifically, when the caption listed on the summons, together with the complaint attached to that summons, clearly demonstrate that it is the corporate defendant, not its agent, that is being sued, service is adequate. *Id.* at 85, 243 S.E.2d at 758. The *Wiles* Court reasoned:

> Since, under Rule 4, a copy of the complaint must be served along with the summons, and the corporate representative who may be served is customarily one of sufficient discretion to know what should be done with legal papers served on him, the possibility of any substantial misunderstanding concerning the identity of the party being sued in this situation is simply unrealistic. Under the circumstances, the spirit certainly, if not the letter, of N.C.R. Civ. P. 4(b) has been met.

Id. (citation omitted). Although *Wiles* only dealt with Rule 4 in the context of service upon corporations, we believe *Wiles* is equally applicable in situations involving service upon state agencies. After all, Rule 4(b) deals with the requirements for summonses in general, not just for corporate defendants. Thus, so long as the caption on the summons, together with the complaint attached to the summons, clearly show that the state agency, as opposed to its registered agent, is the party being sued, the fact that the summons directs service only upon the agent will not invalidate service upon the state agency. Here, both the complaint and the caption on the summons clearly list UNC-CH as a party-defendant. Neither Ms. Ehringhaus nor UNC-CH could have reasonably been misled. We therefore conclude service upon UNC-CH was valid.

Defendant UNC-CH points out that in *Wiles*, "Registered Agent" was listed next to the name of the person upon whom service was to be directed. From this, defendant argues that plaintiff may not avail itself of the *Wiles* rule because it nowhere stated on the summons that Ms. Ehringhaus is a process agent. This is simply a distinction without a difference. *Wiles* focuses upon how the *defendant* is listed in the caption on the summons and in the complaint; how the *agent* is listed is immaterial.

Affirmed.

Judge JOHN concurs.

Judge McGEE dissents.

Judge McGEE dissenting.

I respectfully dissent. I disagree with the majority opinion's broad construction of N.C. Gen. Stat. §§ 143.135.3(c1) and (d).

I do not disagree with the majority opinion that the General Assembly provided a contractor an alternative appeal option under N.C.G.S. § 143-135.3(d) for a dissatisfied contractor to appeal from the decision of the OSC. However, once plaintiff contractor selected the option of "commenc[ing]" its case under N.C.G.S. § 143-135.3(c1) by filing a petition with the OAH, it could not then "institute" a complaint in superior court under N.C.G.S. § 143-135.3(d) when the statute provides for the civil action in state court *in lieu of* a contested case. The benefit of an alternative appeal option does not warrant plaintiff offending the strict construction of N.C.G.S. § 143.135.3. *See Construction Co. v. Dept. of Administration*, 3 N.C. App. 551, 553, 165 S.E.2d 338, 340 (1969) ("[S]tatutes permitting suit, being in [derogation] of sovereign right of immunity, are to be strictly construed."); *see also In re Thompson Arthur Paving Co.*, 81 N.C. App. 645, 647-48, 344 S.E.2d 853, 855, *disc. review denied*, 318 N.C. 506, 349 S.E.2d 874 (1986) ("Waiver of sovereign immunity may not be lightly inferred and statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed."); *see also* 82 C.J.S. *Statutes* § 380 (1999) ("Among the statutes in derogation of sovereignty and subject to the rule requiring strict construction in favor of the state are those allowing suits against the state or its representative . . . or waiving its immunity from liability[.]").

The majority opinion emphasizes that plaintiff decided to proceed in superior court "before any hearing or other action had occurred before the OAH." Nonetheless, this overlooks the fact that the contractor both "*commence[d]*" its case by filing a petition with the OAH and also "*institute[d]*" a complaint in superior court, resulting in two actions pending at the same time in two different forums. N.C.G.S. § 143-135.3(c1) ("[a] contractor . . . may *commence* a contested case on the claim[.]"); N.C.G.S. § 143-135.3(d) ("the contractor may, in lieu of the procedures set forth in [subsection(c1)] . . . *institute* a civil action[.]") (emphasis added). By employing the verbs "commence" and "institute" in the respective subsections of the statute, I believe the General Assembly intended to measure the time of these procedures from the contractor's first act or commencement of the case, not the OAH's decision to hear the case, as the majority opinion suggests. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990) (holding that legislative purpose is first ascertained from the plain language of the statute); *see also Black's Law Dictionary* 268, 800 (6th ed. 1990) (defining "commence" as "[t]o initiate by performing the first act or step" and defin-

ing "institute" as "[t]o inaugurate or commence[.]"). If the General Assembly intended that these procedures be measured by an OAH *hearing* of the contractor's case, not the contractor's action to "commence" or "institute" the action, it would have expressly so stated. It did not choose to do so.

Strictly construing N.C.G.S. §§ 143-135(c1) and (d), as we must, plaintiff's both *commencing* of its contested case in the administrative court and also *instituting* a complaint in superior court violated the provisions of the statute necessary to waive defendants' claim to sovereign immunity. *See Construction Co.*, 3 N.C. App. at 553, 165 S.E.2d at 340; *see also In Re Thompson*, 81 N.C. App. at 647-48, 344 S.E.2d at 855. The majority opinion characterizes the strict construction of the two-tiered process available to plaintiff as essentially a "penalty." However unfortunate the result, the majority opinion has interpreted the waiver statute too broadly and failed to follow "the admonition to strictly construe statutes which waive the benefits of the doctrine of sovereign immunity." *State v. Taylor*, 85 N.C. App. 549, 557, 355 S.E.2d. 169, 175 (1987) (Eagles, J., dissenting), *rev'd*, 322 N.C. 433, 436, 368 S.E.2d 601, 603 (1988) (holding that the Court of Appeals erred in "broadening the scope of the waiver of sovereign immunity[.]"). I would reverse the decision of the trial court and remand for entry of summary judgment for defendants UNC-CH and DOA.

LUTHER R. MEDLIN, JR., AND WIFE, PAMELA DICKENSON MEDLIN, PLAINTIFFS V. FYCO, INC., A NORTH CAROLINA CORPORATION, AND M. FRANK YOUNG, DEFENDANTS

No. COA99-1067

(Filed 15 August 2000)

1. Trials— mistrial—mention of insurance

The trial court did not abuse its discretion by denying defendant's motion for a mistrial made after plaintiffs' second witness made reference to defendant's insurance carrier in an action for breach of implied warranty of habitability concerning synthetic stucco, because: (1) the mention conveyed, at most, a suggestion that coverage existed and was not direct evidence of an independent fact that defendant was insured against liability for defects in plaintiffs' house; (2) the reference was incidental,

insignificant, and inadvertent, so that the trial judge determined that giving the jury a curative instruction would only serve to highlight the matter and bring it to the jury's attention; and (3) while the better practice may have been to give a curative instruction, defendant neither requested such an instruction nor assigned error to the trial court's failure to give one.

2. Warranties— implied warranty of habitability—synthetic stucco—motion for directed verdict—judgment notwithstanding the verdict

The trial court did not err by denying defendant's motions for directed verdict and judgment notwithstanding the verdict in an action for breach of implied warranty of habitability concerning synthetic stucco, because: (1) there was substantial evidence that plaintiffs' house failed in the essential requirement of keeping moisture out, a major structural defect sufficient to take the case to the jury under strict liability; and (2) there was evidence that defendant's installation of the synthetic stucco was not in accordance with the manufacturer's specifications or the North Carolina Building Code, meaning it did not meet the prevailing standard of workmanlike quality.

3. Warranties— implied warranty of habitability—synthetic stucco—jury instruction—workmanlike construction

Although defendant contends the trial court erred by failing to require that the jury find before awarding damages that such damages were proximately caused by defendant's failure to meet the industry standards of workmanlike construction in an action for breach of implied warranty of habitability concerning synthetic stucco, the trial court gave the substance of this instruction requiring the jury to find the necessary causal link between defendant's breach and plaintiffs' damages, and even if the instructions were deficient on proximate causation, the evidence was overwhelming.

4. Interest— prejudgment—breach of implied warranty of habitability—date action instituted

The trial court did not err by awarding plaintiffs prejudgment interest from the date the action was instituted, as opposed to the date of defendant's breach of the implied warranty of habitability concerning synthetic stucco, because the implied warranty of habitability is a quasi-contract with the awarding of interest governed by N.C.G.S. § 24-5(b).

Appeal by plaintiffs and defendant FYCO, Inc., from judgment entered 4 December 1998 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 7 June 2000.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr. and Amanda L. Fields, for plaintiffs.

Dean & Gibson, LLP, by Christopher J. Culp, and Brown, Todd & Heyburn, PLLC, by Julie Muth Goodman and Mark R. Cambron, for defendant FYCO, Inc.

MARTIN, Judge.

Plaintiff brought this civil action alleging breach of express and implied warranties, negligence, negligent misrepresentation, unfair and deceptive trade practices and fraud. Prior to or during trial, defendant M. Frank Young was granted summary judgment or directed verdict as to all claims asserted against him in his individual capacity, and defendant FYCO, Inc., was granted summary judgment or directed verdict as to all claims asserted against it, with the exception of the claim for breach of the implied warranty of habitability.

The trial of this action commenced on 26 October 1998 and concluded on 4 November 1998. At trial, the parties offered evidence which, briefly summarized, tended to show that plaintiffs Luther and Pamela Medlin purchased a house, located at 2003 Brassfield Road, Greensboro, North Carolina, from FYCO, Inc., a general contractor and builder, for $335,000.00 in December 1993. The exterior cladding of the house was an exterior insulation and finish system (EIFS), commonly referred to as "synthetic stucco," rather than real stucco as the Medlins asserted they were told. Less than two years later, the Medlins began having serious moisture problems with the residence and, in 1996, defendant Young, FYCO's president, told them the house had been constructed using EIFS. At about the same time, the building industry was discovering problems with the use of EIFS and the North Carolina Building Code Council placed a moratorium on the use of EIFS in 1996. Evidence was presented with respect to both the inherent incompatibility of EIFS with other building materials commonly used in residential construction, and the improper and defective installation of the EIFS on plaintiffs' house, resulting in significant water intrusion problems. Plaintiffs also offered evidence tending to show that the roof and attic framing in their house was structurally inadequate, the front foyer wall had been improperly constructed and was not structurally sound, and that there was inad-

equate support for two bay windows. Plaintiffs presented evidence from three witnesses tending to show the costs to repair the defective work would be $191,300.00.

The jury returned a verdict in favor of plaintiffs finding that FYCO had breached the implied warranty of habitability and awarding damages in the amount of $187,305.00. The trial court entered judgment on the verdict and awarded plaintiffs prejudgment interest from the date of the filing of the complaint. Defendant FYCO appeals; plaintiffs cross-appeal the trial court's refusal to award pre-judgment interest from the date of breach rather than from the date of filing of the complaint.

DEFENDANT FYCO'S APPEAL

I.

[1] Defendant contends that the trial court erred by denying its motion for mistrial, made after plaintiffs' second witness, Walter Strand, III, made reference to FYCO's insurance carrier during his testimony. Mr. Strand, a structural engineer, was relating his observations, and the reports he had reviewed, upon his first inspection of plaintiffs' home and testified:

> Now, when we arrived on site at this house, Mr. Medlin and Mr. Grimes provided me with two moisture reports that had been done by others prior to my being requested to become involved in the project. One by a firm, I believe, called Quality Residential Inspections or Quality Residential Testing. And I reviewed that and saw that the gentleman who had performed those tests had found several areas on the house of what is considered to be elevated moisture or high moisture content in the structure below the EIFS.
>
> The other report was a much more thorough report. It was done by the firm of Kimley-Horn & Associates, which is a very reputable large engineering firm in Raleigh. And it's my understanding that Kimley-Horn had provided that inspection on behalf of perhaps the builder's insurer on that project. So they were essentially working for FYCO or somehow related to that side of the case. I reviewed that report and it showed many, many locations of elevated moisture on the house.
>
> And as I said, I find, I've seen Kimley-Horn's work before. We get involved on numerous projects together where they're out

representing Maryland Casualty, the builder's insurer, and we're out there representing a homeowner. And we invariably come up with the same results. I mean, their data is good. They know what they're doing. For that reason, I suggested to Mr. Medlin that he not waste any money on having me redo the moisture testing part of the evaluation, I'd just do the visual evaluation, which is what we did.

MR. BERKELHAMER: Your Honor, could we approach?

THE COURT: Ladies and Gentlemen, step into the jury room please.

Defendant's counsel moved for a mistrial and, after a hearing in the absence of the jury, the trial court reserved ruling throughout the remainder of the trial to determine "whether there is any apparent prejudice to the defendant's case." Although plaintiffs' counsel suggested "some form of limiting instruction," defense counsel made no such request and the trial court declined to give any such instruction.

In hearing defendant's post-trial motions, the trial court again considered defendant's earlier motion for mistrial. In denying the motion, the trial court observed:

> The most troubling aspect of this, for me, and at the time of the incident, was the witness' reference—that's Mr. Strand, as I recall it. And the transcript that counsel provided me supports it. My recollection—or my impression was that this was a rather voluntary and somewhat pompous narrative by Mr. Strand, about his undertaking in this case, and the reference to the Kimley-Horn report, in my mind at the time, and again at this time, the references to that firm's involvement on behalf of the plaintiffs—or defendants, rather, it seemed to me to be made in an effort to buttress or to support the validity of that report, rather than to inject before the jury the specter that there was a deep pocket here willing to pay. But when he said it again, prior to the time we excused the jury, and I confronted that witness, when he said it again, he said it more explicitly. He said, "We invariably come up with the same results. I mean, their data is good." I believe his intention, however misguided it was, in making reference to that firm's involvement, was to try to show that "the findings in that report are similar to the findings in my report or in line with what I'm trying to show, and therefore, they're good."

As counsel's correct to point out, as well, I did not give a curative instruction, because I felt that would be throwing gasoline on a small spark. I believed at the time, and I continue to believe, after reviewing this transcript, that the purpose of the mention of that firm and their involvement in the case was simply to expand on the validity of their findings, to the degree that those findings corresponded with Mr. Strand's position in the case.

The error, if there is an error, a reversible error, is going to be that the Court did not deliver a curative instruction, but again, I hope the courts may review that, in view of what my determination was, and my discretion at the time was that it was not a significant mention, was not made for improper purpose, and the curative instruction was simply going to make a situation much worse than it was.

In any event, I believe that the evidence is—competent evidence introduced during the trial was sufficient to support the jury's verdict. I do not believe the jury's verdict was based on speculation or on evidence of liability insurance coverage or on any other improper factor or motive.

G.S. § 8C-1, Rule 411 provides that evidence that a person was or was not insured against liability is not admissible upon the issue of whether he acted wrongfully. In *Fincher v. Rhyne,* 266 N.C. 64, 145 S.E.2d 316 (1965), our Supreme Court, noting that the existence of liability insurance is not relevant to the issues of fault or damages, stated:

> [w]here testimony is given, or reference is made, indicating directly and as an independent fact that defendant has liability insurance, it is prejudicial, and the court should, upon motion therefor aptly made, withdraw a juror and order a mistrial. But there are circumstances in which it is sufficient for the court, in its discretion, because of the incidental nature of the reference, to merely instruct the jury to disregard it (citations omitted).

Id. at 69, 145 S.E.2d at 319-20. *See also Apel v. Queen City Coach Co.,* 267 N.C. 25, 147 S.E.2d 566 (1966) (denying a mistrial and finding sufficient a jury instruction to disregard testimony that a photograph showing damage to an automobile was made by bus company's insurance adjuster). Indeed, where the reference to insurance is incidental and conveys, at most, merely the idea that coverage exists, "a mistrial

would seem rarely, if ever, to be justified." 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence*, § 108, p. 333 (5th ed. 1998); *see Carrier v. Starnes*, 120 N.C. App. 513, 463 S.E.2d 393 (1995), *disc. review denied*, 342 N.C. 653, 467 S.E.2d 709 (1996) (mistrial not required where mention of insurance was not used as evidence of an independent fact).

The decision of whether a mistrial is required to prevent undue prejudice to a party or to further the ends of justice is a decision vested in the sound discretion of the trial judge. *Keener v. Beal*, 246 N.C. 247, 98 S.E.2d 19 (1957). The trial judge is vested with such discretion " 'because of his learning and integrity, and of the superior knowledge which his presence at and participation in the trial gives him over any other forum.' " *Id.* at 256, 98 S.E.2d at 25 (quotation omitted). An abuse of discretion occurs " 'where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Long v. Harris*, 137 N.C. App. 461, 464, 528 S.E.2d 633, 635 (2000) (quotation omitted).

In the present case, Mr. Strand's mention of Kimley-Horn's connection with defendant's insurer conveyed, at most, a suggestion that coverage existed; it was not direct evidence of an independent fact that defendant was insured against liability for defects in plaintiffs' house. The reference was, as the trial judge noted, incidental, insignificant, and inadvertent, so much so that the judge determined that giving the jury a curative instruction would only serve to highlight the matter and bring it to the jury's attention. The trial judge's careful weighing of the potential prejudice of Mr. Strand's statement against all of the other evidence presented at trial demonstrates the decision to deny the motion for mistrial was the result of a reasoned decision, rather than an arbitrary one. While the better practice may have been to give a curative instruction, defendant neither requested such an instruction nor assigned error to the trial court's failure to give one. We find no abuse of discretion in the trial court's denial of defendant's motion for mistrial.

II.

[2] Assigning error to the denial of its motions for directed verdict and judgment notwithstanding the verdict, defendant next contends plaintiffs presented insufficient evidence to support an EIFS-related damage award for breach of an implied warranty of habitability. Defendant argues plaintiffs were required to show, and did not, that their moisture intrusion problems resulted from defendant's failure

to meet the applicable standards of construction, rather than inherent defects in the EIFS. We disagree.

The question presented by a defendant's motion for directed verdict pursuant to G.S. § 1A-1, Rule 50(a) is whether the evidence, considered in the light most favorable to the plaintiff, was sufficient to take the case to the jury and to support a verdict for the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977). The same question is presented by a motion for judgment notwithstanding the verdict; the motion is essentially a renewal of an earlier motion for directed verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985). If there is evidence to support each element of the plaintiff's claim, the motions should be denied. *Abels v. Renfro Corp.*, 335 N.C. 209, 436 S.E.2d 822 (1993).

The implied warranty of habitability arises by operation of law, *Griffin v. Wheeler-Leonard & Co., Inc.*, 290 N.C. 185, 225 S.E.2d 557 (1976), and requires that a building 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 the implied warranty of habitability is whether there is a major structural defect or "a failure to meet the prevailing standard of workmanlike quality" in the construction of the house; whether the defendant has breached the implied warranty of habitability is a question of fact for the jury. *Gaito v. Auman*, 313 N.C. 243, 252, 327 S.E.2d 870, 877 (1985). The implied warranty of habitability imposes strict liability upon the warrantor. *George v. Veach*, 67 N.C. App. 674, 678, 313 S.E.2d 920, 922 (1984) (citing W. Prosser, Law of Torts § 95, 97 (4th ed. 1971)). "Fault on the part of the builder-vendor is not a prerequisite to liability under the doctrine of implied warranty." *Id. See also Griffin, supra.*

In this case, there was substantial evidence that plaintiffs' house failed in the essential requirement of keeping moisture out, a major structural defect. Such evidence was sufficient to take the case to the jury under strict liability, irrespective of defendant's knowledge, or lack thereof, as to the inherent problems with EIFS, or any fault on its part in installing the EIFS. Moreover, there was also evidence that defendant's installation of the EIFS was not in accordance with the manufacturer's specifications or the North Carolina Building Code, thus it did not meet the prevailing standard of workmanlike quality.

We hold there was sufficient evidence to support the jury's award of damages for plaintiffs' EIFS claim.

III.

[3] Finally, defendant contends the trial court erred in its jury instructions by failing to require the jury to find, before awarding damages, that such damages were proximately caused by defendant's failure to meet the industry standards of workmanlike construction. We hold the instructions were adequate.

As we have discussed, a builder-vendor such as defendant FYCO is liable for breach of the implied warranty of habitability if the house fails to meet the standard of workmanlike quality, irrespective of fault. The court instructed the jury:

> . . . [T]o prevail on a claim for an implied warranty of breach of workmanlike quality, ladies and gentlemen, the plaintiffs must also show that the structural defects of which they complain *had their origin in the builder/seller* and in construction which does not meet the standard of workmanlike quality then prevailing at the time and place of construction (emphasis added).

On the issue of damages, the court instructed:

> . . . Where there is a breach of an implied warranty of workmanlike quality, the party claiming damages is entitled to recover the amount required to bring the property into compliance with the implied warranty.
>
> . . .
>
> The law requires, ladies and gentlemen, that the plaintiff' damages, if any, on this issue must be reasonably determined from the evidence presented in the case.
>
> . . .
>
> With regard to the second issue on which the plaintiffs, Mr. and Mrs. Medlin, have the burden of proof, if you find by the greater weight of the evidence the amount of damages sustained by the plaintiffs *by reason of the defendant's breach of warranty*, then it would be your duty to write that amount in the blank space provided following issue number 2 (emphasis added).

" 'The court is not required to charge the jury in the precise language requested so long as the substance of the request is

included.' " *Shreve v. Combs*, 54 N.C. App. 18, 28, 282 S.E.2d 568, 575 (1981) (quotation omitted). The foregoing instructions clearly required the jury to find the necessary causal link between defendant's breach and plaintiffs' damages. Moreover, even if the instructions were arguably deficient on the issue of proximate causation, the evidence that defendant's use of, or improper application of, EIFS in the construction of the house was the proximate cause of the moisture intrusion damage, was so overwhelming as to compel such a finding. Where the evidence is so strong as to permit the jury to draw but one conclusion as to proximate cause, a new trial will not be granted by reason of an erroneous instruction on the issue. *See Watkins v. Hellings*, 321 N.C. 78, 361 S.E.2d 568 (1987) (evidence of contributory negligence so compelling that erroneous instruction was not prejudicial); *Brannon v. Sprinkle*, 207 N.C. 398, 177 S.E. 114 (1934) (failure of judge to instruct on proximate cause in a negligence case not grounds for new trial where evidence was such that jury could draw only one inference). Defendants' assignments of error with respect to the jury instructions are overruled.

PLAINTIFFS' APPEAL

[4] Plaintiffs' appeal presents the single issue of whether the trial court erred in granting prejudgment interest from the date the complaint was filed rather than from the date of defendant's breach of the implied warranty of habitability. Plaintiff contends that an action for breach of an implied warranty is an action in contract, and therefore, prejudgment interest should be awarded pursuant to G.S. § 24-5(a) which provides: "In an action for breach of contract . . . the amount awarded on the contract bears interest from the date of breach."

In *Farmah v. Farmah*, 348 N.C. 586, 500 S.E.2d 662 (1998), the Supreme Court held that the equitable principles of quasi-contract are different from the legal principles of contract law, and that an action grounded in quasi-contract was not an action for breach of contract. Thus, the prejudgment interest provisions of G.S. § 24-5(a) did not apply, and the awarding of interest was controlled by G.S. § 24-5(b) which provides: "In an action other than contract, any portion of a money judgment designated by the factfinder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied."

Like the unjust enrichment claim in *Farmah*, the implied warranty of habitability was not created as a result of the parties' negotiations and assent, but rather arose by operation of law. *See Griffin*,

supra. The Supreme Court has stated in *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 443, 238 S.E.2d 597, 605 (1977) (quoting Corbin on Contracts, Vol. I § 19, p. 46):

> A quasi contractual obligation is one that is created by the law for reasons of justice, without any expression of assent and sometimes even against a clear expression of dissent. If this were true, it would be better not to use the word "contract" at all. Contracts are formed by expressions of assent; quasi contracts quite otherwise. The legal relations between contractors are dependent upon the interpretation of their expressions of assent; in quasi contract the relations of the parties are not dependent on such interpretation (emphasis omitted).

Therefore, we hold that the implied warranty of habitability is a quasi-contract and the awarding of interest is governed by G.S. § 24-5(b). The trial court correctly awarded plaintiffs prejudgment interest from the date the action was instituted.

No error.

Judges McGEE and HUNTER concur.

STATE OF NORTH CAROLINA v. COLLINS STEPHANIE WILSON, DEFENDANT

No. COA99-709

(Filed 15 August 2000)

1. Criminal Law— habitual felon—punishment—jury not informed at principle felony trial

The trial court did not err by not allowing defendant to argue to the jury at the first phase of the trial the possible punishment he faced as an habitual felon. Although a criminal defendant has the right to inform the jury of the punishment that may be imposed upon conviction, that principle does not support extrapolation to the right to inform the jury during a principal felony trial of the possible sentence upon an habitual felon adjudication. Statutory provisions that an habitual felon trial be subsequent and separate from the principal felony trial and that an habitual felon indictment be revealed only upon conviction of the princi-

pal felony offense logically preclude argument of habitual felon issues during the principal felony trial. Moreover, the proof necessary during a principal felony trial and an habitual felon proceeding is different and distinct, and the bifurcated procedure precludes prejudice to defendant and confusion by the jury.

2. Constitutional Law— habitual felon—prosecutorial discretion—separation of powers—no violation

The trial court did not err by denying defendant's motion to dismiss an habitual felon indictment as violating North Carolina constitutional provisions concerning separation of powers on the ground that the prosecutor infringed upon the power of the General Assembly to determine the parameters of criminal sentences by choosing whether to punish defendant under the Structured Sentencing Act or the Habitual Felon Act. Furthermore, defendant did not argue and the evidence does not reflect an improper motive by this prosecutor in the decision regarding these charges. N. C. Const. art. I, § 6.

3. Sentencing— habitual felon—status rather than crime—sentence enhancement—no separate judgment

Defendant's motion for appropriate relief should have been granted and both the court's judgment finding defendant guilty of being an habitual felon and imposing sentence and the sentences imposed upon the underlying convictions of felonious breaking and entering and felonious larceny were vacated and remanded for resentencing where the trial court imposed the habitual felon sentence in a separate judgment and directed that the principal felony sentence run at the expiration of the habitual felon sentence. Being an habitual felon is not a crime but a status and the status only will not support a criminal sentence. Upon conviction as an habitual felon, the court must sentence defendant for the underlying felony as a Class C felon; here, defendant was improperly sentenced with a Prior Record Level of I on the Class H felonies.

Appeal by defendant from judgments entered 10 February 1999 by Judge C. Preston Cornelius in Moore County Superior Court. Heard in the Court of Appeals 20 April 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel P. O'Brien, for the State.

Bruce T. Cunningham, Jr., for defendant-appellant.

JOHN, Judge.

Defendant appeals judgments entered upon conviction by a jury of felonious breaking or entering and felonious larceny and upon the jury's further adjudication of defendant as an habitual felon. In addition, defendant has filed a motion for appropriate relief with this Court asserting error in the sentencing process. We hold the trial court committed no error at trial, but grant defendant's motion for appropriate relief regarding sentencing.

Defendant was convicted of the above-referenced offenses by a jury at the 8 February 1999 Criminal Session of Moore County Superior Court. The trial court thereupon imposed an active minimum term of one hundred thirty-three months and a maximum term of one hundred sixty-nine months imprisonment upon the habitual felon charge (the habitual felon sentence), and in a separate judgment consolidated the breaking and entering and larceny offenses and imposed a minimum active term of six months and a maximum term of eight months imprisonment to begin at the expiration of the habitual felon sentence. Defendant appeals.

Initially, we note defendant's appellate brief includes no argument addressed to assignments of error two and four. Those assignments of error are therefore deemed abandoned, *see* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error not set out in the appellant's brief . . . will be taken as abandoned"), and we do not discuss them.

Additionally, defendant's fifth and sixth assignments of error asserting constitutional issues have not been preserved for appellate review. The record is devoid of any affirmative indication that defendant raised in the trial court his current arguments based upon the Law of the Land Clause of the North Carolina Constitution, N.C. Const. art. I, § 19, when requesting certain jury instructions.

> [I]t has long been the rule that we will not decide at the appellate level a constitutional issue or question which was not raised or considered in the trial court.

Peace River Electric Cooperative v. Ward Transformer Co., 116 N.C. App. 493, 506, 449 S.E.2d 202, 212 (1994) (citing *Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 47-48, 332 S.E.2d 67, 69 (1985)), *disc. review denied*, 339 N.C. 739, 454 S.E.2d 655 (1995); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (where theory urged on appeal not raised in trial court, "the law does not permit par-

ties to swap horses between courts in order to get a better mount [on appeal]"). Accordingly, we likewise do not address defendant's fifth and sixth assignments of error.

[1] Defendant first maintains

> the trial court erred in not allowing [him] to argue to the jury at the first phase of the trial the possible punishment [he] faced as an habitual felon.

This contention is unfounded.

Prior to final argument by counsel at the felonious breaking or entering and felonious larceny trial (the principal felony trial), defendant sought the trial court's permission to inform the jury that, upon conviction, he might subsequently be subject to a maximum punishment of two hundred ten months imprisonment as an habitual felon. Defendant asserted that

> in order to enable the jury to appreciate the seriousness of their responsibility . . . they should be informed of the consequences of . . . their verdict

in the principal felony trial. The trial court denied defendant's request, noting he "ha[d] not been declared an habitual felon yet by the Court or by the jury." We hold the trial court did not err in its ruling.

N.C.G.S. § 14-7.5 (1999) prescribes the bifurcated habitual felon determination process as follows:

> The indictment that the person is an habitual felon shall not be revealed to the jury unless the jury shall find that the defendant is guilty of the principal felony or other felony with which he is charged. *If the jury finds the defendant guilty of a felony*, the bill of indictment charging the defendant as an habitual felon may be presented to the same jury. Except that the same jury may be used, *the proceedings shall be as if the issue of habitual felon were a principal charge.* If the jury finds that the defendant is an habitual felon, the trial judge shall enter judgment according to the provisions of this Article. If the jury finds that the defendant is not an habitual felon, the trial judge shall pronounce judgment on the principal felony or felonies as provided by law.

G.S. § 14-7.5 (emphasis added); *see State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995) ("trial for the substantive felony is held

first, and only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury"); *see generally State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 709 (1996) ("requirement in G.S. § 14-7.3 that the habitual felon indictment be a separate document from the predicate felony indictment is consistent with the bifurcated nature of the trial").

Although defendant accurately maintains a criminal defendant has the right to "inform the jury of the punishment that may be imposed upon conviction of the crime for which he is being tried," *State v. Walters*, 33 N.C. App. 521, 524, 235 S.E.2d 906, 908-09 (1977) (citing N.C.G.S. § 7A-97 (1999)), *aff'd*, 294 N.C. 311, 240 S.E.2d 628 (1978), this principle does not support defendant's extrapolation therefrom of the right to inform the jury, during a principal felony trial, of the possible maximum sentence which might be imposed upon an habitual felon adjudication. *Walters* pointedly permits apprising the jury only of "the punishment that may be imposed upon conviction of the *crime for which he is being tried.*" *Id.*

Further, the statutory provisions that an habitual felon trial be held subsequent and separate from the principal felony trial, and that an habitual felon indictment be revealed to the jury *only* upon conviction of the principal felony offenses, *see* G.S. § 14-7.5, logically preclude argument of issues pertaining to the habitual felon proceeding, specifically and particularly including punishment, during the principal felony trial. *See State v. Todd*, 313 N.C. 110, 120, 326 S.E.2d 249, 255 (1985) ("a defendant's 'trial' on the issue of whether defendant should be sentenced as an habitual offender [is] analogous to the separate sentencing hearing . . . to determine punishment").

Next, the bifurcated procedure set forth in G.S. § 14-7.5, separating the principal felony trial from the habitual felon proceeding, avoids possible prejudice to the defendant and confusion by the jury considering the principal felony with issues not pertinent to guilt or innocence of such offense, notably the existence of the prior convictions necessary for classification as an habitual felon, and further precludes the jury from contemplating what punishment might be imposed were defendant convicted of the principal felony and subsequently adjudicated an habitual felon. *See Todd*, 313 N.C. at 117, 326 S.E.2d at 253 (" 'while notice [of the habitual felon charge] is given [to defendant] before pleading, only the allegation of the present crime is read and proved to the jury at the first trial, preventing any prejudice due to the introduction of evidence of prior convictions before the trier of guilt for the present offense' ") (quoting *Recidivist*

Procedures, 40 N.Y.U. L. Rev. 332, 348 (1965)), and *Oyler v. Boles*, 368 U.S. 448, 452, 7 L. Ed. 2d 446, 450 (1962) ("the determination of whether one is an habitual criminal is essentially independent of the determination of guilty on the underlying substantive offense . . . [therefore] although the habitual criminal issue may be combined with the trial of the felony charge, it is a distinct issue, and may appropriately be the subject of a separate determination") (citations omitted).

Finally, the proof necessary during a principal felony trial is different and distinct from that required in the habitual felon proceeding. During the former, the State must prove beyond a reasonable doubt each essential element of the charged principal offense. During the latter, on the other hand, the State must prove the defendant was "convicted of or pled guilty to three felony offenses" within an allotted time frame. N.C.G.S. § 14-7.1 (1999); *see State v. Mason*, 126 N.C. App. 318, 322, 484 S.E.2d 818, 820-21 (1997) (during habitual felon trial "defendant is not defending himself against the predicate substantive felony, but against the charge that he has been previously convicted of the required number of felonies"). Although the

> original or certified copy of the court record [of prior convictions] . . . shall be *prima facie* evidence that the defendant named therein is the same as the defendant before the court [charged as a habitual felon] . . . [and] of the facts set out therein,

N.C.G.S. § 14-7.4 (1999), the defendant may contest any prior conviction relied upon by the State to establish habitual felon status by presenting to the jury evidence indicating he was not the perpetrator of such felony or certified court records reflecting such conviction was otherwise inaccurate or flawed.

In short, considering the statutory provisions, authorities and public policy noted above, we hold the trial court did not err in denying defendant's request to argue to the jury the punishment he might receive as an habitual felon if found guilty of the principal offenses.

[2] Defendant next contends the trial court erred by denying his motion to dismiss the habitual felon indictment. Defendant argued to the trial court and reiterates on appeal his contention that the habitual felon provisions of G.S. §§ 14-7.1 *et seq.* (the Habitual Felon Act) violate North Carolina Constitution art. I, § 6 ("legislative, executive, and . . . judicial powers of the State government shall be forever separate and distinct") by

> authoriz[ing] the District Attorney, in his sole and unrestricted discretion, to decide whether to enhance the legislatively prescribed punishment for a certain crime.

Specifically, defendant claims the prosecutor *sub judice* possessed the "unfettered discretion" either to punish defendant under the Structured Sentencing Act, *see* N.C.G.S. §§ 15A-1340.10 *et seq.* (1999), for the Class H felonies of breaking or entering and larceny, *see* G.S. § 15A-1340.17, N.C.G.S. § 14-54(a) (1999) and N.C.G.S. § 14-72 (1999), or to indict and try defendant pursuant to the Habitual Felon Act so as to achieve an enhanced sentence. According to defendant, the prosecutor was thereby allowed to infringe upon the prerogative of the General Assembly which bears the "responsibility to establish the parameters of criminal sentences within which judges may exercise limited discretion." As a consequence, defendant concludes, "a[ny] person with more than three non-overlapping felony convictions can be punished either as a Class H felon or a Class C felon" as the prosecutor may elect.

Our courts have held the procedures set forth in the Habitual Felon Act comport with a criminal defendant's federal and state constitutional guarantees. *See State v. Hairston*, 137 N.C. App. 352, 354, 528 S.E.2d 29, 31 (2000) (citing *Todd*, 313 N.C. at 118, 326 S.E.2d at 253), and *State v. Hodge*, 112 N.C. App. 462, 468, 436 S.E.2d 251, 255 (1993) (upholding Habitual Felon Act against due process, equal protection, and double jeopardy challenges). Further, the clear mandate of North Carolina Constitution art. IV, § 18, stating

> [t]he District Attorney shall . . . be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district,

N.C. Const. art. IV, § 18, is that "the responsibility and authority to prosecute all criminal actions . . . is vested solely," *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991), with the various elected district attorneys.

It is well established that

> there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon "an unjustifiable standard such as race, religion or other arbitrary classification."

State v. Lawson, 310 N.C. 632, 644, 314 S.E.2d 493, 501 (1984) (quoting *State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980)), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

For defendant to have prevailed on his motion, therefore, he must have shown that the instant "prosecutorial system was motivated by a discriminatory purpose and had a discriminatory effect." *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995) (citing *Wayte v. United States*, 470 U.S. 598, 84 L. Ed. 2d 547 (1985)), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996); *see Oyler*, 368 U.S. at 456, 7 L. Ed. 2d at 453 ("conscious exercise of some selectivity" by prosecutor in application of West Virginia recidivist statute not, in itself, denial of equal protection absent selection deliberately based upon "unjustifiable standard such as race, religion, or other arbitrary classification"); *see generally Garner*, 340 N.C. at 588, 459 S.E.2d at 725 ("only limitation on [district attorney's] discretion [in first-degree murder cases] . . . is that the decision to prosecute capitally may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"), and *State v. Rorie*, 348 N.C. 266, 270-71, 500 S.E.2d 77, 80 (1998) (prosecutor is accorded broad discretion to try a defendant for first-degree murder, second-degree murder, or manslaughter in homicide case, but has no discretion to try a defendant capitally or noncapitally for first-degree murder due to expressed provisions of N.C.G.S. § 15A-2000 (1999) specifically controlling such issue).

Upon careful review of the record, we hold defendant has neither argued nor does any evidence reflect an improper motive by the prosecutor *sub judice* in the decision regarding the charges upon which defendant was indicted and tried. Indeed, called as a witness by defendant, the district attorney testified as to the general policies of his office as follows:

> anyone who is eligible to be indicted as an habitual felon is indicted as such . . . . [O]nce a person is indicted as an habitual felon there is not a dismissal taken of that unless there is an evidentiary reason to do so.

The trial court did not err in denying defendant's motion to dismiss.

[3] In conclusion, we consider defendant's motion for appropriate relief. The motion alleges the trial court erred in imposing the habitual felon sentence in a separate judgment from the principal felony

convictions, and directing that the latter sentence run at the expiration of the habitual felon sentence. We agree.

In responding to defendant's motion, the State concedes that he correctly asserts an

> habitual felon conviction is not a separate crime for which a defendant can be separately sentenced, but that the trial court must sentence a convicted habitual felon for the underlying felony as a Class C felon.

See State v. Penland, 89 N.C. App. 350, 351, 365 S.E.2d 721, 721-22 (1988) ("[u]pon a conviction as an habitual felon, the court must sentence the defendant for the underlying felony as a Class C felon"). The State adds that the trial court improperly "sentenced defendant with a Prior Record Level of I on the Class H felonies."

In *Penland*, this Court held:

> [t]he only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. Being an habitual felon is not a crime but is a status. The status itself, standing alone, will not support a criminal sentence. A court may not treat the violation of the Habitual Felon Act as a substantive offense.

Id. (citations omitted).

To be brief, the trial court's judgment "finding defendant guilty of being an habitual felon," *id.*, and imposing sentence thereon was erroneous and must be vacated, *see id.* The sentences imposed upon defendant's convictions of felonious breaking or entering and felonious larceny must likewise be vacated and remanded for resentencing. *See id.* Upon remand, the court shall calculate defendant's proper prior record level pursuant to N.C.G.S. § 15A-1340.14 (1999) and shall impose sentences upon the "the underlying felon[ies] as . . . Class C felon[ies]," *Penland*, 89 N.C. App. at 351, 365 S.E.2d at 722; *see also State v. Kirkpatrick*, 89 N.C. App. 353, 354-55, 365 S.E.2d 640, 641-42 (1988) (where defendant initially improperly sentenced to term of fifteen years upon habitual felon "conviction" and term of three years upon felonious possession of stolen property conviction, imposition following remand of fifteen year sentence upon felonious possession conviction affirmed, notwithstanding provisions of N.C.G.S. § 15A-1335 (1999) precluding new sentence in excess of

prior sentence upon conviction set aside on appeal, because statute "does not apply to prevent the imposition of a more severe sentence" when "trial court is required by [Habitual Felon Act] to impose a particular sentence" on resentencing).

No error in part; vacated and remanded in part.

Judges WYNN and HORTON concur.

EVANGELINE SCOTT DANCY, EMPLOYEE, PLAINTIFF v. ABBOTT LABORATORIES, EMPLOYER, SELF/FIREMAN'S FUND INSURANCE COMPANY, DEFENDANT

No. COA99-683

(Filed 15 August 2000)

Workers' Compensation— Form 21 agreement—subsequent Form 26 agreement—burden of establishing total disability

The Industrial Commission erred by concluding that defendants had the burden of presenting evidence to rebut a presumption of continued total disability raised by a Form 21 agreement where the parties subsequently signed a Form 26 supplemental agreement under which the employer agreed to pay plaintiff for a temporary partial disability at a reduced rate for a two-week period. There was no language in the Form 26 agreement indicating that plaintiff would return to her previous status of temporary total disability; resolution of the issue is determined by the terms of the agreement between the parties and the burden on remand is on plaintiff to establish total disability.

Judge GREENE dissenting.

Appeal by defendants from Opinion and Award entered 26 February 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 March 2000.

Ralph G. Willey, P.A., by Ralph G. Willey, III, for plaintiff-appellee.

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

EDMUNDS, Judge.

Plaintiff Evangeline Dancy (plaintiff) was employed by defendant Abbott Laboratories (employer) for approximately fifteen years. (Where appropriate, employer and its insurer, Fireman's Fund Insurance Company, will be designated collectively as defendants.) While working in the overwrap department, she began to experience pain and numbness in her hands. On 15 May 1991, plaintiff complained of pain in her arms and shoulders to Dr. Margaret Sowerwine, employer's physician. Although nerve conduction tests of plaintiff's upper extremities were within normal limits, Dr. Sowerwine believed plaintiff was developing bilateral carpal tunnel syndrome. Plaintiff returned to work with wrist splints.

In October 1991, employer transferred plaintiff from the overwrap department to the "fab and print" department in hopes of alleviating her pain. In February 1992, plaintiff returned to Dr. Sowerwine complaining of numbness and burning pain in her right hand. On 8 March 1992, plaintiff visited orthopaedic surgeon Dr. Greg Nelson, who examined plaintiff and diagnosed her as suffering from bilateral carpal tunnel syndrome with the right hand being in worse condition than the left.

On 16 March 1993, employer completed a Form 21 agreement accepting responsibility for plaintiff's bilateral carpal tunnel syndrome. (Details of this and other pertinent Industrial Commission forms will be discussed below.) Plaintiff underwent right carpal tunnel release surgery on 30 March 1993, and on 2 April 1993, she reported no pain and decreased numbness in her right hand; however, she reported increasing pain in her left wrist. During a 22 April 1993 visit to Dr. Nelson, plaintiff complained of pain in her left wrist. At this time, plaintiff was not working and was receiving benefits while she participated in physical therapy. Dr. Nelson recommended that plaintiff participate in a work-hardening program for two to three weeks, then return to normal work duties.

On 13 May 1993, Nash Day Occupational Therapy reported that plaintiff was "dying of [right] arm, as well as [left] arm pain . . . and it would be pointless to restart work hardening." Dr. Nelson stopped plaintiff's physical therapy and referred her to Nash General Hospital, where additional testing led Drs. Nelson and Sowerwine to conclude that plaintiff was not suffering from reflex sympathetic dystrophy (RSD). Drs. Nelson and Sowerwine then agreed that because there was no objective evidence to support the degree of constant pain

plaintiff was describing, she should consult a psychologist. Plaintiff began seeing a psychologist but subsequently discontinued her visits and resumed physical therapy.

Dr. Nelson released plaintiff to return to work without restrictions on 10 June 1993, but suggested that plaintiff begin with the least-demanding part of her job and ease back into the more difficult work. Dr. Sowerwine agreed that plaintiff should return to work, but due to the nature of her work, recommended limited hours. Plaintiff resumed work on 14 June 1993, but each day she complained of severe burning pain in both wrists within an hour and was allowed to go home. On 21 June 1993, plaintiff did not think she could continue stacking bags because of her pain and asked to be placed in the overwrap department where she could do inspection work. A disagreement exists between the parties as to whether plaintiff was fired or quit when she was told there were no openings in overwrap, but that disagreement is not germane to our analysis. Employer filled out a Form 28 indicating that plaintiff quit on 21 June 1993 and that it was discontinuing her workers' compensation coverage.

On 6 July 1993, plaintiff and employer signed a Form 26 "Supplemental Memorandum of Agreement as to Payment of Compensation," pursuant to which employer agreed to pay plaintiff for a temporary partial disability at the rate of $113.50 per week for a two-week period that began on 14 June 1993. These were the last worker compensation benefits plaintiff received until she instituted the present action.

Plaintiff began seeing Dr. Robert J. Spinner in the Orthopaedics Department at Duke Medical Center, who made a preliminary diagnosis of bilateral RSD. Nerve conduction testing provided electrophysiologic evidence of mild right carpal tunnel syndrome. Physical examination provided no evidence of left carpal tunnel syndrome or right cervical radioculopathy. Electromyography and nerve conduction studies showed no conclusive deficit to explain the diffuse pain described by plaintiff in both hands, her arms, and neck. Because these findings indicated that plaintiff might be suffering from fibromyalgia, she was referred to Dr. John S. Sundy, a rheumatologist. Dr. Sundy diagnosed plaintiff as suffering from fibromyalgia with muscle spasms, sleep disorder, and depression. He believed that plaintiff's wrist and arm pain, sleeplessness, and fibromyalgia were causing her depression, and her depression, in turn, was aggravating her symptoms of fibromyalgia. Dr. Sundy testified that there is "no known correlation in terms of carpal tunnel [syndrome] causing

fibromyalgia as far as I know." He also stated that he knew of no case where a person's fibromyalgia was aggravated by the development of carpal tunnel syndrome.

Dr. Sundy referred plaintiff to Dr. David F. Naftolowitz in the Psychiatric Department at Duke University Medical Center to treat her depression. Dr. Naftolowitz diagnosed plaintiff as suffering from a somatoform pain disorder, in which a psychological component causes a patient to magnify pain. He summarized plaintiff's condition as follows:

> [T]here's a clear physical basis in the carpal tunnel syndrome which would explain the hand and wrist pain. The remainder of the pain is in somewhat gray areas involving a diagnosis by her rheumatologist of fibromyalgia and then the added component of exaggeration of the pain which could be caused by both the somatoform disorder and major depression for that matter, can also lead to exaggeration of pain complaints.

It was Dr. Naftolowitz' opinion that "the development of carpal tunnel syndrome and the problems with her job was in fact the precipitating factor for [plaintiff's] depression."

On 1 August 1995, plaintiff filed a Form 33 "Request that Claim be Assigned for Hearing," alleging a substantial change in her condition since receiving her last compensation check on 23 June 1993 and seeking temporary total disability benefits. A deputy commissioner heard the case on 19 September 1996 and ordered defendants to resume paying plaintiff temporary total disability benefits beginning 19 September 1996; in his Opinion and Award of 1 May 1998, the deputy commissioner found that defendants failed to rebut plaintiff's presumption of disability. Therefore, he ordered defendants to pay a lump-sum award for temporary total disability compensation that had accrued from 21 June 1993 through 19 September 1996. Defendants appealed to the Full Commission. The Full Commission also placed the burden of proof upon employer to show that plaintiff was no longer temporarily totally disabled and capable of earning pre-injury wages, then concluded as a matter of law:

> Defendant-employer admitted liability for plaintiff's carpal tunnel syndrome by signing the Industrial Commission Form 21 Agreement to pay disability compensation. Once defendant-employer accepted plaintiff's occupational disease as compensable on a Form 21, there was a presumption that her disability

continued until she returned to work at wages equal to those she was receiving at the time her injury occurred.

Affirming the deputy commissioner, the Full Commission awarded plaintiff temporary total disability benefits from 21 June 1993 through 19 September 1996 and ordered employer to continue to pay temporary total disability benefits at the rate of $226.96 per week. Defendants appeal to this Court.

"The standard of appellate review of an opinion and award of the Industrial Commission is limited to whether there was any competent evidence before the Commission to support its findings of fact and whether the findings of fact justify the Commission's legal conclusions and decision." *Harris v. North American Products*, 125 N.C. App. 349, 352, 481 S.E.2d 321, 323 (1997) (citation omitted). The Commission's findings "will not be disturbed on appeal if supported by any competent evidence even if there is evidence in the record which would support a contrary finding." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986) (citation omitted). However, the Industrial Commission's conclusions of law are reviewable *de novo* by this Court. *See Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997).

Defendants argue that the Commission erred (1) in finding that a presumption of temporary total disability arose as a result of the 16 March 1993 Form 21 agreement and (2) in placing upon defendants the burden of overcoming this presumption. Defendants contend that by signing the subsequent 6 July 1993 Form 26 agreement, plaintiff waived the presumption that she was temporarily totally disabled.

When parties enter into a Form 21 agreement, a presumption of disability attaches in favor of the employee. *See Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 77, 476 S.E.2d 434, 436 (1996). Plaintiff had been earning $340.40 per week, and pursuant to the Form 21 agreement, employer agreed to pay her $226.95 per week beginning 3 October 1993 for an undetermined number of weeks. This reduced payment, which was 66⅔% of plaintiff's original wage, is consistent with an agreement that plaintiff was totally disabled. *See* N.C. Gen. Stat. § 97-29 (1999). Although plaintiff briefly returned to work on 14 June 1993, "[a]n employee's release to return to work is not the equivalent of a finding that the employee is able to earn the same wage earned prior to the injury, nor does it automatically deprive an employee of the [Form 21] presumption." *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994) (citation omitted).

However, on 6 July 1993, employer and plaintiff signed a Form 26 "Supplemental Memorandum of Agreement as to Payment of Compensation," agreeing that on 14 June 1993 plaintiff's weekly earning power was reduced from $340.40 per week to $170.20 per week. Pursuant to this Form 26 agreement, employer agreed to pay plaintiff temporary partial disability benefits of $113.50 per week for two weeks. This agreement, which was signed by plaintiff, her attorney, and a representative of employer, was filed with the Industrial Commission and approved on 19 August 1993.

We have held that

> [u]nless the presumption [in favor of disability] is waived by the employee, no change in disability compensation may occur absent the opportunity for a hearing. . . . [O]ne such way a waiver might occur is when an employee and employer settle their compensation dispute in a manner consistent with N.C. Gen. Stat. § 97-17 [(1999)], and that settlement is subsequently approved by the Commission.

Kisiah, 124 N.C. App. at 81, 476 S.E.2d at 439 (internal citations omitted). Section 97-17 reads in pertinent part:

> Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article. A copy of such settlement agreement shall be filed by employer with and approved by the Industrial Commission: Provided, however, that no party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters therein set forth . . . .

N.C. Gen. Stat. § 97-17. Section 97-82(a) provides: "If the employer and the injured employee or his dependents [do] reach an agreement in regard to compensation under this Article, they may enter into a memorandum of the agreement in the form prescribed by the Commission." N.C. Gen. Stat. § 97-82(a) (1999). "[I]t has been uniformly held that an agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal." *Pruitt v. Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976) (citations omitted).

We believe the resolution of this case is controlled by our Supreme Court's decision in *Saunders v. Edenton Ob/Gyn Center*, 352 N.C. —, 530 S.E.2d 62 (2000). In that case, the plaintiff/employee was injured on 7 December 1992. On 28 January 1993, she entered into a Form 21 agreement in which she was compensated for four weeks at a rate consistent with total disability. Thereafter, on 14 April 1993, the plaintiff and employer entered a Form 26 agreement in which the parties agreed that plaintiff was temporarily partially disabled; the time covered by this agreement was indefinite, covering "necessary" weeks. The *Saunders* Court held that the Form 26 supplemental agreement, to which the parties agreed and which the Commission approved, constituted the final agreement, whose terms were binding between the parties. *Id.* at —, 530 S.E.2d at 65-66.

> Although we agree that the [rebuttable presumption of continuing disability resulting from execution of a Form 21 agreement] was not lost, we disagree that the presumption of total disability was not lost through the subsequent [Form 26] agreement of "partial disability." . . . [That subsequent agreement] precludes coverage for total disability under N.C.G.S. § 97-29, unless plaintiff rebuts the presumption of partial disability through the presentation of evidence supporting total disability at a hearing before the Commission.

Id. at —, 530 S.E.2d at 65.

Comparing the forms completed in *Saunders* and in this case, we see that in *Saunders* the Form 21 agreement, which covered the employee's total disability for four weeks, was followed by a Form 26 agreement, which covered the employee's temporary partial disability for an indefinite period. Conversely, in the case at bar, the Form 21 agreement, which covered employee's total disability for an indefinite period, was followed by a Form 26 agreement, which covered employee's temporary partial disability for two weeks. Here, plaintiff's Form 21 agreement was open-ended as to duration; logically, her later Form 26 agreement with its specific duration superseded the earlier agreement. Consistent with the holding in *Saunders*, a presumption of plaintiff's partial disability survives even though the Form 26 covered only two weeks. There was no language in the Form 26 agreement indicating that plaintiff would return to her previous status of temporary total disability. "[R]esolution of the issue is determined by the terms of the agreement between the parties." *Id.* at —, 530 S.E.2d at 64. The burden is now on plaintiff to establish her total disability.

Here, as in *Saunders*, the Commission concluded as a matter of law that because defendants had the burden of proof to present evidence sufficient to rebut a presumption of continued total disability raised by the Form 21 agreement, and defendants had not met that burden, plaintiff was entitled to a continuing presumption of total disability. Because these conclusions were reached through an erroneous application of law, we reverse and remand to the Commission for further proceedings in accordance with this opinion. On remand, in her claim for total disability, plaintiff will have the burden of "rebut[ting] the [existing] presumption of partial disability through the presentation of evidence supporting total disability." *Id.* at —, 530 S.E.2d at 65.

Reversed and remanded.

Judge McGEE concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I believe plaintiff is entitled to a presumption of total disability, arising from the execution of the Form 21 agreement, and I, therefore, respectfully dissent.

In this case, plaintiff and employer entered into a Form 21 agreement for an *indefinite* duration that stated plaintiff was totally disabled. Plaintiff and employer subsequently supplemented or amended the Form 21 agreement with a Form 26 agreement. The Form 26 agreement stated plaintiff was partially disabled; however, this Form 26 agreement specified plaintiff's partial disability was for a *definite* period of two weeks. Thus, the terms of the Form 21 agreement remained in effect, except as modified by the Form 26 agreement. Accordingly, at the end of the two-week period specified in the Form 26 agreement, plaintiff was again entitled to benefits consistent with the Form 21 agreement and the presumption of disability arising under that agreement in the event payments (or lack of payments) under the agreement were contested before the Commission.

This result does not contradict the North Carolina Supreme Court's holding in *Saunders v. Edenton Ob/Gyn Center*, 352 N.C. 136, 530 S.E.2d 62 (2000). In *Saunders*, the parties entered into a Form 21 agreement that provided the employee was totally disabled for a *limited* duration of time. *Id.* at 137, 530 S.E.2d at 63. The parties then

supplemented the Form 21 agreement with a Form 26 agreement that provided the employee was partially disabled for an *indefinite* period of time. *Id.* In *Saunders*, the court held the Form 26 agreement constituted the "final terms which became binding between the parties." *Id.* at 140, 530 S.E.2d at 65. Unlike the case *sub judice*, the duration of the Form 21 agreement in *Saunders* was limited and the duration of the subsequent Form 26 agreement was unlimited. The employee in *Saunders* was, therefore, no longer entitled to a presumption of total disability, as the employee's entitlement under the Form 21 agreement terminated upon the expiration of the period designated in that agreement. Accordingly, the relevant agreement in *Saunders* was the Form 26 agreement and any presumption the employee was entitled to receive was pursuant to that agreement.

In this case, because plaintiff was entitled to a presumption of total disability based on the Form 21 agreement and that agreement is the relevant agreement (benefits under the Form 26 agreement having expired), I would affirm the opinion and award of the Full Commission which gave plaintiff the benefit of the total disability presumption.

MILTON L. HARRISON, EMPLOYEE-PLAINTIFF v. TOBACCO TRANSPORT, INC., EMPLOYER, NON-INSURED, DEFENDANT, AND/OR CNA INSURANCE COMPANIES, CARRIER; DEFENDANTS

No. COA99-1058

(Filed 15 August 2000)

1. Workers' Compensation— Kentucky policy—Kentucky law—no North Carolina coverage

The Industrial Commission did not err by not applying Kentucky law to determine whether a workers' compensation insurance policy provided coverage for plaintiff's injury where defendant-employer was a Kentucky corporation with its principal place of business in Kentucky, plaintiff was hired in North Carolina by a supervisor for defendant, plaintiff testified that he sometimes worked for the supervisor but did not know the name of the supervisor's employer or that the employer was located in Kentucky, and plaintiff resided in North Carolina, performed his work here, was injured here, and never traveled outside of North

Carolina. Although defendant argued that Kentucky's full coverage statute applied, plaintiff's injuries were not "subject to this chapter" under the plain language of that statute.

2. Workers' Compensation— Kentucky policy—language of policy—no North Carolina policy

A workers' compensation insurance carrier was properly dismissed from a workers' compensation proceeding where the plain language of the policy provided competent evidence sufficient to uphold the Commission's determination that the policy did not provide workers' compensation insurance to defendant in North Carolina. No states were listed where required for coverage by the plain language of the "Other States Insurance" provision; that subparagraph was not altered by an amendatory endorsement; the amended version also referred to the section in which no other states were listed; and defendant did not meet the requirements for the amended subparagraph to apply.

3. Workers' Compensation— attorney fees—employer's dispute with insurer—refusal to compensate

The Industrial Commission did not abuse its discretion in a workers' compensation action by awarding attorney fees where it was undisputed that plaintiff suffered a compensable injury in 1994; compensation for that injury is the ultimate responsibility of the employer, defendant; and defendant's refusal to compensate plaintiff pending the outcome of its litigation with the insurer prevented plaintiff from receiving the full amount of his compensation for about six years.

4. Workers' Compensation— Kentucky policy—no North Carolina coverage—employer fined

The Industrial Commission did not err by assessing a fine against defendant where it had been determined in the same workers' compensation action that a Kentucky policy did not provide worker's compensation insurance for plaintiff's North Carolina injuries. Defendant failed to procure necessary insurance for its North Carolina operations and thus violated N.C.G.S. § 97-94.

5. Appeal and Error— cross-assignment of error—issues not providing alternate basis for judgment—not considered

A workers' compensation plaintiff's cross-assignments of error concerning a Kentucky insurance policy which did not pro-

vide North Carolina coverage and the failure to assess a late payment penalty were not preserved for appeal where they would not have provided an alternative basis in law for upholding the order and award of the Industrial Commission. Plaintiff should have filed a cross-appeal.

Appeal by defendant Tobacco Transport, Inc., from opinion and award entered 16 April 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 May 2000.

Stephen N. Camak for plaintiff-appellee.

Maupin Taylor & Ellis, P.A., by M. Keith Kapp and Kevin W. Benedict, for defendant-appellant Tobacco Transport, Inc.

Teague, Campbell, Dennis & Gorham, L.L.P., by Thomas M. Clare and Tracey L. Jones, for defendant-appellee CNA Insurance.

MARTIN, Judge.

In October 1994 plaintiff Milton L. Harrison ("plaintiff") was employed by defendant Tobacco Transport, Inc. ("Tobacco Transport") for the unloading of tobacco bales from trucks. On 10 October 1994 plaintiff was unloading a truck for Tobacco Transport in Kinston, North Carolina, when he fell approximately 20 feet onto a concrete surface, sustaining serious injuries. Plaintiff has incurred substantial expenses for medical treatment and has been unable to work since the date of the accident.

Tobacco Transport is a Kentucky corporation with its principal place of business in Milltown, Kentucky. Plaintiff was hired in North Carolina to perform work for Tobacco Transport by Freddy Todd, a Tobacco Transport supervisor. Plaintiff testified that he sometimes worked for Mr. Todd, and that he did not know the name of Mr. Todd's employer or that the employer was located in Kentucky. Plaintiff resided in North Carolina, was hired in North Carolina, performed his work for Tobacco Transport in this State, and was injured here. Plaintiff never performed work for Tobacco Transport in Kentucky; indeed, he testified that he had never traveled outside of North Carolina.

Plaintiff filed this workers' compensation claim in North Carolina on 20 May 1996. At the time of plaintiff's accident, Tobacco Transport carried workers' compensation insurance under a policy issued by

defendant CNA Insurance Companies ("CNA"). With respect to coverage for injuries sustained outside of Kentucky, the policy contains the following relevant provisions:

> "Information Page"
>
> ITEM 3.A. Workers' Compensation Insurance: Part One of the policy applies to Workers' Compensation Law of the states listed here:
>
> 16-Kentucky
>
> C. Other States Insurance: Part Three of the Policy applies to the states, if any, listed here:
>
> [none listed]
>
> "Part Three—Other States Insurance"
>
> A. How This Insurance Applies
>
> 1. This other states insurance applies only if one or more states are shown in Item 3.C. of the Information Page.

The policy also contains an endorsement amending the "Other States Insurance" provision. The endorsement provides as follows:

> 2. If you begin work in any one of those states after the effective date of the policy and are not insured or are not self-insured for such work, all provisions of the policy will apply as though that state were listed in Item 3.A. of the Information Page.
>
> 4. If you have work on the effective date of this policy in any state not listed in Item 3.A. of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days.

All parties have stipulated that plaintiff sustained a compensable injury on 10 October 1994. CNA, however, declined coverage, contending its policy does not provide coverage for injuries sustained by Tobacco Transport's workers employed in North Carolina. On 30 April 1998, the deputy commissioner issued an opinion and award in favor of CNA, and on 16 April 1999 the Full Commission affirmed, concluding that the policy did not provide Tobacco Transport with coverage in North Carolina. The Commission dismissed CNA from the action, ordered Tobacco Transport to pay compensation and reasonable medical expenses to plaintiff, and, in addition, to pay plaintiff's reasonable attorney's fees and a fine in the amount of $50.00 per

day each day past 10 October 1994 for its failure to provide workers' compensation insurance in North Carolina. Tobacco Transport appeals.

By its five assignments of error, Tobacco Transport contends the Commission erred in ruling that the CNA policy does not provide coverage for its North Carolina operations, in dismissing CNA as a party, in requiring Tobacco Transport to pay plaintiff's attorney's fees; and in imposing a fine against Tobacco Transport for its failure to provide plaintiff with workers' compensation benefits. We affirm.

The standard of appellate review of decisions of the Industrial Commission consists of a determination of whether the Full Commission's findings of fact are supported by competent evidence, and whether its conclusions of law are supported by those findings. *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 528 S.E.2d 397 (2000). "Under the first inquiry, the findings of fact are conclusive on appeal so long as they are supported by any competent evidence, even if other evidence would support contrary findings." *Id.*; *see also Lewis v. Sonoco Products Co.*, 137 N.C. App. 61, 526 S.E.2d 671 (2000).

I.

[1] Tobacco Transport assigns error to the Commission's determination that the CNA policy does not provide coverage for plaintiff's North Carolina injuries. Specifically, Tobacco Transport argues that the Commission should have applied Kentucky's "full coverage" statute to conclude that plaintiff's injuries were covered by the CNA policy, but that in any event, the plain language of the amendatory endorsement to the "Other States Insurance" provision of the policy clearly extends coverage to North Carolina.

Tobacco Transport first argues that because plaintiff was employed by Tobacco Transport and was working on its payroll with the knowledge and consent of Tobacco Transport's president, Kentucky's full coverage statute applies to mandate coverage for plaintiff's injuries. "With insurance contracts the principle of *lex loci contractus* mandates that the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000) (citation omitted).

The full coverage provision of Kentucky's Workers' Compensation Act provides that "[e]very policy or contract of workers' compensation insurance under this chapter, issued or delivered in this state, shall cover the entire liability of the employer for compensation to each employee subject to this chapter . . . ." K.R.S. 342.375 (1998). While the CNA policy was indeed issued to Tobacco Transport in Kentucky, Tobacco Transport's argument ignores the plain language of this provision that requires an employee to be "subject to this chapter" in order for the full coverage provision to apply. Whether an employee working in another state is subject to Kentucky's Workers' Compensation Act, and thus, the full coverage provision, is determined by the following provisions set forth in section 342.670 of the Kentucky Act:

> (1) If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he . . . would have been entitled to the benefits provided by this chapter had that injury occurred within this state, that employee . . . shall be entitled to the benefits provided by this chapter, if at the time of the injury:
>
> (a) His employment is principally localized in this state, or
>
> (b) He is working under a contract of hire made in this state in employment not principally localized in any state, or
>
> (c) He is working under a contract of hire made in this state in employment principally localized in another state whose workers' compensation law is not applicable to his employer, or
>
> (d) He is working under a contract of hire made in this state for employment outside the United States and Canada.

K.R.S. 342.670 (1998).

In the present case, plaintiff's employment with Tobacco Transport was not localized in Kentucky; plaintiff had never been to Kentucky, nor did plaintiff know that he was working for a Kentucky corporation. Rather, plaintiff's contract of hire was entered into in North Carolina, and all of plaintiff's employment duties with Tobacco Transport were executed in North Carolina. Under the plain language of K.R.S. 342.670, plaintiff's injuries are not "subject to this chapter" containing Kentucky's full coverage provision, and the Commission therefore did not err in failing to apply Kentucky law.

[2] Tobacco Transport also argues that, applying North Carolina rules of contract interpretation, the plain language of the CNA policy

provides coverage for plaintiff's injuries; alternatively, it contends the policy language is ambiguous, requiring that the policy be interpreted in favor of providing coverage. Both North Carolina and Kentucky apply the principle of construction that where the language of an insurance policy is clear and unambiguous, the language must be accorded its plain meaning. *See Nationwide Mut. Fire Ins. Co. v. Grady*, 130 N.C. App. 292, 502 S.E.2d 648 (1998); *Pierce v. West American Ins. Co.*, 655 S.W.2d 34 (1983). "Ambiguity in the terms of the policy is not established simply because the parties contend for differing meanings to be given to the language. 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." *Allstate Ins. Co. v. Runyun Chatterton*, 135 N.C. App. 92, 95, 518 S.E.2d 814, 816-17 (1999) (citations omitted), *disc. review denied*, 351 N.C. 350, — S.E.2d — (2000).

In the present case, the Commission found that the relevant policy provisions are not ambiguous and must be accorded their plain and ordinary meaning. The Commission found that under section 3.C. of the Information Page, the policy clearly states that the "Other States Insurance" provision applies only to those states listed under section 3.C., which, in Tobacco Transport's policy, listed no states. The Commission also found that subparagraph 1 of the "Other States Insurance" provision clearly states that the provision only applies if one or more states are listed under section 3.C.

With respect to the effect of the amendatory endorsement to the "Other States Insurance" provision, the Commission found that, under subparagraph 2 as amended, had Tobacco Transport begun work after the effective date of the policy in any of "those states" listed under section 3.C., the policy would have covered injuries sustained in "those states." However, because no states were listed under section 3.C., the Commission found that the policy could not cover North Carolina. The Commission declined to adopt Tobacco Transport's interpretation that "those states" refers to the list of states to which the amendatory endorsement applies, but rather, found that the phrase clearly refers to those states listed under section 3.C.

Regarding the amended subparagraph 4, the Commission found that, if Tobacco Transport had worked in North Carolina on 1 December 1993, the effective date of the policy, coverage would have existed for plaintiff's injuries so long as Tobacco Transport had notified CNA within 30 days of its North Carolina operations. However,

the Commission found that Tobacco Transport was not working in North Carolina on 1 December 1993. The Commission concluded that the CNA policy provides coverage for Kentucky only.

While the Commission's findings regarding the interpretation of the policy language are mixed findings of fact and conclusions of law, and thus fully reviewable, *see Royster v. Culp, Inc.*, 343 N.C. 279, 470 S.E.2d 30 (1996), we nevertheless agree with the Commission's interpretation of the policy language, and hold that it supports the conclusion of law that on 10 October 1994 Tobacco Transport was not covered for workers' compensation insurance in North Carolina. We agree with the Commission that the language of subparagraph 1 of the "Other States Insurance" provision unambiguously states that the provision applies "only if one or more states are shown in item 3.C. of the Information Page." This subparagraph was not altered by the amendatory endorsement, and no states were listed under section 3.C.

We further agree with the Commission that the plain language of subparagraph 2 of "Other States Insurance," as amended, appears to refer to "those states" listed under section 3.C. of the policy, where no states were listed. Moreover, for amended subparagraph 4 to apply to North Carolina, the language unambiguously requires that Tobacco Transport must have worked in North Carolina on the effective date of the policy, and that it have notified CNA of such work within 30 days of that date. The Commission found, and the evidence supports the finding that Tobacco Transport did not meet these requirements.

The plain language of the policy provides competent evidence sufficient to uphold the Commission's determination that the CNA policy did not provide workers' compensation insurance to Tobacco Transport in North Carolina. Thus, CNA was properly dismissed as a party to this action.

II.

[3] Tobacco Transport next assigns error to the Commission's award of attorney's fees to plaintiff. Under G.S. § 97-88.1, the Commission may award attorney's fees if it determines that "any hearing has been brought, prosecuted, or defended without reasonable ground." N.C. Gen. Stat. § 97-88.1 (1999). In addition, the Commission may award fees where the party instituting the proceeding has reasonable grounds to do so, if as a result of the proceeding, the party is ordered

to make or continue making benefit payments to the injured worker. *Lewis v. Sonoco Products Co.* at 69, 526 S.E.2d at 676. "The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Id.* at 71, 526 S.E.2d at 677 (citation omitted). An abuse of discretion results only where a decision is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Long v. Harris*, 137 N.C. App. 461, 465, 528 S.E.2d 633, 635 (2000).

In the present case, the Commission found as follows:

> 21. Defendant-employer has defended this case on unreasonable grounds. Although there was a genuine issue as to whether defendant-carrier was on the risk, defendant-employer is responsible for plaintiff's work injury. Defendant-employer has not raised credible evidence to dispute the nature and extent of plaintiff's compensable injury. Plaintiff should not go without any workers' compensation benefits while defendants litigate the coverage issue. Defendant-employer's failure to pay plaintiff the benefits to which he is entitled, pending resolution of the coverage dispute, constitutes unfounded litigiousness, entitling plaintiff to reasonable attorney's fees.

Based on this finding, the Commission concluded that "[p]laintiff is entitled to reasonable attorney fees for defendant-employer's unreasonable defense of plaintiff's injury by accident. N.C. Gen. Stat. § 97-88.1."

We do not believe the Commission's award of attorney's fees was "manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision." It is undisputed that plaintiff suffered a compensable injury in 1994, compensation for which is the ultimate responsibility of the employer under North Carolina's workers' compensation laws. Tobacco Transport's refusal to compensate plaintiff pending the outcome of its litigation with CNA with respect to coverage has, for approximately six years, prevented plaintiff from receiving the full amount of compensation to which he is entitled under the laws of this State. Under these circumstances, we hold the Commission's award of attorney's fees was neither arbitrary nor unreasoned. This assignment of error is overruled.

III.

[4] Tobacco Transport also assigns error to the Commission's assessment of a fine against it in the amount of $50.00 per each day past 10 October 1994. The order was based on the following findings:

> 19. As of 10 October 1994, defendant-employer had failed to secure workers' compensation insurance for accidents in the State of North Carolina. Plaintiff's accident on that date occurred in Kinston, North Carolina; plaintiff is a North Carolina resident; defendant-employer has a North Carolina registered office address of 1042 Washington Street, Raleigh, North Carolina and employed three (3) or more employees in North Carolina in 1994.
>
> 20. On 10 October 1994, defendant-employer was engaged in interstate commerce through its business of transporting of tobacco, yet only contracted and paid for workers' compensation insurance for accidents arising under Kentucky law. Therefore, defendant-employer is subject to the penalty provisions of N.C. Gen. Stat. § 97-94.

Based on these findings, the Commission concluded that Tobacco Transport is subject to the penalty provision of G.S. § 97-94.

> G.S. § 97-94 provides, in pertinent part:
>
> (b) Any employer required to secure the payment of compensation under this Article who refuses or neglects to secure such compensation shall be punished by a penalty of one dollar ($1.00) for each employee, but not less that fifty dollars ($50.00) nor more than one hundred dollars ($100.00) for each day of such refusal or neglect, and until the same ceases; and he shall be liable during the continuance of such refusal or neglect to an employee either for compensation under this Article or at law at the election of the injured employee.

N.C. Gen. Stat. § 97-94(b).

Since we have affirmed the Commission's ruling that the CNA policy does not provide coverage for plaintiff's North Carolina injuries, the Commission correctly determined that Tobacco Transport had failed to procure necessary insurance for its North Carolina operations, and thus, that Tobacco Transport is in violation of G.S. § 97-94. Its order assessing the fine is affirmed.

IV.

[5] By purported cross-assignments of error, plaintiff attempts to argue that the Commission erred both in concluding that the CNA policy did not cover plaintiff's North Carolina injuries, and in failing to assess a 10% late payment penalty against Tobacco Transport pursuant to G.S. § 97-18(g). N.C.R. App. P. 10(d) provides that "an appellee may cross-assign as error any action or omission of the trial court . . . which deprived the appellee of an alternative basis in law for supporting the judgment . . . from which appeal has been taken." Neither of plaintiff's cross-assignments of error, if sustained, would provide an alternative basis for upholding the order and award of the Commission. In order to properly present the alleged errors for appellate review, plaintiff should have filed a cross-appeal. *See Atlantic Veneer Corp. v. Robbins*, 133 N.C. App. 594, 516 S.E.2d 169 (1999); *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 397 S.E.2d 358 (1990). Plaintiff has failed to do so, and we therefore do not consider his arguments. *See Mann Contractors, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 522 S.E.2d 118 (1999).

Affirmed.

Judges WYNN and McGEE concur.

LADANE WILLIAMSON, PLAINTIFF/APPELLEE v. LAURA M. BULLINGTON, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF WILLIAM T. BULLINGTON, JR., DECEASED, DEFENDANT/APPELLANT

No. COA99-703

(Filed 15 August 2000)

1. Divorce— property settlement agreement—estate—remedy

The trial court's grant of summary judgment in favor of plaintiff ex-wife, based on a property settlement agreement imposing upon decedent husband the duty to make a will to bequeath the pertinent lease interests to plaintiff during decedent's lifetime and his failure to do so, is vacated and plaintiff is allowed the opportunity to amend her pleadings to assert the appropriate remedy if she so chooses, because: (1) the agreement does not

guarantee that plaintiff would inevitably receive the property without having to purchase it; and (2) the requirement that decedent prepare a will bequeathing the property to plaintiff was open-ended, meaning plaintiff's rights accrued only upon decedent's death.

2. Parties— interest in outcome of litigation—not necessary party

The trial court properly held that plaintiff's brother and father were not necessary parties to this action seeking to enforce a property settlement agreement between plaintiff ex-wife and decedent husband, because while plaintiff's brother and father have interests in the outcome of the litigation, their interests are not of such a nature as to render it impossible for the court to finally adjudicate the question presented.

3. Civil Procedure— summary judgment—affidavits

The trial court properly struck plaintiff's affidavits supporting her motion for summary judgment in an action seeking to enforce a property settlement agreement between plaintiff ex-wife and decedent husband, because: (1) portions of each of plaintiff's affidavits were properly stricken as inadmissible hearsay, irrelevant, or violative of the parol evidence rule; and (2) the portions that would remain provide no support to plaintiff's motion for summary judgment.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 4 March 1999 by Judge William C. Gore, Jr., in Brunswick County Superior Court. Heard in the Court of Appeals 28 March 2000.

King, Walker, Lambe & Crabtree, P.L.L.C., by William O. King, and Powell & Payne, by William A. Powell, for plaintiff-appellee.

Rountree & Seagle, L.L.P., by George Rountree, III and Charles S. Baldwin, IV, and Frink, Foy & Yount, P.A., by Henry G. Foy, for defendant-appellant.

EDMUNDS, Judge.

Defendant Laura M. Bullington appeals the trial court's grant of summary judgment in favor of plaintiff LaDane Williamson. We vacate entry of judgment and remand this case with instructions.

Plaintiff is the former wife of William T. Bullington, Jr. (decedent). She and decedent separated after being married for approximately fifteen years. Following their separation, on 31 August 1990, plaintiff and decedent entered into a Property Settlement Agreement (the Agreement). Pursuant to the Agreement, decedent was to keep, among other things, a one-half interest in the parties' 50% interest in two golf course leases. However, with regard to this property, which is the subject matter of this action, the Agreement provided as follows:

> Husband agrees that he will promptly take any and all reasonable and necessary steps to prepare a Last Will and Testament to cause his estate upon his death to distribute all of his interest in and to the Ocean Isle Beach Golf Lease . . . and the Pearl Golf Course Lease . . . to Wife and, if Wife shall predecease Husband, to the parties' children in equal shares.
>
> With respect to said Ocean Isle Beach Golf Lease and Pearl Golf Course Lease, Husband shall not at any time during his lifetime dispose of all or any part of his interest in said leases without Wife's written consent. The term "dispose of" as used in this paragraph shall include a sale, assignment, transfer, conveyance, gift, encumbrance, pledge, hypothecation, or other disposition of his interest in said lease (voluntary, involuntary, or otherwise), including committing a levy or attachment of said leases. In the absence of such written consent, the following provisions shall govern:
>
> . . . .
>
> (5) If Husband violates the preceding provisions concerning these lease interest restrictions, Wife or Wife's father or brother shall have an option to purchase all of Husband's lease interest at fair market value as that term is defined hereinafter.
>
> (6) If Husband violates the aforesaid provision concerning his obligation to cause his estate to bequeath the lease interest to Wife or alternatively, to the parties' children upon his death, then Wife or Wife's father or brother shall have the option to purchase Husband's interest in the leases in question at fair market value as that term is defined hereinafter.

Thereafter, plaintiff and decedent divorced, and decedent married defendant Laura M. Bullington. Decedent died testate on 1 December

1997, leaving his entire estate, including the lease interests on the golf courses, to defendant.

Plaintiff filed suit against defendant and decedent's estate seeking the following specific performance: "That Defendant(s) be ordered to immediately transfer to Plaintiff all of the previously-existing rights of William T. Bullington, Jr. in the two (2) golf courses identified herein . . . ." Defendant Bullington timely answered and made a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1999). The parties filed cross-motions for summary judgment. At the hearing on the motions, the trial court struck affidavits that plaintiff had attached to her motion, then granted summary judgment in favor of plaintiff. Defendant appeals.

I.

Property settlements such as the one at issue here are "as binding and enforceable as other contracts," *Riley v. Riley*, 86 N.C. App. 636, 638, 359 S.E.2d 252, 253 (1987) (citations omitted), and should be " 'determined by the same rules which govern the interpretation of contracts,' " *Small v. Small*, 93 N.C. App. 614, 620, 379 S.E.2d 273, 277 (1989) (quoting *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E.2d 622, 624 (1973)). Therefore, when determining the meaning and effect of the instant property settlement agreement, the trial court should look to the "language of the agreement as it reflects the intentions of the parties" and be guided by the " 'presum[ption] the parties intended what the language used clearly expresses, and . . . mean[s] what on its face it purports to mean.' " *Hagler v. Hagler*, 319 N.C. 287, 291, 294, 354 S.E.2d 228, 232, 234 (1987) (citations omitted). If "the language of a contract is clear and unambiguous, construction of the contract is a matter of law for the court." *Id.* at 294, 354 S.E.2d at 234. Additionally, "a contract must be construed as a whole, considering each clause and word with reference to all other provisions and giving effect to each whenever possible." *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 504, 320 S.E.2d 892, 897 (1984) (citations omitted).

The Agreement at bar specifically provides for the scenario that has unfolded, where decedent, having agreed to bequeath the lease interests to plaintiff, failed to keep that agreement. Paragraph 3(a)(6) states: "If Husband violates the aforesaid provision *concerning his obligation to cause his estate to bequeath the lease interest to Wife* . . . , then Wife or Wife's father or brother shall have the option to purchase Husband's interest . . . ." (Emphasis added.) Additionally, Paragraph 10 states:

> [T]his Agreement is the only contract existing between the parties. The covenants, stipulations, premises, agreements, assignments, conveyances and provisions in this instrument are inclusive, and they fully and completely determine all issues, controversies and claims between Wife and Husband so that . . . neither can have or will have any past, present or future claims against the other for any reason, other than the breach of any provision of this Agreement.

[1] Notwithstanding Paragraph 3(a)(6), plaintiff contends that requiring defendant to transfer the lease interests was the correct remedy because the Agreement imposed upon decedent the duty to make a will bequeathing the property to plaintiff during decedent's lifetime; had decedent done so, at his death, plaintiff would have received the property free of charge. This argument fails for two reasons. First, the Agreement does not guarantee that plaintiff would inevitably receive the property without having to purchase it. Pursuant to Paragraph 3(a)(5) of the Agreement, an attempt by decedent to transfer the property during his lifetime would provide plaintiff with the sole option of purchasing the lease interests at fair market value. Second, the requirement that decedent prepare a will bequeathing the property to plaintiff was open-ended; decedent was not required to prepare the will by any particular time. Therefore, plaintiff's rights set out in Paragraph 3(a)(6) accrued only upon decedent's death. Those rights control the outcome of this appeal. By granting the remedy sought in plaintiff's motion for summary judgment, a remedy different from that provided in the Agreement, the trial court failed to enforce the Agreement originally reached between the parties. This failure was prejudicial error. Accordingly, we vacate the trial court's grant of summary judgment in favor of plaintiff.

We must now determine the proper remedy. We have found no North Carolina case in which a plaintiff sought, and the trial court granted, specific performance of a wrong remedy under the terms of the controlling agreement. However, it appears that plaintiff still has a claim under the terms of the Agreement and that she should not be precluded from asserting it. *See, e.g., Felix v. Workmen's Compensation Appeals Board*, 116 Cal. Rptr. 345 (Cal. Ct. App. 1974) ("Where a plaintiff inadvertently or mistakenly chooses a remedy which proves to be the wrong remedy, or at least an unfruitful one, he may thereafter seek an alternative remedy and is not estopped under the doctrine of election of remedies."); *Geist v. Lehmann*, 312 N.E.2d

42 (Ill. App. Ct. 1974) (reversing trial court's dismissal of plaintiff's amended complaints in contract action where contract specified remedy for breach, stating "if a party has but one remedy, a mistaken resort to an unavailable inconsistent remedy will not bar him from later choosing his correct remedy unless the other party has relied on the election of the first remedy"); *Beyer v. Easterling*, 738 So. 2d 221 (Miss. 1999) (reversing summary judgment against plaintiff, who had filed and won a previous suit, on grounds that "[c]onsiderations of fairness and equity do not support the dismissal of a possibly meritorious lawsuit based on an earlier lawsuit which may have been filed based on a misunderstanding of the applicable facts"); *Paul's Rod & Bearing, Ltd. v. Kelly*, 847 S.W.2d 68 (Mo. Ct. App. 1991) ("Paul's has a right growing out of the transaction, but has chosen the wrong remedy against the Kellys, and in such an instance, this court has the discretion to 'remand the cause to permit the petition to be amended, and a retrial of the cause.' "); *Lancaster v. Smithco, Inc.*, 128 S.E.2d 915 (S.C. 1962) (establishing the rule "that the mistaken choice of a fancied remedy on a certain state of facts is not such an election as will bar subsequent pursuit of another remedy which is appropriate to the same state of facts"). Accordingly, we remand this case with instructions that leave should be granted for plaintiff to amend the complaint to assert the appropriate remedy should she so choose. *See* N.C. Gen. Stat. § 1A-1, Rule 15(a) (1999); *Ingle v. Allen*, 53 N.C. App. 627, 629, 281 S.E.2d 406, 408 (1981) (reversing dismissal for lack of subject matter jurisdiction and remanding with instructions to allow reformation of pleadings).

In light of our decision to vacate summary judgment in favor of plaintiff and to allow plaintiff the opportunity to amend her pleadings, determining the propriety of defendant's motion for summary judgment would be inappropriate at this time. *See Madry v. Madry*, 106 N.C. App. 34, 38-39, 415 S.E.2d 74, 77 (1992) ("In light of our decision to allow defendant the opportunity to amend her pleadings, summary judgment in favor of either party would be inappropriate at this time."). Because we decline to address this assignment of error, defendant should not be prejudiced by the former filing and denial of her summary judgment motion and may refile should plaintiff elect to amend her complaint.

II.

[2] Next, defendant contends that the trial court erred by granting summary judgment because plaintiff's father and brother are not parties to the action. *See* N.C. Gen. Stat. § 1A-1, Rule 19 (1999).

Paragraph 3(a)(6) of the Agreement states that plaintiff, her father, or her brother shall have the option to purchase decedent's interest. We address this issue because it may arise again. Plaintiff's father and brother are not necessary parties to this action. "A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence." *Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 451-52, 183 S.E.2d 834, 837 (1971).

In *Carding Developments*, a case concerning breach of contract, three parties entered into a contract: the plaintiff, the defendant, and a Canadian corporation. The plaintiff filed suit against the defendant, and the defendant moved to dismiss on grounds that the plaintiff was not the real party in interest and that a necessary party, i.e., the Canadian corporation that was a party to the contract, had not been joined. The trial court denied the motion but ordered joinder of the Canadian corporation. This Court found no prejudicial error, holding:

> We do not view Carding Canada as a necessary party. Plaintiff, although a formal party to the agreement, is in effect a third party beneficiary. A party to a contract is ordinarily not a necessary party in a suit brought against the other contracting party by a beneficiary who claims the contract has been breached. It does not follow, however, that the court committed reversible error in ordering the joinder of Carding Canada as a party, for if it is a proper party, plaintiff may not complain of its joinder.
>
> . . . While this is a matter primarily between Carding Canada and plaintiff, it nevertheless represents an interest which Carding Canada has in this litigation. . . . Therefore, Carding Canada most assuredly has interests in this controversy, although its interests are not of such a nature as to render it impossible for the court to finally adjudicate the question of defendant's liability to plaintiff without Carding Canada's presence.

Id. at 452-53, 183 S.E.2d. at 837-38 (internal citations omitted). Accordingly, the Court held that the Canadian corporation was a *proper party* to the suit, thus permitting the trial court to require joinder, but was not a *necessary party* to the suit. *See id.* at 453, 183 S.E.2d at 838.

Similarly, in the case at bar, while plaintiff's father and brother certainly have interests in the outcome of the litigation, "[their] interests are not of such a nature as to render it impossible for the court to finally adjudicate the question [presented]." *Id.* at 453, 183 S.E.2d at 837-38. The trial court correctly found that plaintiff's brother and father were not necessary parties.

III.

[3] Lastly, plaintiff cross-assigns error to the trial court's striking of affidavits submitted with plaintiff's motion for summary judgment. *See* N.C. R. App. P. 10(d). Again, we address this issue because it may arise again.

Rule 56(e) of the North Carolina Rules of Civil Procedure governs the form of affidavits and provides in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (1999). If an affidavit contains hearsay matters or statements not based on an affiant's personal knowledge, the court should not consider those portions of the affidavit. *See Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 499 S.E.2d 772 (1998). Similarly, if an affidavit sets forth facts that would be inadmissible in evidence because of the parole evidence rule, such portions should be struck by the trial court. *See Borden, Inc. v. Brower*, 284 N.C. 54, 199 S.E.2d 414 (1973).

Portions of each of plaintiff's affidavits were properly stricken as inadmissible hearsay, irrelevant, or violative of the parole evidence rule. The portions that would remain after striking the improper statements provide no support to plaintiff's motion for summary judgment. Accordingly, the trial court correctly struck plaintiff's affidavits supporting her motion for summary judgment. This assignment of error is overruled.

Vacated and remanded with instructions.

Judge McGEE concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority that the trial court granted plaintiff a remedy not provided for in the Agreement. I, therefore, respectfully dissent.

A provision in a contract is ambiguous when the "language of [the] contract is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993).

In this case, the Agreement requires decedent "to prepare a Last Will and Testament to cause his estate upon his death to distribute all of his interest in and to the Ocean Isle Beach Golf Lease . . . and the Pearl Golf Course Lease . . . to [plaintiff]." Paragraph 3(a)(6) of the Agreement further provides decedent:

> shall not at any time *during his lifetime* dispose of all or any part of his interest in said leases without [plaintiff's] written consent. . . . In the absence of such written consent, the following provisions shall govern:
>
> (6) If [decedent] violates the aforesaid provision concerning his obligation to cause his estate to bequeath the lease interest to [plaintiff] . . . then [plaintiff] or [plaintiff's] father or brother shall have the option to purchase [decedent's] interest in the leases in question at fair market value as that term is defined hereinafter.
>
> (7) The fair market value of the lease interest in question will be reached by mutual agreement of the parties . . . .

(Emphasis added.)

Plaintiff argues the remedy provided for in paragraph 3(a)(6) of the Agreement applies only to actions taken by decedent in breach of the Agreement during decedent's lifetime. In contrast, defendant argues paragraph 3(a)(6) applies only to decedent's obligation to bequeath the lease agreement to plaintiff and is not limited to actions taken by decedent during his lifetime. Because the remedy provided for in the contract is fairly and reasonably susceptible to either of these constructions, the remedy is ambiguous.

When a provision in a contract is ambiguous, the trial court must construe the contract "in a manner that gives effect to all of its provisions, if the court is reasonably able to do so." *Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992).

In this case, the Agreement provides the parties with a remedy in addition to the ambiguous remedy provided for in paragraph 3(a)(6). In the paragraph of the Agreement entitled "PERFORMANCE: BREACH: ENFORCEMENT: REMEDIES," the Agreement provides "[b]oth [decedent] and [plaintiff] mutually agree that either party hereto shall have the right to compel the performance of this Agreement or to sue for the breach thereof." Pursuant to this provision, plaintiff brought suit against defendant for specific performance of the Agreement and the trial court properly granted plaintiff the relief sought. I, therefore, would affirm the trial court's order granting summary judgment in favor of plaintiff.

TIMOTHY L. PEACHES AND DIERDRE R. PEACHES, PLAINTIFFS v. SEAN A. PAYNE AND BRANDY FOLSON, DEFENDANTS

No. COA99-821

(Filed 15 August 2000)

Contempt— criminal—attorney—no opportunity to respond to charges

The trial court erred by holding plaintiff's trial attorney in criminal contempt based on contemnor's questioning of the rulings of the court and allegedly showing disrespect for the court, because the trial court did not comply with the statutory requirements when it failed to give contemnor a summary opportunity to respond to the charges and to present reasons not to impose a sanction as required by N.C.G.S. § 5A-14(b).

Appeal by contemnor William E. Moore, Jr., from order entered 11 March 1999 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 April 2000.

Michael F. Easley, Attorney General, by Daniel P. O'Brien, Assistant Attorney General, for the State.

Maxwell Freeman and Bowman, P.A., by James B. Maxwell, for contemnor-appellant.

EDMUNDS, Judge.

Contemnor William E. Moore, Jr., appeals the trial court's finding of criminal contempt and order that he pay the costs of the underlying action as a sanction. We reverse.

The contemnor's actions and resulting court rulings that are the subject of this appeal occurred during a personal injury trial that began 8 March 1999. The trial court initially instructed the attorneys for both parties to select the jury using the procedure approved in *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980) and warned them: "[I]f you don't select that jury, in accordance with State Vs. Phillips, you're going to hear from me." (In *Phillips*, the court stated that counsel should not attempt to indoctrinate jurors, stake them out or establish rapport with them during *voir dire*, and that when possible, questions should be asked collectively of the entire panel.) The next day, after jury selection had been completed, the trial court chided both attorneys:

> You took too long selecting a jury yesterday. Ought to be done in about two hours.
>
> . . . .
>
> . . . You were [too] verbose, as lawyers tend to be. And, you didn't follow State Vs. Phillips. So, the reason I'm bringing this to your attention is the next time I have a case with either one of you, you're on notice.

Contemnor called plaintiff Timothy L. Peaches (Mr. Peaches) as his first witness. He established on direct examination that Mr. Peaches saw defendants' automobile "from [his] left, careen into—on Independence Boulevard, . . . [go] off into the grass, into the other lane, [spin] around; continue[] up in front of [plaintiffs] and on-going traffic, turned sideways." Contemnor then asked Mr. Peaches' opinion of the speed of defendants' car. When defense counsel objected on the grounds of improper foundation, the trial court sustained the objection. Contemnor asked additional questions in an attempt to lay a proper foundation, then asked Mr. Peaches' opinion of the speed of defendants' car four more times. Each time, the trial court sustained defendants' objections. Contemnor requested a bench conference, which was not recorded. The jury remained in the courtroom during the bench conference. When contemnor resumed his direct examination, the trial court interrupted him and excused the jury. The following exchange ensued:

THE COURT: Now Mr. Moore, if you want to be, in the future, sure of what the law is before you come up here to argue with the Court about it. What you stated the law to be is not the law. I can cite you any number of cases that would so indicate. You should have been prepared to handle[] that before you began trial of this case.

MR. MOORE: Well, Your Honor, I am sure of what I know of the law. I don't have a cite because it's a pretty basic principle with my 18 years of practice.

THE COURT: It's not.

MR. MOORE: I have tried many cases where that question has been asked and answered and the objection has been overruled.

Now Judge, I may be wrong on the law and what I remember of it. But if I brought in every case authority for every basic principle, I would be able to fill the courtroom up with my library.

THE COURT: Well, the OBJECTION HAS BEEN SUSTAINED because you have not laid the proper foundation.

MR. MOORE: I understand that.

THE COURT: You have still not laid a proper foundation.

MR. MOORE: Obviously, Your Honor, I have overlooked the part of the foundation that the Court is relying upon.

THE COURT: I'm relying on the law.

MR. MOORE: Well, Your Honor, I understand that. I certainly respect your ruling. But, I disagree with you. And, I will certainly do my best to figure out what it is I've left out of the foundation and do my best to represent these folks and get the evidence in.

THE COURT: I don't want to waste a lot more time with bench conferences.

MR. MOORE: Nor do I, Your Honor. But, I certainly—

THE COURT: I want to make it clear to you, now. I don't want any questions raised about my rulings because if you do, you're going to be in [the baliff]'s custody for a while. And, I wanted to make that clear to you, while the jury was out.

MR. MOORE: I understand, Your Honor. However, I also have a duty to zealously represent my clients and I will do what I have to do to try to get the evidence in.

THE COURT: Well, you just continue on, at your own peril.

MR. MOORE: Judge, the reason I asked for a conference, I understood your ruling is based on foundation. I thought I had laid a foundation. Obviously, I have not. I will attempt to do so, Your Honor.

However, I will say that I find it, if the point is for us to move on and not take up a lot of time with bench conferences, a basic question of—

THE COURT: That is the point.

MR. MOORE: —a basic question of the lay witness' opinion of the speed of the vehicle that he saw, once it passed him, and that he observed it traveling at some speed, has been admitted in every court I've practiced in, in these types of cases. I might be missing something.

THE COURT: I don't believe that's the case, Mr. Moore.

MR. MOORE: Well, Judge,—

THE COURT: If it has, it's erroneous.

MR. MOORE: Your Honor, that's certainly—well, all right, sir. Let me see if I can't find another way to present the evidence for these folks and we'll go to the next one.

Contemnor made two more unsuccessful attempts on direct examination to elicit Mr. Peaches' estimate of defendants' speed. However, on re-direct, when contemnor established that Mr. Peaches observed defendants' automobile for approximately 150 yards and about six to seven seconds, the trial court allowed him to answer contemnor's question about speed.

Later that morning, after the trial court excused the jurors for their lunch break, the court had the following conversation with the attorneys:

THE COURT: All right. Mr. Bolster, Mr. Moore finally got his question right. You ou[gh]t to read the case of *Beaman Vs. Sheppard.*

MR. MOORE: Okay.

THE COURT: 35N.C.Ap.73 [sic], which says, among other things, that 80 feet is enough time to have an opportunity to observe to give an opinion as to speed.

. . . .

MR. MOORE: Your Honor, I would like to apologize, for not having my case cites better prepared on that issue. I didn't anticipate a problem.

. . . .

THE COURT: I'm looking at some books here that I started keeping when I started practicing law in 1960. And, they're up to date, to the last advance sheet. No reason why y'all can't.

MR. MOORE: I did have a trial notebook, Your Honor. I picked up the wrong one. I appreciate the Court's patience.

The rest of 9 March 1999 consisted of the direct examination and part of the cross-examination of plaintiffs' expert chiropractic witness. Although contemnor made occasional objections, we see nothing in the transcript to suggest antagonism between contemnor and the trial court. The trial court sustained one of contemnor's objections and held a thorough *voir dire* before overruling another.

The trial resumed the next morning. Again, although contemnor raised occasional objections, we see no indication in the transcript of tension between contemnor and the trial court. However, during redirect examination of plaintiffs' chiropractor, on request of contemnor, the court took judicial notice of N.C. Gen. Stat. § 90-157.2 (1999) ("Chiropractor as expert witness"), which sets forth matters to which a properly qualified chiropractor may testify. Contemnor then asked the chiropractor his understanding of the meaning of the terms "etiology," "diagnosis," and "disability." Although defense counsel did not object to this testimony, the trial court *sua sponte* instructed the jury "not to consider the answers that this witness gave with respect to the last statute," and contemnor objected "for the record."

After contemnor's re-direct examination of the chiropractor, defendants' attorney conducted a re-cross examination. When contemnor then sought an opportunity for re-re-direct examination, the following exchange occurred:

MR. MOORE: Very briefly, may I, Your Honor?

THE COURT: No, sir.

MR. MOORE: OBJECTION, FOR THE RECORD.

THE COURT: All right. Let the record show that this witness has been examined and cross-examined and direct examined and re-direct examined. The Court, in its discretion and in [its] supervisory power to conduct the trial of the case . . . is not allowing any further questions by counsel for either side.

MR. MOORE: Yes, Your Honor. Let the record also reflect new matters were raised on cross-examination, to which plaintiff's counsel has not been given an opportunity to examine this witness. And, that's the basis of my objection.

THE COURT: Take the jury out, please sir.

{The following proceedings take place in open court, outside the presence of the jury.}

THE COURT: Come down, Doctor.

Mr. Moore, on several occasions this morning, you have questioned the rulings of the Court. And, one of those occasions was when you were asking the doctor about his interpretation of a statute, which clearly, he was not qualified to do. And, you objected to that.

And, so, we're going to continue this case until in the morning at 9:30. And, in the meantime, you're in the custody of the sheriff, for your disrespect toward this Court.

We will be in recess until 9:30 in the morning. Take him into custody, Mr. Sheriff.

Contemnor was incarcerated until 5:00 p.m. that day. The next morning, contemnor made a handsome apology to the trial court and to the parties for any action or conduct that the court perceived as being disrespectful, and the court graciously accepted the apology. However, when contemnor advised that his clients hoped the trial would continue, the trial court instead declared a mistrial and issued an order that was both recorded in the transcript and later drawn up in writing by the clerk of court. Although the court made findings of fact as to contemnor's behavior, neither the oral nor the written order included a finding that contemnor had been given an opportunity to

be heard nor a summary of any response contemnor made. In light of our holding, we need not address the court's findings of fact in its order.

The controlling issue before us is whether the trial court fully complied with statutory requirements before holding contemnor in contempt. Except under circumstances not pertinent to the case at bar, punishment may not be imposed for criminal contempt unless "the act or omission was preceded by a clear warning by the court that the conduct is improper." N.C. Gen. Stat. § 5A-12(b)(2) (1999). In addition, where the imposition of a penalty for contempt is, as here, summary (i.e., "immediate," *Black's Law Dictionary* 1449 (7th ed. 1999)), "[b]efore imposing measures . . . the judicial official *must* give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt." N.C. Gen. Stat. § 5A-14(b) (1999) (emphasis added).

These pertinent statutory requirements have been interpreted in two apposite opinions of this Court. In *State v. Verbal*, 41 N.C. App. 306, 254 S.E.2d 794 (1979), we reversed a trial court's determination that an attorney was in contempt for being eighteen minutes late in returning to court after a lunch recess. We held:

> [I]t is implicit in [N.C. Gen. Stat. § 5A-14(b)] that the judicial official's findings in a summary contempt proceeding should clearly reflect that the contemnor was given an opportunity to be heard, along with a summary of whatever response was made and that judicial official's finding that the excuse or explanation proffered was inadequate or disbelieved.

Id. at 307, 254 S.E.2d at 795. Because the attorney in *Verbal* was not given an opportunity to be heard, and because the trial court's findings did not "indicate what, if any, standard of proof was applied," we reversed the contempt finding. *Id.*

More recently, in *In re Owens*, a news reporter was subpoenaed to testify at a motion *in limine*, which was being conducted to determine the admissibility of statements made by a defendant to the reporter. 128 N.C. App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam*, 350 N.C. 656, 517 S.E.2d 605 (1999). The reporter refused to testify, claiming a qualified privilege, and was held in contempt. The reporter appealed, arguing in part, that she had not received a hearing before she was held in contempt. We noted that "the official comments to

N.C. Gen. Stat. § 5A-14 state that its provisions are not intended to require a hearing, or anything approaching a hearing. Instead, the requirements of the statute are meant to ensure that the individual has an opportunity to present reasons not to impose a sanction." *Id.* at 580-81, 496 S.E.2d at 594. We held that the contemnor in *Owens* had ample opportunity during her testimony at the hearing on the motion *in limine* to present on the record her reasons for declining to comply with the court's order and affirmed the finding of contempt.

Applying these holdings to the case at bar, we conclude that the trial court failed to comply with all the statutory requirements by failing to give contemnor a "summary opportunity to respond." N.C. Gen. Stat. § 5A-14(b). Although this Court held in *Owens* that "[n]otice and a formal hearing are not required when the trial court promptly punishes acts of contempt in its presence," *Owens*, 128 N.C. App. at 581, 496 S.E.2d at 595, we also held that the statute does guarantee a potential contemnor a chance to respond to the charges, *id.* at 580-81, 496 S.E.2d at 594. This holding is consistent with the mandatory language of the statute. *See* N.C. Gen. Stat. § 5A-14(b).

The transcript reveals that the court advised contemnor that, because he had questioned the rulings of the court and shown disrespect for the court, he was in the bailiff's custody. Court was immediately recessed without contemnor having been given "an opportunity to present reasons not to impose a sanction." *Owens*, 128 N.C. App. at 581, 496 S.E.2d at 594; *see also* 1 *North Carolina Trial Judges' Bench Book for Superior Court* sec. I, ch. 2, pt. D(2)(a)-(b) (3d ed. 1999).

Trial judges must have the ability to control their courts. However, because a finding of contempt against a practitioner may have significant repercussions for that lawyer, judges must also be punctilious about following statutory requirements. Because the trial court failed to follow the procedure mandated by N.C. Gen. Stat. § 5A-14(b), we reverse the finding of contempt.

Reversed.

Judges GREENE and McGEE concur.

WILLIAM J. MERCIER, SR., PLAINTIFF v. GILBERT W. DANIELS AND U-HAUL COMPANY OF NORTH CAROLINA, DEFENDANTS

No. COA99-1025

(Filed 15 August 2000)

1. Alienation of Affections— vicarious liability of employer— scope of employment—deviation

The trial court did not err by granting summary judgment in favor of defendant employer based on plaintiff's failure to forecast sufficient evidence to support his claim that defendant employee's alienation of affection of plaintiff's wife was in the scope of the employee's employment, because the employee's personal involvement with plaintiff's wife represented a deviation from the duties of his employment and was not committed in furtherance of his employer's business.

2. Alienation of Affections— ratification of employer—no facts alleging knowledge

The trial court did not err by granting summary judgment in favor of defendant employer based on its finding that the employer did not ratify any of defendant employee's alleged wrongful acts of alienation of affection of plaintiff's wife, because: (1) plaintiff did not allege facts indicating the employer's knowledge of its employee's conduct and an intention to ratify the acts; and (2) even if plaintiff had properly alleged the employer's supposed ratification of its employee's misdeeds, plaintiff failed to forecast sufficient evidence in support of his claim.

Appeal by plaintiff from judgment entered 17 May 1999 by Judge Shelly S. Holt in New Hanover County District Court. Heard in the Court of Appeals 18 May 2000.

John K. Burns, for plaintiff-appellant.

Butler & Butler, by Algernon L. Butler, III, for defendant-appellee U-Haul Company of North Carolina.

Gilbert Daniels, pro se. No brief filed.

SMITH, Judge.

Plaintiff William J. Mercier, Sr. appeals from the trial court's "Revised and Final Order and Judgment" granting summary judgment

in favor of defendant U-Haul Company of North Carolina (U-Haul) on 17 May 1999. We affirm.

William and Nancy Mercier were married in 1969, separated in 1992, reconciled in 1994 and lived together continuously from 1994 until 29 December 1997. Mr. and Mrs. Mercier jointly operated Auto Specialists, a used car dealership in Wilmington, North Carolina. Mr. Mercier purchased, repaired and sold cars, while Mrs. Mercier performed office duties and paperwork. In the spring of 1997, the Merciers sought to supplement income from car sales by acquiring a U-Haul dealership.

At that time, defendant Gilbert Daniels was employed with defendant U-Haul as an area field manager. He was responsible for supervising thirty U-Haul dealerships in southeastern North Carolina. His duties included helping prospective U-Haul dealers complete applications, teaching new dealers about U-Haul procedures and paperwork, assisting dealers with business operations and moving U-Haul equipment between dealerships. Daniels first met Mr. and Mrs. Mercier when they applied for a dealership in 1997. In time, Daniels' business relationship with the Merciers developed into friendship.

After an argument between the Merciers on 29 December 1997, Mrs. Mercier left the marital home and went to her daughter's house. She called Daniels and asked if she could stay in his home temporarily. After briefly returning to the marital home in early January 1998, Mrs. Mercier moved in with Daniels permanently.

On 20 April 1998, Mr. Mercier commenced this civil action against Daniels for alienation of affection and criminal conversation. The complaint alleged that U-Haul was vicariously liable for alienation of affection caused by Daniels.

U-Haul and Daniels generally denied Mr. Mercier's allegations of misconduct in their respective answers. On 30 April 1999, U-Haul filed a motion for summary judgment supported by the affidavits of Mrs. Mercier and James Frawley, U-Haul's vice president. In reply, Mr. Mercier submitted a response to the motion for summary judgment and a counteraffidavit. On 17 May 1999, after considering the pleadings, affidavits and depositions, the trial court granted summary judgment in favor of U-Haul. Plaintiff appeals.

According to appellee U-Haul's brief, after the trial court granted summary judgment, the case was tried before a jury. Following their

verdict, the trial court entered judgment against Daniels on 21 May 1999, and no appeal from the judgment against Daniels has been brought forward.

Before considering appellant's assignments of error, we note that normally "it is not a part of the function of the court on a motion for summary judgment to make findings of fact and conclusions of law." *Capps v. City of Raleigh*, 35 N.C. App. 290, 292, 241 S.E.2d 527, 528 (1978). Although "in rare situations it can be helpful to set out the undisputed facts which form the basis for [a] judgment," *id.* at 292, 241 S.E.2d at 529, "the enumeration of findings of fact . . . is technically unnecessary and generally inadvisable in summary judgment cases," *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987). In the instant case, we believe it was unnecessary for the trial court to make the detailed findings and conclusions in its judgment.

In this case, the court's order granting summary judgment contained the following statements:

> The Court finds that U-Haul did not expressly authorize any wrongful or malicious conduct of Daniels. . . .
>
> . . . .
>
> The Court . . . finds that Daniels committed no wrongful or malicious act or any acts that caused the alleged alienation of affection in the course or scope of his employment or implied authority.
>
> . . . .
>
> The Court . . . finds that U-Haul did not ratify any of the alleged wrongful acts . . . which caused the alleged alienation of affections.

Pursuant to *Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147, *disc. review denied*, 295 N.C. 467, 246 S.E.2d 9 (1978), these findings of fact can be disregarded on appeal.

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). When considering the substance of a motion for summary judgment, a defendant bears the burden of showing (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff is unable to produce evidence which supports an essential element of his claim; or, (3) plaintiff cannot overcome an affirmative defense which would bar his claim. *Lyles v. City of Charlotte*, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996).

Once defendant has met his burden, the plaintiff must "forecast sufficient evidence of all essential elements of [his] claims." *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992). In ruling on the motion, the trial court must view all evidence in the light most favorable to the plaintiff, accepting his facts as true, and drawing all inferences in his favor. *See Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994).

In order to survive U-Haul's motion for summary judgment, Mr. Mercier must show: (1) all of the elements of the alienation of affection claim against Daniels are satisfied; and (2) there is a basis for imposing liability against U-Haul. Assuming *arguendo* Mr. Mercier forecast sufficient evidence of all essential elements of his alienation of affection claim against Daniels, we conclude he did not present any evidence to support U-Haul's vicarious liability.

Our courts have held that:

> liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal.

Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 491, 340 S.E.2d 116, 121, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). In the case *sub judice*, Mr. Mercier concedes that U-Haul did not expressly authorize Daniels' wrongful conduct. Thus, we address only his remaining contentions that either Daniels acted within the scope of his employment or U-Haul ratified his behavior.

[1] Mr. Mercier first argues that the trial court erred in finding that he failed to forecast evidence sufficient to support his claim that Daniels' alienation of Mrs. Mercier's affection was in the scope of his employment with U-Haul. We disagree. "To be within the scope of employment, an employee, at the time of the incident, must be acting

in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment." *Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 271, 365 S.E.2d 665, 668, *disc. review denied*, 322 N.C. 838, 371 S.E.2d 284 (1988). The North Carolina Supreme Court held that an employer "is not liable if the employee departed, however briefly, from his duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do." *Wegner v. Delicatessen*, 270 N.C. 62, 66-67, 153 S.E.2d 804, 808 (1967).

U-Haul contends that Daniels' involvement with Mrs. Mercier "was not done in furtherance of U-Haul's business, . . . but was a product of Daniels' own purpose and was done in consummation of his personal desire." While we find no published decisions in North Carolina involving an employer's vicarious liability for alienation of affection, we find support for U-Haul's position in cases concerning workplace sexual harassment. In *Hogan*, 79 N.C. App. at 492, 340 S.E.2d at 122, we held that a male employee's gestures and suggestive remarks, though committed in the workplace while he and the plaintiff were on duty, were acts "in pursuit of some corrupt or lascivious purpose of his own." As such, we held that he was not acting within the scope of his employment. *Id.; see also Phelps v. Vassey*, 113 N.C. App. 132, 437 S.E.2d 692 (1993); *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989), *disc. review improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990).

At least one jurisdiction has considered an employer's liability for alienation of affection caused by an employee. In *Jackson v. Righter*, 891 P.2d 1387 (Utah 1995), the plaintiff commenced a civil action against his wife's supervisors and employers, alleging, *inter alia*, that the defendants were liable for alienating his wife's affection. While the plaintiff's wife was an employee of the defendant companies, she was romantically and physically involved with two of her supervisors. *Id.* The court held that, "although [a supervisor] used business activities as a forum for pursuing his romantic relationship with [the plaintiff's wife], [the supervisor's] acts were clearly an abandonment of employment and outside the scope of his employment." *Id.* at 1391.

In light of these decisions and in accordance with the evidence in this case, we conclude that Daniels' personal involvement with Mrs. Mercier represented a deviation from the duties of his employment with U-Haul. Mr. Mercier argues that Daniels, in the course and scope of his employment, alienated Mrs. Mercier's affection by talking with

her about personal problems and relationships, declaring his love for her and transporting her to his home. As an area field manager, Daniels was responsible for setting up new dealerships and visiting and supporting existing dealers. U-Haul encouraged him to promote "good will" between dealers and the company. Daniels was required to have almost daily personal contact with dealers in the first weeks of operation, quarterly personal contact with established dealers and regular telephone communication with all U-Haul dealers.

While U-Haul may have endorsed frequent interaction with dealers, Daniels' personal, romantic involvement with Mrs. Mercier was not for the purpose of accomplishing any of his duties or U-Haul's business. To the contrary, Daniels' romantic interest in Mrs. Mercier was clearly personal and in no way in furtherance of his employment. In his deposition, Mr. Daniels testified that his relationship with Mrs. Mercier "had absolutely nothing to do with U-Haul" and was "[his] personal life. One hundred percent." As in the cases mentioned above, where the individual defendants made sexual advances toward their coworkers, Daniels' behavior should not be construed as promoting U-Haul's business. *See Hogan*, 79 N.C. App. 483, 340 S.E.2d 116; *Phelps*, 113 N.C. App. 132, 437 S.E.2d 692; *Brown*, 93 N.C. App. 431, 378 S.E.2d 232. Thus, we hold that Daniels' actions were not within the scope of his employment.

[2] Mr. Mercier also contends that "the trial court erred in finding that defendant U-Haul did not ratify any of [Daniels'] alleged wrongful acts." After reviewing the evidence in the light most favorable to Mr. Mercier and drawing all inferences in his favor, we disagree.

Under North Carolina law, "[i]n order to show that the wrongful act of an employee has been ratified by his employer, it must be shown that the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer by words or conduct, shows an intention to ratify the act." *Hogan*, 79 N.C. App. at 492, 340 S.E.2d at 122 (citing *Equipment Co. v. Anders*, 265 N.C. 393, 144 S.E.2d 252 (1965)). Thus, in order to properly state a claim for ratification, Mr. Mercier is required to allege facts indicating U-Haul's knowledge of Daniels' conduct and an intention to ratify his acts.

In Mr. Mercier's unverified complaint, the only references to U-Haul are contained in the jurisdictional allegation, the prayer for relief, and the following passages in the body of the complaint:

> 18. [Daniels] was, at all times relevant to this civil action, a District Manager for the [U-Haul] district in which the plaintiff was doing business. The plaintiff was a local dealer of [U-Haul]. [Mrs. Mercier] worked in the plaintiff's business, including the U-Haul dealership part of the business.
>
> 19. Regular direct contact with the plaintiff and his employees was within the course and scope of [Daniels'] employment with [U-Haul].
>
> 20. This business relationship required frequent contact between [Daniels] and [Mrs. Mercier]. . . .
>
> 21. [Daniels] . . . deliberately used his position as a district manager . . . to manipulate the emotions of [Mrs. Mercier] and to alienate her affections from the plaintiff.

None of these statements directly or implicitly suggest that U-Haul had knowledge of or intended to ratify Daniels' conduct.

Even if Mr. Mercier had properly alleged U-Haul's supposed ratification of Daniels' misdeeds, he failed to forecast sufficient evidence in support of his claim. His affidavit referred to U-Haul only four times:

> 10. In 1997 I was told on numerous occasions, after the fact, of lunches or dinners that my wife and [Daniels] had taken alone. I was told on each occasion that the meal was a U-Haul business necessity.
>
> . . . .
>
> 12. . . . [Daniels] would leave his dog in the care of my wife for a day or two at a time, while he was out of town on U-Haul business. . . .
>
> . . . .
>
> 15. The largest problem we ever encountered was financial and in the course of 1997 it appeared that the success of our U-Haul dealership would bring long-term financial relief.
>
> . . . .
>
> 19. Defendant Daniels' inducing my wife to abandon me has impoverished me. Before his misconduct, I lived in a home with a good income from the U-Haul dealership that I founded with my wife. Because of his misconduct, the dealership was closed.

Like the complaint, this affidavit failed to state any fact which would corroborate the assertions in Mr. Mercier's brief. While U-Haul's vice president denied all knowledge of the relationship between Daniels and Mrs. Mercier before January 1998, Mr. Mercier's own affidavit contained no statements or facts in rebuttal. Mr. Mercier's affidavit also failed to state any facts from which it may be inferred that U-Haul had any intention to ratify or affirm Daniels' actions. Thus, on both elements of ratification, Mr. Mercier did not forecast sufficient evidence to overcome summary judgment on his claim that U-Haul ratified Daniels' acts. *See Waddle*, 331 N.C. at 82, 414 S.E.2d at 27.

U-Haul satisfied its burden on the motion for summary judgment by showing that an essential element of Mr. Mercier's claim was nonexistent, *see Lyles*, 120 N.C. App. at 99, 461 S.E.2d at 350. Because plaintiff failed to allege knowledge or affirmation of Daniels' conduct or present sufficient evidence thereof, defendant's motion for summary judgment was properly granted.

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

THE JAY GROUP, LTD. AND B. KLITZNER & SON, INC. v. BRAXTON GLASGOW, III; MICHAEL A. ALMOND; AND PARKER, POE, ADAMS & BERNSTEIN

No. COA99-208

(Filed 15 August 2000)

Fraud— sale of corporation—knowledge of invalid trademark

The trial court did not err by granting a directed verdict for defendants on claims for fraud, conspiracy, constructive fraud, negligent misrepresentation, legal malpractice, and breach of fiduciary duty arising from the sale of a corporation where plaintiff agreed to the acquisition to obtain certain trademarks, those trademarks were the subject of controversy with another company, and registration of the trademarks was subsequently refused. Plaintiffs' evidence showed that two officers of plaintiff Jay Group and its subsidiary were informed that the trademarks conflicted with those of another company and that their registra-

tion had been rejected. Knowledge of the president or agent of a corporation is imputed to the corporation, even if the information may not have been passed along to the CEO and Chairman of the Board, and plaintiffs' knowledge of the problems with the trademarks is fatal to their claims.

Appeal by plaintiffs from order entered 17 September 1998 by Judge Howard E. Manning, Jr., in Nash County Superior Court. Heard in the Court of Appeals 17 November 1999.

Hartzell & Whiteman, L.L.P., by Andrew O. Whiteman and J. Jerome Hartzell, for plaintiff-appellants.

Smith Helms Mulliss & Moore, L.L.P., by Stephen P. Millikin, Alan W. Duncan, and Shannon R. Joseph for defendant-appellee Braxton Glasgow, III.

Bell, Davis & Pitt, P.A., by William K. Davis and Stephen M. Russell for defendant-appellees Michael A. Almond and Parker, Poe, Adams & Bernstein.

MARTIN, Judge.

Plaintiffs, The Jay Group, Ltd., and its wholly owned subsidiary, B. Klitzner & Son, Inc., formerly D. Jay Fashions, Inc., (hereinafter collectively referred to as "Jay Group") brought this action against defendants Braxton Glasgow ("Glasgow"), Michael Almond ("Almond"), and Parker, Poe, Adams & Bernstein ("Parker Poe") for actions allegedly committed in connection with Jay Group's purchase of a North Carolina corporation, Shoefactory, Inc. ("Shoefactory"), from its German parent corporation, Shoefactory Vertriebs GmbH. In summary, plaintiffs alleged that defendants had intentionally and negligently failed to disclose material facts to plaintiffs, had stated other material facts known to them to be false, had conspired to defraud plaintiffs, and had breached their fiduciary duties to plaintiffs. In addition, plaintiffs alleged that Almond and Parker Poe had committed "fraudulent practices" within the meaning of G.S. § 84-13 in connection with their representation of plaintiffs during the transaction, and had committed legal malpractice as attorneys for plaintiffs. Defendants filed answers in which they denied the material allegations of plaintiffs' complaint and asserted affirmative defenses.

The trial court, *ex mero motu*, ordered that the issues of liability and damages be bifurcated into separate trials before the

same jury. Plaintiffs' evidence at trial, in the light most favorable to plaintiffs, tended to show that prior to August 1994, defendant Glasgow was president and director of Shoefactory, Inc., and owned approximately 20% of the stock in Shoefactory Vertriebs GmbH. In 1993, Glasgow had employed Parker Poe and Almond to represent Shoefactory in connection with Shoefactory's attempts to register the trademark "Blue Heart" and, subsequently, to register a new trademark, "BH Studio." These trademarks were the subject of a controversy with another shoe company, and the Patent and Trademark Office subsequently refused Shoefactory's applications to register the trademarks.

David Jay, the owner, C.E.O., and Chairman of the Board of Jay Group, had become acquainted with Glasgow through Jay's earlier efforts to sell some of his ownership interest in Jay Group. Jay and Glasgow discussed the possibility of Glasgow becoming employed by Jay Group, and Glasgow conditioned the employment upon Jay Group's purchase of Shoefactory, which was insolvent. Glasgow told Jay that Jay Group could thereby obtain the use of the "Blue Heart" and "BH Studio" brands to revitalize Jay Group's new shoe business. Jay was aware of the financial condition of Shoefactory, but agreed to its acquisition in order to obtain the trademarks. Glasgow began work for the Jay Group on 1 August 1994; his first assignments were to work with Jay Group's new shoe business and to complete Jay Group's acquisition of Shoefactory.

According to plaintiffs' evidence, Almond, who was an attorney with Parker Poe and a friend of Glasgow's, represented Glasgow in connection with his employment by the Jay Group. At Glasgow's urging, plaintiffs hired Almond and Parker Poe to handle the Shoefactory acquisition. Parker Poe drafted the stock purchase agreement for plaintiffs' acquisition of Shoefactory. At Glasgow's instruction, the agreement contained no warranties or representations concerning the transaction. The agreement contained the following provision:

> 5.b Company owns the following applications for trademark registration on the Principal Register of the U.S. Patent and Trademark Office: BH STUDIO (no serial number assigned; filed July 15, 1994), BLUE HEART s/n:74/293127 and BLUE HEART and design s/n:74/293126

The agreement also prohibited Jay Group from conveying the trademarks until the purchase price was paid in full.

On 17 August 1994, the date the transaction was supposed to close, David Jay contacted Michael Colo, an attorney in Rocky Mount, North Carolina, who had represented Jay Group over a period of years, and requested that he look over the documents prepared by Parker Poe. Colo reviewed the documents, noticed there were no covenants of title regarding the trademarks, and called Almond the following day to inquire. Almond told him the parties had agreed there would be no representations or warranties. Colo advised David Jay of his conversation with Almond and advised him that to enter such an agreement without warranties was a "business risk." David Jay told Colo that he had been told by Glasgow that Shoefactory owned the trademarks; Colo responded that if Jay trusted Glasgow and Almond he should not worry about the lack of warranties.

On 17 August 1994, Forrest Norman, president and a director of Jay Group, and Robert Elliott, controller of Jay Group and an officer and director of its subsidiary, D. Jay Fashions, Inc., went to the Shoefactory offices in Richmond to conduct a "due diligence" review of the Shoefactory financial records in connection with the purchase. While they were there, Norman and Elliott learned that Shoefactory's applications for registration of the Blue Heart trademarks had been denied. However, David Jay denied that Norman or Elliott gave him this information before Jay Group's acquisition of Shoefactory was completed on 31 August 1994. He testified that he first became aware of problems with the trademarks when he tried to license them to a third party in August 1995. He testified that he would not have proceeded with the acquisition of Shoefactory had he been advised of the problem with the trademarks.

At the close of plaintiffs' evidence, the trial court granted all defendants' motions for directed verdict. Plaintiffs appeal.

The single issue presented by the assignment of error brought forward in plaintiffs' brief is whether the trial court properly granted directed verdicts in favor of defendants at the conclusion of plaintiffs' evidence. A motion for a directed verdict tests the legal sufficiency of the evidence to take the case to the jury. *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 365 S.E.2d 621 (1988). In ruling upon the motion, the evidence is viewed in the light most favorable to the nonmoving party, who is to be given the benefit of every reasonable inference which may be drawn from it. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977). Appellate review of an order

granting a directed verdict is limited to the grounds asserted by the moving party at the trial level. *Crane v. Caldwell*, 113 N.C. App. 362, 438 S.E.2d 449 (1994).

Plaintiffs asserted claims against Almond and Parker Poe alleging fraud, conspiracy to defraud, breach of fiduciary duty (constructive fraud), negligent misrepresentation and legal malpractice, based upon their failure to inform plaintiffs that the trademarks were not and could not be registered. Plaintiffs also asserted claims for fraud, conspiracy to defraud, and negligent misrepresentation against Glasgow and, additionally, alleged that Glasgow, by not disclosing the information about the trademarks, is liable for breach of his fiduciary duty as an officer and director of Jay Group. Plaintiffs argue that the order granting directed verdicts for all defendants was improper because sufficient evidence was presented to the trial court to support each of these claims. We disagree and affirm the trial court's order granting defendants' motions for directed verdict.

Each of plaintiffs' claims is based upon their contention that defendants either affirmatively concealed or negligently failed to disclose that the trademarks had not been registered and could not be registered due to a conflict with the mark of another company. Defendants' motions for directed verdict were based upon, *inter alia*, evidence presented by plaintiffs which showed that they had knowledge of the problems with the trademarks in advance of the Shoefactory acquisition.

To establish fraud, a plaintiff must show "(1) that defendant made a false representation or concealment of a material fact; (2) that the representation or concealment was reasonably calculated to deceive him; (3) that defendant intended to deceive him; (4) that plaintiff was deceived; and (5) that plaintiff suffered damage *resulting from defendant's misrepresentation or concealment*." *Claggett v. Wake Forest University*, 126 N.C. App. 602, 610, 486 S.E.2d 443, 447 (1997) (emphasis supplied). A claim for conspiracy to defraud cannot succeed without a successful underlying claim for fraud. *See Burton v. Dixon*, 259 N.C. 473, 476, 131 S.E.2d 27, 30 (1963) ("A civil action for conspiracy is an action for damages resulting from acts committed by one or more of the conspirators pursuant to the formed conspiracy, ..."). "The elements of a constructive fraud claim are proof of circumstances '(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of

his position of trust *to the hurt of plaintiff.*' " *Estate of Smith By and Through Smith v. Underwood*, 127 N.C. App. 1, 10, 487 S.E.2d 807, 813, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997) (citations omitted) (emphasis supplied). Unlike actual fraud, constructive fraud does not require evidence of intent to deceive. *Jordan v. Crew*, 125 N.C. App. 712, 482 S.E.2d 735, *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997). However, in order for defendants to take advantage of plaintiffs, plaintiffs must be deceived. *See id.*

With respect to a claim for legal malpractice arising out of concealment of, or a failure to disclose, information, "an attorney who makes fraudulent misstatements of fact or law to his client, or who fails to impart to his client information as to matters of fact and the legal consequences of those facts, is liable for *any resulting damages* which his client sustains." *Fox v. Wilson*, 85 N.C. App. 292, 299, 354 S.E.2d 737, 742 (1987) (quoting 7 Am.Jur.2d, Attorneys At Law § 215, at 258 (1980)) (emphasis supplied). Similarly, "[t]he tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Hudson-Cole Development Corp. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999).

With respect to the breach of duty claims alleged by plaintiff against Almond and Parker Poe, both the breach of fiduciary duty claim and the breach of duty of loyalty claim are encompassed within a claim for constructive fraud. *See generally Miller v. First Nat'l Bank of Catawba County*, 234 N.C. 309, 316, 67 S.E.2d 362, 367 (1951) (explaining that constructive fraud rests upon the presumption of fraud arising from a breach of fiduciary obligation "which . . . the law declares fraudulent because of its tendency to deceive, to violate confidence, ..."); *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 447, 499 S.E.2d 790, 799 (1998) (skeptically discussing claim which plaintiff "denominated 'Breach of Duty of Loyalty' "); *Estate of Smith v. Underwood*, 127 N.C. App. 1, 487 S.E.2d 807 (1997); *Stone v. Martin*, 85 N.C. App. 410, 418, 355 S.E.2d 255, 259, *disc. review denied*, 320 N.C. 638, 360 S.E.2d 105 (1987) ("Fraud exists when there is a breach of a fiduciary duty."); 15 N.C. Index 4th, Fiduciaries § 6 (1992). Similarly, plaintiffs' claim against Glasgow for breach of his fiduciary duty essentially amounts to a claim for constructive fraud. *See Stone*, *supra*; 15 N.C. Index 4th, Fiduciaries § 6 (1992) (likening breach of fiduciary duty to constructive fraud); *Hudson-Cole*, *supra*. As plaintiffs acknowledge in their brief, each of

these claims requires proof of an injury proximately caused by the breach of duty.

Each of the foregoing claims asserted by plaintiffs requires that plaintiff establish the element of proximate causation. Even if we assume for the purposes of our decision that plaintiffs have offered sufficient evidence of every other element necessary to take this case to the jury, plaintiffs' knowledge, in advance of the Shoefactory acquisition, of the problems existing with respect to the trademarks is fatal to their claims.

Plaintiffs' evidence showed that prior to the completion of the Shoefactory acquisition on 31 August 1994, Forrest Norman and Robert Elliott, both of whom were corporate officers of Jay Group and its subsidiary, D. Jay Fashions, Inc., were informed on 17 August 1994 by a Shoefactory vice-president that the trademarks, which were very similar to and thus conflicted with the marks of another company, were not federally registered and that applications for their registration had been rejected. Knowledge of the president or agent of a corporation is imputed to the corporation itself. *See Whitten v. Bob King's AMC/Jeep, Inc.*, 292 N.C. 84, 231 S.E.2d 891 (1977); *Jenkins v. Renfrow*, 151 N.C. 323, 66 S.E. 212 (1909). This is true even though Norman and Elliott may not have passed the information along to David Jay. *See Norburn v. Mackie*, 262 N.C. 16, 136 S.E.2d 279 (1964) (principal is chargeable with knowledge received by agent while acting within scope of his authority although agent does not in fact inform principal); *Passmore v. Woodard*, 37 N.C. App. 535, 246 S.E.2d 795 (1978); 18B Am.Jur. 2d, Corporations § 1671 (1985). The corporate entities, not David Jay, are Norman's and Elliott's principals and plaintiffs in this case. *See Board of Transportation v. Martin*, 296 N.C. 20, 28-29, 249 S.E.2d 390, 396 (1978) ("A corporation is an entity distinct from the shareholders which own it. . . . Where persons have deliberately adopted the corporate form to secure its advantages, they will not be allowed to disregard the existence of the corporate entity when it is to their benefit to do so."); 18 Am. Jur. 2d, Corporations § 43, at 841 (1985) ("a corporation is a legal entity existing separate and apart from the persons composing it"). Even when it is considered in the light most favorable to the plaintiffs, this evidence will not allow a reasonable inference that plaintiffs were deceived by, or reasonably relied upon, the alleged misrepresentations by defendants. *See Watts v. Cumberland County Hospital*, 317 N.C. 110, 117, 343 S.E.2d 879, 884 (1986) (plaintiff could not be deceived as to a material fact of which it was already aware).

Therefore, any damages sustained by plaintiffs due to the problems with the Shoefactory trademarks did not proximately result from any acts or omissions of defendants and their motions for directed verdict were properly granted.

Plaintiffs have not briefed the propriety of the directed verdicts with respect to their claims against all defendants for securities fraud brought pursuant to G.S. §§ 78A-8 and 78A-56, or their claim against defendant Glasgow for negligent misrepresentation, thus the claims are deemed abandoned. N.C.R. App. P. 28(a), 28(b)(5). For the same reason, plaintiffs' additional assignment of error, relating to the exclusion of expert testimony, is also deemed abandoned.

The trial court's order granting defendants' motions for directed verdict is affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

SUZETTE ALEXIS DUTCH, EXECUTRIX OF THE ESTATE OF EDWARD MALCOLM DUTCH, DECEASED, PLAINTIFF v. HARLEYSVILLE MUTUAL INSURANCE COMPANY AND USAA GENERAL INDEMNITY COMPANY, DEFENDANTS

No. COA99-667

(Filed 15 August 2000)

1. Insurance— automobile—UIM coverage—person under parked car at time of collision—person insured

The trial court did not err by concluding that the decedent (Dutch) was insured under the UIM provisions of a USAA policy where the vehicle Dutch was driving (the Bullock vehicle, insured by Harleysville) skidded into a ditch; Dutch solicited help from a nearby residence and Clark drove his vehicle (insured by USAA) to the scene, where he parked on the road while Dutch hooked a chain to the vehicle he was driving and crawled under the Clark vehicle to attach the other end of the chain; and a vehicle driven by Fairley collided with both the Bullock and Clark vehicles and ran over Dutch, causing his death. Under the USAA policy definitions, Dutch was either in contact with the Clark vehicle or in the process of attaching the chain and was thus

"upon" or "getting on" the vehicle. Moreover, he would qualify as the "person insured" under the Motor Vehicle Safety and Financial Responsibility Act if he was "using" the vehicle at the time of the accident. Finally, although USAA contends that Dutch was a Class Two insured who is insured only while occupying an insured vehicle, case law makes clear that Class II persons insured may recover when the insured vehicle is involved in the insured's injuries.

2. Appeal and Error— presentation of issues—failure to assign error challenge in brief

The question of whether the trial court erred by crediting an amount paid by a tortfeasor solely to Harleysville rather than sharing the credit upon the multiple UIM carriers was not preserved for appellate review where appellant (USAA) did not assign error to nor challenge in its brief the court's characterization of the Harleysville policy as primary and the USAA policy as excess. It is well established that the primary provider of UIM coverage is entitled to the credit for the liability coverage.

Appeal by defendant USAA General Indemnity Company from judgment entered 16 March 1999 by Judge Dexter Brooks in Scotland County Superior Court. Heard in the Court of Appeals 13 March 2000.

Gordon, Horne & Hicks, P.A., by Charles L. Hicks, Jr., for plaintiff-appellee.

McDaniel, Anderson & Stephenson, L.L.P., by William E. Anderson and John M. Kirby, for defendant-appellee Harleysville Mutual Insurance Company.

Everett L. Henry, for defendant-appellant USAA General Indemnity Company.

JOHN, Judge.

Defendant USAA General Indemnity Company (USAA) appeals the trial court's declaratory judgment ruling that a policy of insurance issued by USAA (the USAA policy) provided underinsured motorists (UIM) coverage to Edward Malcolm Dutch (Dutch). We affirm.

The parties stipulated to the following pertinent facts: On 17 February 1995, Dutch was operating an automobile titled in the name of Dwayne Taylor and owned by Marvin F. Bullock d/b/a Laurel Hill

Auto Sales (the Bullock vehicle), with the permission of the latter. While Dutch was driving, the Bullock vehicle skidded off the road and into a ditch.

Dutch walked to the nearby residence of Howard Dean Clark (Clark) to solicit help in removing the Bullock vehicle from the ditch. Clark thereupon drove himself and Dutch in Clark's automobile (the Clark vehicle) to the location of the Bullock vehicle. Clark parked on the road, partially in the northbound lane of travel and partially in the southbound lane of travel, and left the engine running with both the lights and emergency flashers activated as he and Dutch exited.

Dutch hooked a chain to the rear of the Bullock vehicle and crawled under the Clark vehicle to attach the other end of the chain. As he was doing so, and although Clark attempted to warn the driver of the obstruction in the road, an automobile operated by Michael Fairley (Fairley; the Fairley vehicle) collided with both the Bullock and Clark vehicles and ran over Dutch, resulting in his death.

At the time of the accident, the Bullock vehicle was insured under a policy of insurance issued by defendant Harleysville Mutual Insurance Company (Harleysville; the Harleysville policy), which included UIM coverage with liability limits of $50,000.00 per person. The Clark vehicle was insured under the USAA policy which provided UIM coverage limits of $300,000.00 per person.

Plaintiff Suzette Alexis Dutch, executrix of Dutch's estate, filed suit against Fairley alleging his negligence proximately caused Dutch's death. Pursuant to N.C.G.S. § 20-279.21(b)(4) (1999), plaintiff gave notice of suit to USAA, Harleysville, and Metropolitan Property & Casualty Insurance Company (Metropolitan), the company which insured Fairley's vehicle. Upon order of the court, Metropolitan was allowed to pay $50,000.00, the limits of the bodily injury coverage under its policy with Fairley, to plaintiff, and was relieved of further liability.

While her suit against Fairley was pending, plaintiff also filed the instant declaratory judgment action against Harleysville and USAA, seeking a ruling that the policies of each covering the Bullock and Clark vehicles provided UIM coverage to Dutch. Harleysville and USAA answered, generally denying their policies provided such coverage.

The trial court entered judgment 16 March 1999, concluding that (1) both the Harleysville and USAA policies provided UIM coverage

to Dutch; (2) the Harleysville policy was the "primary" policy and the USAA policy the "excess" policy; (3) Harleysville, as the primary policy carrier, was entitled to credit for the $50,000.00 payment by Metropolitan; and, (4) "after the credit, [Harleysville] provide[d] no coverage for [Dutch] for this accident." Essentially, the trial court's judgment rendered USAA solely liable for damages in excess of $50,000.00 and up to its policy limits of $300,000.00 which might be awarded plaintiff in her action against Fairley.

USAA timely appealed, citing two assignments of error. USAA first claims the trial court erred by concluding as a matter of law that Dutch was insured under UIM provisions of the USAA policy. Alternatively, USAA argues that if Dutch indeed was covered by its policy, then USAA was entitled to share in the $50,000.00 Metropolitan payment credit. We address each contention *ad seriatim*.

[1] We first examine the USAA policy, bearing in mind that

> provisions of insurance policies and compulsory insurance statutes which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction.

State Capital Ins. Co. v. Nationwide Mutual Ins. Co., 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). USAA does not dispute that its policy contained UIM coverage, but argues Dutch was not an insured for purposes of the policy, which defined an "insured" as:

> 1. You or any family member.
>
> 2. Any other person occupying:
>
> a. your covered auto; or
>
> b. any other auto operated by you.
>
> 3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person listed in 1. or 2. above.

"You" referred to the "named insured," in this case Clark.

The parties have stipulated that Dutch was not a family member of Clark. Thus, Dutch was an insured under the USAA policy definition only if he was "occupying" Clark's covered auto. USAA points out that Dutch "had departed the Clark vehicle" to return to the Bullock vehicle.

However, the USAA policy defined "[o]ccupying" as "in; upon; getting in, on, out or off." Although we agree Dutch was not "in" or "getting in, . . . out or off" the Clark vehicle at the time of the accident, we must consider whether he either was "getting . . . on" or was actually "upon" the Clark vehicle at the moment of impact. "Upon" is defined as "[o]n," while "on" is defined as "[u]sed to indicate contact with" or "[u]sed to indicate actual motion toward." American Heritage College Dictionary 1482, 953 (3d ed. 1997).

The parties stipulated Dutch had

> crawl[ed] under the rear portion of the Clark vehicle in order to attach the other end of the chain to the Clark vehicle . . . .

At the time of the accident, therefore, Dutch was either in contact with the Clark vehicle while attaching the chain and thus "upon" the vehicle, or was in the process of attaching the chain and thus was "getting . . . on" the Clark vehicle. In short, Dutch qualified as an "insured" under the USAA policy definition.

We note also that the Motor Vehicle Safety and Financial Responsibility Act (the Act), N.C.G.S. §§ 20-279.1—279.39, the provisions of which "are written into every automobile insurance policy," *Scales v. State Farm Mut. Automobile Ins. Co.*, 119 N.C. App. 787, 788, 460 S.E.2d 201, 202 (1995), defines "persons insured" as

> the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above . . . .

N.C.G.S. § 20-279.21(b)(3) (1999); *see Brown v. Truck Ins. Exchange*, 103 N.C. App. 59, 62, 404 S.E.2d 172, 174 (the UIM statute, G.S. § 20-279.21(b)(4), "incorporates by reference the definition of 'persons insured' that is found in" G.S. § 20-279.21(b)(3)), *disc. review denied*, 329 N.C. 786, 408 S.E.2d 515 (1991). Accordingly, although Dutch was not the named insured nor a member of the named insured's household, he would qualify as a "person insured" under the Act for purposes of the USAA policy if he "was 'using' the [insured] vehicle at the time of the accident." *Falls v. N.C. Farm Bureau Mut. Ins. Co.*, 114 N.C. App. 203, 207, 441 S.E.2d 583, 585, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994).

In the context of the interpretation of policies of insurance, this Court has "adopted the ordinary meaning of the word 'use,' " *Nationwide Mutual Ins. Co. v. Davis*, 118 N.C. App. 494, 497, 455 S.E.2d 892, 894, *disc. review denied*, 341 N.C. 420, 461 S.E.2d 759 (1995); that is,

> "to put into action or service[,] . . . to carry out a purpose or action by means of[, or] . . . [to] make instrumental to an end or process . . . ." Webster's Third New International Dictionary 2523-24 (1968). . . . [T]he verb "use" "is general and indicates any putting to service of a thing . . . ." *Id.* at 2524.

Leonard v. N.C. Farm Bureau Mut. Ins. Co., 104 N.C. App. 665, 671, 411 S.E.2d 178, 181-82 (1991), *rev'd on other grounds*, 332 N.C. 656, 423 S.E.2d 71 (1992). Further, while

> the test for determining whether an automobile liability policy provides coverage for an accident is not whether the automobile was a proximate cause of the accident[, . . . there must be] a causal connection between the use of the automobile and the accident.

State Capital Ins., 318 N.C. at 539-40, 350 S.E.2d at 69.

In addition, review of applicable decisions reflects that our courts "have recognized that liberally construed, the term 'use' may refer to more than the actual driving or operation of a vehicle." *Davis*, 118 N.C. App. at 497, 455 S.E.2d at 894. Thus a person "uses" a vehicle under the Act when (1) loading or unloading the vehicle, *Casualty Co. v. Insurance Co.*, 16 N.C. App. 194, 199, 192 S.E.2d 113, 118, *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972); (2) pushing a disabled vehicle onto the shoulder of the road, *Whisnant v. Insurance Co.*, 264 N.C. 303, 308, 141 S.E.2d 502, 506 (1965); (3) helping the vehicle owner change a flat tire, *Leonard*, 104 N.C. App. at 672, 411 S.E.2d at 182; and, (4) walking on the shoulder of the road in search of help for a disabled vehicle, *Falls*, 114 N.C. App. at 208, 441 S.E.2d at 585. Further, a police officer who leaves his vehicle with the engine running, the warning lights activated, and the police radio engaged, in order to direct traffic at the location of a malfunctioning traffic signal, is also "using" his vehicle for purposes of the Act. *Maring v. Hartford Casualty Ins. Co.*, 126 N.C. App. 201, 205, 484 S.E.2d 417, 420 (1997).

Liberally construing "use" and guided by previous decisions, we conclude that under the circumstances *sub judice* Dutch was "using"

the Clark vehicle for purposes of the Act, in that he was " 'put[ting the Clark vehicle] into action or service . . . to carry out a purpose,' " *Leonard*, 104 N.C. App. at 671, 411 S.E.2d at 181, *i.e.*, removal of the Bullock vehicle from the ditch. Moreover, as in *Maring*, 126 N.C. App. at 205, 484 S.E.2d at 420, the emergency lights on the Clark vehicle had been activated such that Clark and Dutch were also "using" the vehicle to alert passing motorists to the obstruction in the road. Finally, the requisite causal connection between "use" of the Clark vehicle and the accident, *see State Capital Ins.*, 318 N.C. at 540, 350 S.E.2d at 69, was also satisfied in that the Clark vehicle, partially located in Fairley's lane of travel, was struck by the Fairley vehicle as it also collided with the Bullock vehicle and ran over Dutch. In short, Dutch not only qualified as an insured under the express terms of the USAA policy, but also under terms of the Act incorporated by reference into such policy. *See Brown*, 103 N.C. App. at 62, 404 S.E.2d at 174.

Notwithstanding, USAA argues strenuously that Dutch "[wa]s a Class Two insured who is an insured *only while occupying an insured vehicle.*" USAA misreads our case law.

> G.S. § 20-279.21(b)(3)
>
> establishes two "classes" of "persons insured": (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

Crowder v. N.C. Farm Bureau Mut. Ins. Co., 79 N.C. App. 551, 554, 340 S.E.2d 127, 129-30, *disc. review denied*, 316 N.C. 731, 345 S.E.2d 387 (1986). It is not disputed that Dutch fell into the second category.

However, rather than restricting Class II "persons insured," *id.*, to UIM coverage only if actually occupying a vehicle as USAA suggests, our case law makes clear such individuals may recover

> only when the insured vehicle is involved in the insured's injuries,

Smith v. Nationwide Mutual Ins. Co., 328 N.C. 139, 143, 400 S.E.2d 44, 47 (1991).

The foregoing requirement is broadly construed; a Class II insured walking from a disabled vehicle to summon help has been

deemed a "person insured" under the statute. *See Falls*, 114 N.C. App. at 208, 441 S.E.2d at 585. Moreover, given that the Fairley vehicle ran over Dutch as it was colliding with the Clark vehicle, the insured vehicle was involved in Dutch's injuries. *See State Capital Ins.*, 318 N.C. at 540, 350 S.E.2d at 69. In sum, USAA's first assignment of error is unfounded.

Before proceeding, we briefly address the argument interjected by Harleysville that its policy "does not provide UIM benefits because Harleysville's UIM coverage is not in excess of the Fairley vehicle's liability coverage," and because plaintiff should not be allowed to "stack" the USAA and Harleysville policies. In this context, we note Harleysville registered no appeal of the trial court's judgment and failed to assign error to any portion thereof. The foregoing issue raised by Harleysville thus has not been preserved for appellate review. *See* N.C.R. App. P. 10(a) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal"). We are therefore bound by the trial court's express holding that both the USAA and Harleysville policies provided UIM coverage to Dutch, as well as by its implied holding that these policies may be stacked.

[2] In its second assignment of error, USAA claims the trial court erroneously credited the $50,000.00 paid by Metropolitan solely to Harleysville. USAA argues that "multiple UIM carriers are to share the credit *pro rata*." The trial court based its decision upon the determination that the Harleysville policy was "primary" and the USAA policy was "excess."

Harleysville asserts USAA has failed to preserve this issue for review in that USAA did not specifically assign error to the foregoing portion of the trial court's judgment. *See* N.C.R. App. P. 10(a). We agree.

Our review reveals that neither in USAA's assignments of error nor in its appellate brief does it challenge the trial court's characterization of the respective status of the two providers. USAA has thus waived assertion of that argument on appeal, and we presume the court's findings and conclusions on the issue are correct. *See Saxon v. Smith*, 125 N.C. App. 163, 169, 479 S.E.2d 788, 792 (1997).

It is well established that "the primary provider of UIM coverage . . . is entitled to the credit for the liability coverage." *Falls*, 114 N.C. App. at 208, 441 S.E.2d at 586. In light of the trial court's unchal-

lenged determination of Harleysville as primary provider and USAA as excess, the entire credit was properly allocated to Harleysville, and USAA's final assignment of error is unavailing.

Affirmed.

Judges LEWIS and EDMUNDS concur.

LAYLA MOHAMAD, PLAINTIFF v. DOREENA SHAPIALLE SIMMONS, AND GARY SIMMONS, DEFENDANTS

No. COA99-1090

(Filed 15 August 2000)

1. Arbitration and Mediation— party's failure to attend—no evidence representative possessed authority to make binding decisions

The trial court did not err by concluding that defendants failed to appear at a court-ordered arbitration hearing in an automobile collision case in violation of N.C. Arbitration Rule 3(p) where defendants were not at the hearing but counsel purporting to represent defendants was present along with an adjuster from defendants' liability insurance carrier, because even if Rule 3(p) allows appearance by counsel or a liability insurance carrier representative in lieu of the actual parties, no evidence in the record indicates that the attorney and adjuster in attendance at the arbitration hearing indeed possessed authority to make binding decisions on defendants' behalf in all matters.

2. Arbitration and Mediation— sanctions—authority

The trial court did not abuse its discretion by imposing the sanction of striking defendants' request for a trial de novo based on defendants' failure to participate in mandatory arbitration in a good faith and meaningful manner as required by North Carolina Arbitration Rule 3(1), because the determination that defendants violated N.C. Arb. R. 3(p) accorded the trial court the discretion to impose sanctions under N.C. Arb. R. 3(1), which in turn references N.C.G.S. § 1A-1, Rule 37(b)(2)(c) allowing the striking of pleadings, dismissal of an action or a portion thereof, and rendering judgment by default as permissible sanctions.

Appeal by defendants from order entered 16 April 1999 by Judge Fritz Y. Mercer in Mecklenburg County District Court. Heard in the Court of Appeals 8 June 2000.

Law Offices of Michael A. DeMayo, L.L.P., by Frank F. Voler, for plaintiff-appellee.

Kenneth M. Gondek and Steven J. Colombo, for defendants-appellants.

JOHN, Judge.

Defendants Doreena Shapialle Simmons and Gary Simmons appeal the trial court's 16 April 1999 order (the Order) allowing plaintiff Layla Mohamad's "Motion to Enforce Arbitration Award and/or Attorney Fees and Expenses" and denying defendants' "Motion for Imposition of Sanctions." We affirm.

Pertinent facts and procedural history include the following: On 10 May 1996, plaintiff and Doreena Simmons were involved in an automobile collision. Plaintiff subsequently complained of back pain and was examined by her physician and thereafter treated by a chiropractor, accumulating total bills in the amount of $1,730.00. Plaintiff subsequently filed the instant complaint 23 April 1998, alleging the negligence of Doreena Simmons proximately caused the collision and damages to plaintiff in an amount not in excess of $10,000.00.

The case was assigned to mandatory non-binding arbitration pursuant to the North Carolina Court-Ordered Arbitration Rules 1(a) and 8(a) (1999) (hereinafter N.C. Arb. R. or the Rules). *See* N.C.G.S. § 7A-37.1(b) (1999). On 17 June 1998, defendants filed answer denying negligence and demanding a jury trial. Defendants also filed a pre-arbitration submission, a motion to require prosecution bond, and an Offer of Judgment in the amount of $1,005.00.

A court ordered arbitration hearing (the hearing) was noticed for 15 December 1998. The notice recited, *inter alia*, that "[f]ailure to appear for the hearing and participate in good faith may result in an adverse award and/or sanctions." Defendants did not attend the hearing; however, counsel purporting to represent defendants was present along with an adjuster from defendants' liability insurance carrier. Plaintiff objected to the failure of the individual defendants to appear, but proceeded with the hearing without waiving or withdrawing the objection.

Following the hearing, the arbitrator awarded plaintiff $1,750.00. Defendants timely filed a request for trial *de novo*. *See* N.C. Arb. R. 5(a) ("party not in default . . . who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand" therefor in timely manner). On 8 March 1999, plaintiff moved to enforce the arbitration award and defendants thereupon responded with a motion for imposition of sanctions pursuant to N.C.G.S. § 1A-1, Rule 11 (1999). In the Order, the trial court granted the former motion and denied the latter. Defendants appeal.

Initially, we note defendants set forth five assignments of error, but have failed to address assignments of error three and four in their appellate brief. These assignments of error are therefore deemed abandoned. *See* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

[1] Defendants' first two assignments of error challenge the trial court's "finding of fact" number three, which stated as follows:

> 3. That the named Defendants' failure to appear at the Court-Ordered Arbitration was in violation of Rule 3(p) of the North Carolina Rules for Court-Ordered Arbitration.

The foregoing "finding" is rather a conclusion of law, fully reviewable on appeal. *See Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984) (if "finding of fact is essentially a conclusion of law, . . . it will be treated [as such]" and is fully "reviewable on appeal").

N.C. Arb. R. 3(p) provides that:

> *Parties must be present at hearings; Representation.* All parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Only individuals may appear *pro se.*

It is not disputed that the individual defendants did not attend the hearing; however, counsel purporting to represent defendants and an adjuster employed by their liability insurance carrier were present. Defendants maintain that the phrase "or through representatives authorized to make binding decisions," set out in N.C. Arb. R. 3(p), allows appearance by counsel or a liability insurance carrier representative in lieu of the actual parties.

However, assuming *arguendo* defendants are correct, no evidence in the instant record indicates that the attorney and adjuster in attendance at the hearing indeed possessed authority "to make binding decisions on [defendants'] behalf in all matters." *Id.* Defendants counter that the attorney-client relationship grants "inherent authority" to counsel to make binding decisions for clients, and that contracts of liability insurance similarly grant an insurer authority to make binding decisions on behalf of the insured.

> In the foregoing regard, we note defendants' concession
>
> that the attorney-client relationship rests on the principles of agency, with the client being the principle [sic] and the attorney being the agent.

Notwithstanding, defendants assert that counsel possesses "inherent authority . . . to make binding decisions with respect to strategic and tactical matters," and extrapolate therefrom the conclusion that "defendants' appearance at the arbitration [was] unnecessary for a determination on the merits." We believe defendants' conclusion is unfounded.

First, as noted above, no documents in the record, such as defendants' contract with counsel, an affidavit setting forth the nature of the representational relationship and the authority of counsel, or defendants' policy of insurance, indicate the attorney purporting to represent defendants or the representative of their liability insurance carrier who were present at the hearing possessed *in this case* authority "to make binding decisions on [defendants'] behalf *in all matters* in controversy before the arbitrator." N.C. Arb. R. 3(p) (emphasis added). Without question, our review is based "solely upon the record on appeal," N.C.R. App. P. 9(a), and we decline to accept as part of the record herein assertions of fact in the parties' briefs which are not sustained by record evidence, *see* N.C.R. App. P. 28(b)(4) (underlying facts set out in appellate brief must be supported by "references to pages in the . . . record on appeal"), and *Hudson v. Game World, Inc.* 126 N.C. App. 139, 142, 484 S.E.2d 435, 437-38 (1997) (matters argued in brief but not contained in the record will not be considered on appeal).

Perhaps more importantly, we observe that the commentary to N.C. Arb. R. 1 indicates that the purpose of the Rules "is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving" relatively minor money damage claims as in the case *sub judice*. Parties are thereby provided an early

opportunity to present their contentions to a disinterested third party and obtain an impartial decision thereon in a cost-effective manner. In addition, the "alternative to traditional litigation," *id.*, serves to relieve the constantly increasing caseload of our already overburdened trial courts.

Further, N.C. Arb. R. 3(l) provides for imposition of sanctions upon a "party failing or refusing to participate in an arbitration proceeding in a good faith and meaningful manner." Such a rule only highlights the critical importance of earnest, conscientious involvement by the *parties* in the process.

We believe both the express and implied bases for the Rules would be subverted, if not completely eviscerated, if parties were allowed to disregard the mandatory attendance requirement without unequivocal evidence in the record that representatives attending on behalf of absent parties were indeed "authorized to make binding decisions on [the absent parties'] behalf in all matters in controversy before the arbitrator." N.C. Arb. R. 3(p). To conclude otherwise would simply countenance the failure to participate in mandatory arbitration "in a good faith and meaningful manner." N.C. Arb. R. 3(l).

In sum, as defendants failed to attend the hearing in person, and as no evidence in the record reflects that counsel purporting to appear on defendants' behalf or the representative of defendants' liability insurance carrier were authorized "to make binding decisions . . . in all matters" on behalf of defendants, we affirm the trial court's determination in "finding of fact" number three of the Order that defendants violated N.C. Arb. R. 3(p).

[2] Defendants next argue the trial court erred by imposing the "sanction of striking defendants' request for trial de novo." Defendants concede that the trial court's

> determination that the defendants' violated [N.C. Arb. R.] 3(p) gave [the court] the discretion to impose sanctions pursuant to [N.C. Arb. R.] 3(l).

However, defendants maintain the court's enforcement of the arbitration award implicitly deprived them of the right to a jury trial provided in N.C. Arb. R. 5(a).

N.C. Arb. R. 3(l) permits sanctions pursuant to, *inter alia*, N.C.G.S. § 1A-1, Rule 37(b)(2)(c) (1999) (Rule 37(b)(2)(c)), which allows the trial court to enter

> [a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Sanctions imposed under Rule 37(b)(2)(c) will not be upset on appeal in the absence of an abuse of discretion, *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995), *i.e.*, upon a showing the ruling "was so arbitrary that it could not have been the result of a reasoned decision," *id.*

Suffice it to state we perceive no abuse of discretion in the case *sub judice*. Defendants have acknowledged that the trial court's determination they violated N.C. Arb. R. 3(p) accorded to the court the discretion to impose sanctions under N.C. Arb. R. 3(l), which in turn references Rule 37(b)(2)(c) allowing the striking of pleadings, dismissal of an action or a portion thereof, and rendering judgment by default as permissible sanctions. Assuming *arguendo* the trial court's Order enforcing the arbitration award thereby implicitly imposed the sanctions of striking defendants' request for trial *de novo* or of entering judgment against defendants, such action appears well within the purview of Rule 37(b)(2)(c) and in no event constitutes an abuse of the court's discretion.

In sum, the Order is in all respects affirmed.

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

JOHANNA S. BRYANT, PLAINTIFF v. CALVIN B. BRYANT, DEFENDANT

No. COA99-599

(Filed 15 August 2000)

Divorce— alimony—marital pattern of savings—expense—inclusion for only one spouse—abuse of discretion

Although the trial court did not abuse its discretion by characterizing the funds reflecting a marital pattern of savings as a reasonable expense in this alimony case, the trial court's inclusion of this investment income amount as an expense for the

plaintiff but not for defendant constituted an abuse of discretion because the purpose of alimony is not to increase the estate of a dependent spouse.

Appeal by defendant from judgment entered 7 January 1999 by Judge Charles L. White in Guilford County District Court. Heard in the Court of Appeals 23 February 2000.

Morgenstern & Bonuomo, P.L.L.C., by Barbara R. Morgenstern, for the plaintiff-appellee.

Wyatt Early Harris & Wheeler, L.L.P., by A. Doyle Early, Jr., for the defendant-appellant.

LEWIS, Judge.

Johanna Bryant and Calvin Bryant were married on 25 April 1948 and separated on 30 July 1995. On 23 July 1996, plaintiff filed a complaint seeking postseparation support and alimony from her husband, an equitable distribution of the marital property of the parties, and attorney's fees. On 27 March 1998, a judgment of equitable distribution was entered in Guilford County District Court, distributing plaintiff an estate valued at $504,800.93 and defendant an estate valued at $419,329.65. As part of the equitable distribution, the parties' investment accounts, which they established during the course of the marriage to provide funds for their retirement, were divided between them. It was the practice of the parties during the marriage to reinvest all dividends and interest earned on these investment accounts. The accounts appear to have been equally divided, since each party is receiving an identical amount of investment income from them, averaging $1981.75 per month in 1997.

In deriving the amount of the alimony award, the trial court calculated both plaintiff's and defendant's income and reasonable expenses. In calculating *plaintiff's* income, the court included the $1981.75 in monthly investment income. It also included the $1981.75 in monthly investment income as part of plaintiff's expenses, in order to "enable the plaintiff to continue to reinvest fully [the investment income]." In calculating *defendant's* income, the trial court included the $1981.75 in monthly investment income; however, our review indicates the court did *not* include this sum as part of defendant's expenses, as it did in calculating plaintiff's expenses. Taking into account these calculations, as well as the factors set forth in N.C. Gen. Stat. § 50-16.3A(b), the court here determined the amount of

alimony necessary for plaintiff to meet her accustomed standard of living to be $2800 per month. Defendant was ordered to pay this amount until he retires from the practice of law.

On appeal, defendant primarily contends the trial court improperly calculated the amount of plaintiff's alimony award, particularly in including the investment income as part of *plaintiff's* expenses. But given that the trial court's calculation of an alimony award necessarily involves a comparison of the income and expenses of *both* spouses, *see generally* N.C. Gen. Stat. § 50-16.3A(b), in order to provide adequate review of the court's alimony award, we must necessarily review the trial court's calculations as they relate to *both* spouses.

In setting the amount of an alimony award, the trial court must do three things: determine the needs of the dependent spouse and the ability of the spouses to address those needs, compare income and expenses of both spouses and consider all relevant factors, including those specifically enumerated in N.C. Gen. Stat. § 50-16.3A(b). 2 Suzanne Reynolds, *Lee's North Carolina Family Law*, § 9.22 (5th ed. 1999). The court's comparison of the spouses' income and expenses, which is at issue in this case, is one of the most important considerations necessary to setting the amount of the alimony award. *Id.* § 9.24. (citing G.S. 50-16.3A(b)). The marital standard of living, the eighth factor listed under G.S. 50-16.3A(b), must be used in the court's calculation of expenses. However, as a practical matter, the marital standard of living is merely one of the factors the court takes into account when calculating the parties' reasonable expenses, and as such, the two are separate and distinct considerations.

Defendant contends the case of *Glass v. Glass*, 131 N.C. App. 784, 509 S.E.2d 236 (1998), is controlling on the issues presented here. In *Glass*, this Court discussed the significance of savings practices established during the marriage in relation to a trial court's calculation of the amount of an alimony award. In *Glass*, the dependent spouse had deferred compensation and contributions to a 401(k) plan automatically deducted from her monthly pay during the course of the marriage. *Id.* at 789, 509 S.E.2d at 239. Upon the parties' divorce, the dependent spouse increased the amounts being deducted from her pay. *Id.* The trial court excluded these deductions when calculating the dependent spouse's income. *Id.* Finding the trial court abused its discretion in excluding these sums from her income, we stated:

> Although we agree 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, we conclude the trial court erred in this case when it excluded amounts paid into savings accounts by the parties from their respective incomes. If such an exclusion were allowed, a [supporting] spouse could reduce his or her support obligation to the other by merely increasing his deductions for savings plans. Likewise, a [dependent] spouse might increase an alimony award by deferring a portion of his or her income to a savings account.

Id. at 789-90, 509 S.E.2d at 239 (citations omitted).

In sum, our holding in *Glass* has two parts. First, the trial court *must* consider a party's *total* income, undiminished by savings contributions, in calculating the amount of an alimony award. *Id.* In addition, the trial court *may* also consider established patterns of contributing to savings as part of the parties' *standard of living. Id.* As to the requirement in *Glass* that the court consider a party's total income, we conclude the trial court properly included the investment income in its calculation of both parties' income in this case. *See also Friend-Novorska v. Novorska*, 131 N.C. App. 867, 870, 509 S.E.2d 460, 461 (1998) (holding investment income constitutes income under this analysis).

The more difficult issue presented by this appeal, however, is the effect of the trial court's characterization of investment income as an expense in this case. Given the distinction between the marital standard of living and reasonable expenses in setting alimony awards, the *Glass* Court's holding relating to the *standard of living* leaves open the question of whether the trial court below properly characterized investment income as an *expense* in this case. *See also Rhew v. Rhew*, No. 99-606 (N.C. Ct. App. June 20, 2000) (holding that, in determining entitlement to alimony, as opposed to the amount of alimony, trial court erred in disregarding evidence pertaining to the established pattern of savings in considering defendant's accustomed standard of living).

"The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32, *disc. review*

denied, 306 N.C. 752, 295 S.E.2d 764 (1982). In its calculation of expenses, the trial court may include some amount reflecting the marital pattern of savings. *Cunningham v. Cunningham*, 345 N.C. 430, 439, 480 S.E.2d 403, 406 (1997). Given that defendant is still employed and has a comfortable and significantly higher income than plaintiff, who is not working, we do not find the trial court abused its discretion by characterizing the funds reflecting a marital pattern of savings as a reasonable expense in this case.

We do, however, find the trial court's inclusion of this investment income amount as an expense for the plaintiff but not for the defendant constituted an abuse of discretion. It is not logical that the trial court could properly characterize this investment income, earned and reinvested during the course of the marriage, as an expense for one spouse but not for the other. The court's calculation in this respect effectively promotes the manipulation of funds to affect the support obligation, which this Court has often sought to prevent. *See, e.g.*, *Glass*, 131 N.C. App. at 790, 509 S.E.2d at 239; *Friend-Novorska*, 131 N.C. App. at 870, 509 S.E.2d at 461. In addition, the purpose of alimony is not to increase the estate of a dependent spouse. *Cunningham*, 345 N.C. at 440, 480 S.E.2d at 409; *Glass*, 131 N.C. App. at 790, 509 S.E.2d at 239-40. Including this amount as an expense for only one spouse erroneously provided for such an increase.

We emphasize that our decision is based upon the particular facts and standard of living of the parties reflected in the instant record, thereby warranting our determination that the trial court did not abuse its discretion by characterizing funds reflecting a marital pattern of savings as a reasonable expense *in this case*. Our opinion is not intended and does not reflect any diminution of the cautionary comments of this Court from *Glass*, 131 N.C. App. at 789-90, 509 S.E.2d at 239.

Accordingly, we vacate the order of the trial court and remand the case for new findings of fact with regard to the reasonable expenses consistent with this opinion.

Vacated and remanded.

Judges EDMUNDS and SMITH concur.

LINDA NORRIS, EMPLOYEE, PLAINTIFF v. DREXEL HERITAGE FURNISHINGS, INC./MASCO, EMPLOYER, DEFENDANT v. SELF-INSURED, CARRIER, DEFENDANT

No. COA99-1533

(Filed 15 August 2000)

Workers' Compensation— fibromyalgia—occupational disease—insufficiency of evidence

The Industrial Commission properly found in a workers' compensation action that plaintiff does not have a compensable occupational disease where the Commission found that plaintiff has fibromyalgia and that it was caused or aggravated by her employment but that there was no medical evidence that plaintiff's employment placed her at an increased risk of contracting or developing fibromyalgia. Findings regarding the nature of a disease must ordinarily be based upon expert medical testimony; here, none of the lay witnesses testified regarding any basis of knowledge as to the medical nature of plaintiff's condition or as to whether plaintiff's employment subjected her to a greater risk of contracting fibromyalgia than the general public and none of the medical witnesses expressed an opinion as to whether plaintiff's employment or occupation subjected her to a greater risk of contracting the disease.

Appeal by plaintiff from opinion and award filed 28 July 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 July 2000.

Kuehnert Bellas & Bellas, PLLC, by Eric R. Bellas, and Daniel Law Firm, PA, by Stephen T. Daniel, for plaintiff-appellant.

Morris York Williams Surles & Barringer, LLP, by G. Lee Martin and Kelly F. Miller, for defendant-appellee.

WYNN, Judge.

Plaintiff appeals from an opinion and award of the Industrial Commission denying her claim for compensation arising out of an alleged occupational disease.

Compensation under the Workers' Compensation Act may be awarded for "[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary

diseases of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13) (1999). Thus, for a disease to be compensable under this statute, "two conditions must be met: (1) It must be 'proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment'; and (2) it cannot be an 'ordinary disease of life to which the general public is equally exposed outside of the employment.' " *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 468, 256 S.E.2d 189, 196 (1979). Whether a given illness or disease fits within the definition of an occupational disease under N.C. Gen. Stat. § 97-53(13) is a mixed question of law and fact. *See Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 640, 256 S.E.2d 692, 695 (1979). The claimant bears the burden of proving the existence of an occupational disease. *See Gay v. J.P. Stevens & Co.*, 79 N.C. App. 324, 331, 339 S.E.2d 490, 494 (1986).

Plaintiff began working for the defendant-employer in 1975 and continued to work for the employer through 1996. In 1981 plaintiff began operating a splicing machine. As operator of the splicing machine, plaintiff was responsible for feeding strips of veneer into the machine. Plaintiff performed this job by leaning forward over the machine and pushing the strips, weighing less than one pound, with her arms. Plaintiff also worked as a "tailer." In this capacity plaintiff caught and stacked sheets of veneer strips as they exited from the splicing machine. This job also required plaintiff to use her arms, although not as quickly or as often as she did when operating the splicing machine. Plaintiff also worked as a "patcher," repairing cracks and other defects in strips or sheets of veneer. She manually applied tape to the defective veneer.

Plaintiff first began to notice a physical problem in July of 1995 when she observed the appearance of a knot on the back of her neck. She experienced burning and stinging sensations across her shoulders that disappeared over time. She then began to experience pain in her back. She initially consulted a chiropractor for treatment. After obtaining unsatisfactory results, in September of 1995 she consulted her family physician, Dr. Clay W. Richardson, who diagnosed her as having fibromyostitis or fibromyalgia. Plaintiff subsequently consulted a number of other medical specialists seeking diagnosis and treatment of her condition. All but one, Dr. Franciso A. Naveira, a specialist in chronic pain management, diagnosed plaintiff as having fibromyalgia. Dr. Naveira diagnosed plaintiff's condition as myofascial pain syndrome.

Plaintiff did not work from March 1996 until October 1996, when she returned to work for the employer as a splicing machine operator. In March 1997 she changed jobs to a tailer. As of the date of the hearing before the deputy commissioner on 26 March 1998, she was employed by defendant as a tailer working a full forty-hour week.

The Commission found that plaintiff has fibromyalgia and that her fibromyalgia was caused or aggravated by her employment with defendant. However, because there was no medical evidence that plaintiff's employment with defendant placed her at an increased risk of contracting or developing fibromyalgia as compared to the general public not so employed, the Commission concluded that her fibromyalgia "was not due to causes or conditions that were characteristic of and peculiar to her employment with defendant and, therefore, was not an occupational disease."

Plaintiff contends that the foregoing conclusion of the Commission is incorrect. She argues she proved that her employment as a splicing machine operator placed her at a greater risk of contracting fibromyalgia than the general public. She relies upon testimony of the medical experts whereby they indicated a causal relation existed between plaintiff's condition and her employment. She also relies upon the testimony of three co-workers who performed the job of splicer operator and who indicated they experienced similar burning sensations and knots in their upper backs and shoulders as a result of performing the job. Plaintiff also contends that the Commission acted under a misapprehension of law by requiring medical evidence to prove plaintiff's employment subjected her to a greater risk of developing fibromyalgia than the general public not so employed. We disagree.

First, we note that not only must a claimant prove that a disease is caused by the employment, but that the disease is characteristic of persons engaged in the particular trade or occupation in which the plaintiff is engaged and that the disease is not an ordinary disease of life to which the general public is equally exposed. *See Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981). Proof of a causal relationship of the disease to the employment requires application of a different factual standard. *See Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983).

Second, with regard to the necessity of proof by expert medical testimony, our Supreme Court has stated that "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." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). It has also stated that when " 'a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony.' " *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965) (quote omitted). Therefore, findings regarding the nature of a disease—its characteristics, symptoms, and manifestations—must ordinarily be based upon expert medical testimony. *See Wood*, 297 N.C. at 640, 256 S.E.2d at 695.

In the present case none of the lay witnesses testified regarding any basis of knowledge as to the medical nature of plaintiff's condition or as to whether plaintiff's employment subjected her to a greater risk of contracting fibromyalgia than the general public. Moreover, although they testified that they experienced similar symptoms as plaintiff, none of plaintiff's co-workers testified that they had consulted a physician and had been diagnosed with fibromyalgia. Consequently, their testimony could not have provided a basis for a finding that plaintiff's employment subjected her to a greater risk for contracting fibromyalgia.

Further, none of the medical witnesses expressed an opinion as to whether plaintiff's employment or occupation subjected her to a greater risk of contracting the disease. In fact, Dr. Naveira, upon whose deposition testimony plaintiff places great reliance, testified that he could not recall ever having as a patient a splicer operator with fibromyalgia.

We hold the Commission properly found and concluded, based upon the evidence presented, that plaintiff does not have a compensable occupational disease. We therefore affirm the opinion and award.

Affirmed.

Chief Judge EAGLES and Judge HORTON concur.

JACQUELINE HUNTLEY, PLAINTIFF v. JITEN G. PANDYA, ASHA J. PANDYA, ALLAN ELKINS, STEVEN CARTEE, AND HOUSING AUTHORITY OF THE CITY OF CHARLOTTE, DEFENDANTS

No. COA99-125

(Filed 15 August 2000)

Cities and Towns— public duty doctrine—inapplicable to housing authorities

The trial court's order denying a motion for summary judgment by defendants Charlotte Housing Authority and two of its employees is affirmed because a housing authority is properly classified as a local government agency despite its existence as a municipal corporation, and therefore, the public duty doctrine does not apply to bar plaintiff's action.

Appeal by defendants from order entered 18 November 1998 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 25 October 1999.

Price, Smith, Hargett, Petho and Anderson, by C. Murphy Archibald and William Benjamin Smith, for plaintiff-appellee.

Root & Root, P.L.L.C., by Allan P. Root, for defendant-appellants.

LEWIS, Judge.

In an unpublished opinion filed 7 March 2000, this Court concluded the public duty doctrine barred the plaintiff's action against the Charlotte Housing Authority ("Housing Authority") and two of its employees. We reversed the trial court's 18 November 1998 order and remanded to the trial court for entry of summary judgment in favor of these defendants. Plaintiff filed a petition for rehearing pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure 11 April 2000 which we granted, 14 April 2000.

In two recent opinions, our Supreme Court declined to expand the public duty doctrine beyond local government agencies other than law enforcement departments exercising their general duty to protect the public. *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000); *Thompson v. Waters*, 351 N.C. 462, 526 S.E.2d 650 (2000). In *Lovelace*, the court stated:

> While [the 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 v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711, *cert. denied*, 525 U.S. 1016, 119 S. Ct. 540, 142 L. Ed. 2d 449 (1998), 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 [v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991)].

Lovelace, 351 N.C. at 461, 526 S.E.2d at 654.

In light of this mandate by our Supreme Court, the issue becomes whether the Charlotte Housing Authority is properly classified as a state or local government agency.

The Charlotte Housing Authority is organized pursuant to the North Carolina Housing Authorities Law (N.C. Gen. Stat. § 157-1-157-70, the "Housing Authorities Law"). The statute authorizes the creation of "authorities" or "housing authorities" as "a means of protecting low-income citizens from unsafe or unsanitary conditions in urban or rural areas." *Powell v. Housing Authority*, 251 N.C. 812, 813, 112 S.E.2d 386, 387 (1960). The statute defines "authority" or "housing authority" as "a public body and a body corporate and politic organized in accordance with the provisions of this Article for the purposes, with the powers and subject to the restrictions hereinafter set forth." N.C. Gen. Stat. § 157-3(1).

A Housing Authority created pursuant to Chapter 157 is a municipal corporation. *In re Housing Authority*, 233 N.C. 649, 653, 65 S.E.2d 761, 764 (1951). Our Supreme Court has addressed the definition of a municipal corporation in a line of authority distinct from the issue presented here. Therein, the court has stated that "municipal corporations are agents of the state." *Soles v. City of Raleigh Civil Service Comm.*, 345 N.C. 443, 447, 480 S.E.2d 685, 687 (1997); *see also Britt v. Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952) ("When a municipality is acting 'in behalf of the State' in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign.") While *Soles* makes seemingly

clear that a municipal corporation is properly classified as a state agency, the court has also indicated that municipal corporations are created as local units of self-government. *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951) ("Municipal corporations are instrumentalities of the state for the administration of local government."); *see also Harris v. Board of Commissioners*, 274 N.C. 343, 352, 163 S.E.2d 387, 394 (1968) (stating that municipal corporations are organized primarily for the purposes of local government); *Bridges v. Charlotte*, 221 N.C. 472, 479, 20 S.E.2d 825, 830 (1942) (same). Keeping in mind the dual nature established by this authority and that our courts have never addressed the issue of classification as a state or local government agency in this context, we conclude this distinct line of authority is not entirely instructive here.

We thus turn to the specific statutory provisions in Chapter 157 for guidance. Our review pursuant to these provisions indicates that a housing authority is properly classified as a local government agency, despite its existence as a municipal corporation. For instance, pursuant to N.C. Gen. Stat. § 157-4, a housing authority is created by local government; the city council and its members are appointed by the mayor. Furthermore, the language in several provisions within Chapter 157 clearly distinguishes between housing authorities and state agencies. For example, N.C. Gen. Stat. § 157-26 labels housing authorities as "local government agenc[ies]" and exempts them from taxation "to the same extent as a unit of local government." Furthermore, the Housing Authorities Law which creates the North Carolina Indian Housing Authority states: "It is the intent of the General Assembly that the North Carolina Indian Housing Authority not be treated as a State agency for any purpose, but rather that it be treated as a housing authority as set out above." N.C. Gen. Stat. § 157-66. The specific provisions relevant to housing authorities compel the conclusion that a housing authority is properly classified as a local government agency. Accordingly, we conclude that in light of *Lovelace* and *Thompson*, the public duty doctrine does not apply to the Charlotte Housing Authority.

Contrary to our prior disposition in this appeal, we now affirm the trial court's order of 18 November 1998 denying defendants' motion for summary judgment, and remand this action to the Mecklenburg County Superior Court for trial. This opinion supersedes in all respects the previous opinion of the Court.

Reversed.

Judges WYNN and MARTIN concur.

STATE OF NORTH CAROLINA v. JIM FRANKLIN BONDS

No. COA99-769

(Filed 15 August 2000)

Search and Seizure— driving while impaired—investigatory stop—reasonable suspicion

The trial court did not err in a driving while impaired case by concluding that a police officer had reasonable suspicion to justify the investigatory stop of defendant's vehicle because: (1) the officer testified that he observed specific indicators of intoxication he was specifically trained to look for, including that defendant had a blank look on his face and stared straight ahead without making eye contact with the officer, defendant was driving at least ten miles per hour below the speed limit, and defendant's driver-side window was completely down in twenty-eight degree weather; and (2) just because most investigatory stops in the context of driving while impaired have involved weaving within a lane or weaving between lanes, it does not mean that only those cases will meet the reasonable suspicion standard.

Appeal by defendant from judgment entered 18 February 1999 by Judge William Z. Wood, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 26 April 2000.

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

Pete Bradley for defendant-appellant.

LEWIS, Judge.

On 27 December 1997, Officer Glenn Wyatt of the Lexington Police Department was patrolling Route 8 (Cotton Grove Road) when he came upon defendant's vehicle stopped at an intersection. Officer Wyatt noticed that defendant's driver-side window was rolled down all the way, even though the outside temperature was twenty-eight

degrees. Officer Wyatt also observed defendant had "a blank look on his face" and never turned his head to make eye contact with the officer. After the light changed, Officer Wyatt proceeded to follow defendant for approximately a half mile. The speed limit on this stretch of road was forty miles per hour, but defendant's speed never reached more than thirty miles per hour. As defendant reached the city limits sign (at which point Officer Wyatt testified he would no longer have jurisdiction), Officer Wyatt pulled him over on suspicion of driving while impaired. Defendant submitted to an intoxilyzer test and blew a .13, which is above the then legal limit of .08. He also had no valid driver's license at the time. Officer Wyatt then arrested defendant for driving while impaired and for driving without a license.

Defendant filed a motion to suppress all evidence obtained as a result of the investigatory stop, including the results of the intoxilyzer test. After hearing Officer Wyatt testify as to the grounds for his stopping defendant, the trial court denied defendant's motion. Defendant then pled guilty to driving while impaired in return for the State dropping the charge of driving without a licence, but reserved his right to appeal.

The only issue on appeal is whether Officer Wyatt had sufficient grounds to justify pulling over defendant. Before a police officer may stop a vehicle and detain its occupants without a warrant, the officer must have a reasonable suspicion that criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968). This reasonable suspicion must be more than just a "hunch"; it must be based upon specific, articulable facts that, when taken together with the reasonable inferences from those facts, reasonably justify the seizure. *Id.* at 21, 20 L. Ed. 2d at 906. Moreover, the reasonableness standard must be judged objectively and "viewed as a whole 'through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.' " *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979) (quoting *United States v. Hall*, 525 F.2d 857, 859 (D.C. Cir. 1976)), *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979).

At the suppression hearing, Officer Wyatt articulated three reasons for suspecting defendant may be driving while impaired. First, defendant had a blank look on his face and stared straight ahead. Second, defendant was driving at least ten miles per hour below the speed limit. Third, defendant's driver-side window was completely down in twenty-eight degree weather. Officer Wyatt explained he had

been taught that one of the reasons drivers may roll down their windows in cold weather is "to refresh theirself [sic] because they have too much alcohol in their system." We conclude these reasons are sufficient to satisfy the reasonable suspicion standard.

Officer Wyatt had been specifically trained to look for certain indicators of intoxication, including some of the ones here. He had ten years of experience in this area and had even made several arrests using the exact same indicators that were present here. As stated previously, an officer's training and experience must be considered in analyzing the "reasonable suspicion" standard. *Thompson*, 296 N.C. at 703, 252 S.E.2d at 779. Additionally, we note that the National Highway Traffic Safety Administration ("NHTSA"), in its recent publication "The Visual Detection of DWI Motorists," states that driving ten miles per hour or more under the speed limit, plus staring straight ahead with fixed eyes, indicates a fifty percent chance of being legally intoxicated. Http://www.nhtsa.dot.gov/people/injury/alcohol/dwi/dwihtml/index.htm. This statistic lends objective credibility to Officer Wyatt's suspicions, demonstrating that his suspicions were in fact reasonable—something more than just a "hunch."

Defendant points out, and we acknowledge, that the three indicators cited by Officer Wyatt, in and of themselves, are wholly innocent actions that can be explained by reasons unrelated to intoxication. However, our courts have repeatedly emphasized that the indicators should not be viewed in isolation, but as a totality. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). Furthermore, whether a particular indicator is innocent in nature is immaterial; the relevant inquiry is " 'the degree of suspicion that attaches to particular types of noncriminal acts.' " *United States v. Sokolow*, 490 U.S. 1, 10, 104 L. Ed. 2d 1, 12 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 76 L. Ed. 2d 527, 552 n.13 (1983)). The three indicators here, though noncriminal in nature, elicited enough reasonable suspicion when combined to warrant the investigatory stop.

Defendant also suggests that weaving, or some other form of aberrant driving, is required in order to satisfy the reasonable suspicion standard. To that effect, defendant correctly points out that most North Carolina cases upholding investigatory stops in the context of driving while impaired have involved weaving within a lane or weaving between lanes. *See, e.g., State v. Aubin*, 100 N.C. App. 628, 397 S.E.2d 653 (1990) (weaving within lane plus driving only forty-five miles per hour on the interstate), *disc. review denied*, 328 N.C. 334,

402 S.E.2d 443, *cert. denied*, 502 U.S. 842, 116 L. Ed. 2d 101 (1991); *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989) (weaving within lane plus driving twenty miles per hour below the speed limit), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990); *State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988) (weaving within lane and off road). But just because most of our cases have involved weaving does not mean that *only* those cases involving weaving will meet the reasonable suspicion standard. Our Supreme Court recently concluded that a legal turn immediately prior to a DWI checkpoint, in and of itself, could be sufficient grounds to justify an investigatory stop. *State v. Foreman*, 351 N.C. 627, 632-33, 527 S.E.2d 921, 923 (2000). A driver's intoxicated appearance, as observed by an officer driving by, has also been held to be sufficient. *State v. White*, 311 N.C. 238, 244, 316 S.E.2d 42, 46 (1984). Thus, contrary to defendant's assertion, weaving is not a threshold requirement in order to satisfy the reasonable suspicion standard.

In sum, we conclude that Officer Wyatt did have reasonable grounds to stop defendant. Defendant's slow driving, his blank look and staring straight ahead, and his window being down in below-freezing weather, when viewed together, constituted reasonable and articulable grounds to justify Officer Wyatt's stopping the car.

Affirmed.

Judges MARTIN and WALKER concur.

FREDERIC W. RIPLEY, III, PAMELA BERBUE, AND DIANE R. OLSON, PLAINTIFFS v. SUZANNE E. DAY AND WACHOVIA BANK, N.A., (F/K/A WACHOVIA BANK AND TRUST COMPANY, N.A.), EXECUTOR OF THE ESTATE OF ELLISON G. DAY AND TRUSTEE OF THE TRUST, UNDER AGREEMENT WITH ELLISON G. DAY DATED FEBRUARY 1, 1990, DEFENDANTS

No. COA99-866

(Filed 15 August 2000)

1. Wills— right of dissent—subject matter jurisdiction—declaratory judgment action improper

Although plaintiffs contend they have standing to contest defendant-wife's right of dissent from her deceased husband's will in this action, the trial court did not err by granting summary

judgment in favor of defendant in a declaratory judgment action, because the trial court did not have subject matter jurisdiction over the issues involved based on the facts that: (1) an action contesting a surviving spouse's right of dissent under N.C.G.S. § 30-1 entails something entirely different from the construction of a will in a declaratory judgment action under N.C.G.S. § 1-254 since the dissent action involves valuation of the entire estate and the declaratory judgment action involves valuation of the testamentary estate; and (2) plaintiffs contest defendant's right of dissent from the will based on valuations, rather than an agreement reached through collusion or fraud.

2. Jurisdiction— subject matter—wills—right of dissent

Even if defendant agreed or even urged plaintiffs to institute a declaratory judgment action to determine whether defendant-wife is entitled to dissent from her deceased husband's will, jurisdiction of the court over the subject matter of the action is the most critical aspect of the court's authority to act and cannot be waived.

Appeal by plaintiffs from order entered 19 April 1999 by Judge Wiley F. Bowen in Chatham County Superior Court. Heard in the Court of Appeals 19 April 2000.

Bryant, Patterson, Covington & Idol, P.A., by David O. Lewis, for the plaintiff-appellants.

Newsom, Graham, Hedrick & Kennon, P.A., by Josiah S. Murray III and J. Alan Campbell, for the defendant-appellee.

LEWIS, Judge.

Plaintiffs instituted a declaratory judgment action to determine whether defendant Suzanne E. Day is entitled to dissent from her deceased husband's will. Plaintiffs are the nieces and nephew of the decedent. The trial court granted summary judgment in favor of defendants Day and Wachovia; however, plaintiffs filed notice of appeal only with respect to defendant Day. As such, we address the issues on appeal only as they relate to defendant Day.

[1] Plaintiffs first argue they have standing to contest Day's right of dissent in this action, and as such, the trial court should not have granted summary judgment in favor of defendant Day. Plaintiffs contend that when N.C. Gen. Stat. § 30-1 is read *in pari materia* with

certain provisions of the Declaratory Judgment Act, including N.C. Gen. Stat. § 1-254, they have standing to contest Day's right of dissent by means of a declaratory judgment action. Although we disagree, the problem relates not to a lack of standing, but to a lack of subject matter jurisdiction.

G.S. 30-1 sets forth the requirements for establishing a surviving spouse's right of dissent. The valuations relevant to determining whether a right of dissent exists, including the estate of the deceased spouse and the property passing outside of the will to the surviving spouse, may be established by agreement of the executor and surviving spouse and upon approval of the clerk of superior court. N.C. Gen. Stat. § 30-1(c) (1999). G.S. 1-254, which governs the courts' authority to construe instruments, provides that "[a]ny person interested under a . . . will . . . may have determined any question of construction or validity *arising under the instrument* . . . and obtain a declaration of rights, status or any other legal relations thereunder." (Emphasis added).

It is well-settled that "[s]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Bd. of Adjmt. of the Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993). We conclude the two statutes cited by plaintiffs do not deal with the same subject matter. It is clear that G.S. 30-1(c) specifically governs the determination of a surviving spouse's right of dissent, including both valuation and the ultimate determination of whether a right of dissent is established as a result of the relevant valuations. G.S. 1-254, however, allows questions as to the construction of a *will* to be brought in a declaratory judgment action. *Rogel v. Johnson*, 114 N.C. App. 239, 242, 441 S.E.2d 558, 560 (1994). "The Declaratory Judgment Act . . . is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder." *Farthing v. Farthing*, 235 N.C. 634, 635, 70 S.E.2d 664, 665 (1952).

An action contesting a surviving spouse's right of dissent entails something entirely different from the construction of a will. In fact, as its name connotes, dissent does not even involve application of the will—it involves a spouse's outright refusal to collect under the will. Although both actions in part involve estate valuations (the dissent action involving valuation of the *entire* estate and the declaratory judgment action involving valuation of the *testamentary* estate), the

actions are still fundamentally different in nature. As such, we conclude that G.S. 30-1(c) and G.S. 1-254 govern mutually exclusive subject matter, so that each must be construed separately.

Because G.S. 1-254 does not encompass actions to contest a surviving spouse's right of dissent, we conclude the superior court did not have subject matter jurisdiction over the issues involved in this case. In its declaratory judgment action, plaintiffs sought something entirely different from the court than construction of a will. In their complaint, plaintiffs contest defendant Day's right of dissent from the will based on valuations. Resolution of this issue has nothing to do with construction of the will instrument; the provisions of G.S. 1-254 do not confer subject matter jurisdiction for plaintiffs' action.

It is important to note that plaintiffs' action contests only the valuations relevant to defendant Day's right of dissent. A different analysis may have resulted if plaintiffs had alleged that the agreement in this case was reached through collusion or fraud. While our courts have indicated that "[a]bsent a showing that the parties have failed to act in an arm's length manner . . . the clerk ought to abide by this agreement," *Taylor v. Taylor*, 301 N.C. 357, 363, 271 S.E.2d 506, 510-11 (1980), they have not addressed what action is appropriate when persons other than the parties to the agreement make such a challenge. As plaintiffs have made no contention regarding collusion or fraud, the issue is not before us and we have not addressed it.

[2] Plaintiffs also contend that because defendant Day and her attorney, through conversations and correspondence, previously agreed that plaintiffs have standing to bring a declaratory judgment action, defendant Day waived her right to assert standing as a defense in this case. We have already concluded that the issue in this case was not one of standing, but of subject matter jurisdiction. Hence, even if defendant Day agreed or even urged plaintiffs to institute a declaratory judgment action, jurisdiction of the court over the subject matter of the action is the most critical aspect of the court's authority to act and cannot be waived. W. Brian Howell, *Shuford North Carolina Civil Practice and Procedure* § 12-4 (5th ed. 1998). Furthermore, it was certainly not Day's position to advise plaintiffs on their options for contesting her right of dissent.

Because the superior court had no subject matter jurisdiction over the issues involved in this case, we conclude the trial court properly granted summary judgment in favor of defendants.

Given our disposition as to the first issue, we need not consider plaintiff's contentions regarding valuation of the testate and intestate shares.

Affirmed.

Judges MARTIN and WALKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 AUGUST 2000

BURNS v. STONE No. 99-908	Union (95CVS225)	Affirmed
COMER v. JUPITER CORP. TRANSP. SYS. No. 99-1427	Ind. Comm. (471571)	Vacated and Remanded
DIAMOND CHEVROLET-GEO v. AMERICAN ISUZU MOTORS, INC. No. 99-462	Wake (98CVS11917)	Affirmed
FEDERAL FIN. CO. v. BRADY No. 99-1433	Wake (96CVS11683)	Dismissed
GEIBIG v. WILLIFORD No. 99-998	Orange (98CVD698A)	Dismissed
IN RE SOLOMON No. 99-1499	Richmond (96J164)	Affirmed
KEITH v. FRIEND No. 99-931	Johnston (96CVS1821)	Reversed and Remanded
MANESS v. BEWARD No. 99-1071	Jones (89SP8)	Affirmed in part, Vacated in part, and Remanded
QUBAIN v. GRANBERRY No. 99-469	Wake (95CVS11730)	Reversed in part, Vacated in part
STATE v. CONNER No. 00-118	Guilford (98CRS83569) (99CRS23211)	No Error
STATE v. GREEN No. 99-1330	Pitt (98CRS051497)	Remanded for Resentencing
STATE v. LASSITER No. 99-1317	Hertford (98CRS3315) (98CRS3316) (98CRS3317)	Remanded for entry of a corrected judgment in 98CRS3316; in all other respects, no error
STATE v. McBRIDE No. 99-1486	Mecklenburg (98CRS37087)	No Error
STATE v. MOORE No. 00-5	Montgomery (98CRS526) (99CRS1237)	No Error
STATE v. OLIVER No. 99-1614	Mecklenburg (97CRS50112)	No Error

STATE v. PAGE No. 00-59	Wake (99CRS10312)	No Error
STATE v. PURCELL No. 99-995	Moore (98CRS13587) (98CRS10865) (98CRS10866) (98CRS10867)	No Error
STATE v. REID No. 00-77	Wayne (98CRS14334)	No Error
STATE v. RILEY No. 99-549	New Hanover (98CRS3519) (98CRS3520)	No Error
STATE v. WATSON No. 00-82	Forsyth (94CRS19405) (94CRS19406) (94CRS19401) (94CRS19418)	No Error
STATE v. WILEY No. 99-926	New Hanover (97CRS26928) (97CRS26929)	No Error
STATE v. WILLIAMS No. 99-593	Cumberland (95CRS35037)	No Error
STATE v. WOODARD No. 00-132	Guilford (99CRS025303)	Affirmed
SWENSON v. MOORE No. 99-929	Harnett (99CVS0255)	Reversed
WELCH v. LEE No. 99-817	Ind. Comm. (431525)	Affirmed
WOODS v. COTTRELL No. 99-920	Vance (97CVS131)	Affirmed
WOODWARD v. WOODWARD No. 99-403	Forsyth (97CVD2382)	Vacated and Remanded

ROBERT F. BROOKS, PLAINTIFF v. WAL-MART STORES, INC., DEFENDANT

No. COA99-430

(Filed 29 August 2000)

1. Appeal and Error— preservation of issues—failure to refer to order in notice of appeal—issue preserved under § 1-278

An issue concerning the dismissal of Wal-Mart's codefendants in an action arising from a prescription greater than the intended dose was properly before the Court of Appeals pursuant to N.C.G.S. § 1-278 despite Wal-Mart's failure to refer to the order in its notice of appeal where Wal-Mart registered its objection at trial and plaintiff was put on notice that Wal-Mart intended to question the dismissal on appeal; the order was interlocutory and not immediately appealable because contribution may be determined in an independent action; and the order involved the merits of the suit and necessarily affected the final judgment in that Wal-Mart was rendered solely liable.

2. Contribution— joint tortfeasors—settlement with some—determination of good faith

The Court of Appeals adopts the totality of circumstances approach of *Mahathiraj v. Columbia Gas of Ohio, Inc.*, 617 N.E.2d 737, for determining whether a settlement with only some of the persons liable for a tort was reached in good faith under the Uniform Contribution among Tortfeasors Act, N.C.G.S. § 1B-1. Courts in states which have adopted the Act have generally agreed that a hearing is required; the Mahathiraj approach involves consideration of all available relevant facts and places both the type of proceeding to conduct and the decision of whether the settlement is in good faith in the sound discretion of the trial court.

3. Contribution— joint tortfeasors—settlement with some—determination of good faith—specific procedure and conclusion

In an action against a doctor, his practice, and a pharmacy arising from a prescription where the pharmacy contended that plaintiff's settlement with only the doctor and his practice was in bad faith, the court did not abuse its discretion in its choice of procedure by taking counsel for the other parties at their word rather than allowing the remaining codefendant to examine coun-

sel under oath or abuse its discretion by concluding that the settlement was in good faith.

4. Appeal and Error— preservation of issues—claim not asserted prior to appeal

In a negligence action arising from a prescription, Wal-Mart did not preserve for appellate review the issue of whether the trial court should have granted its motions for directed verdict and JNOV on the grounds that its pharmacist had filled the prescription as directed by a physician where Wal-Mart did not assert that claim prior to appeal.

5. Appeal and Error— preservation of issues—objection at trial—different grounds on appeal

Defendant Wal-Mart did not preserve for appellate review its contention regarding the court's instruction in a negligence action arising from a prescription where Wal-Mart objected at trial, but the grounds asserted before the trial court were markedly different from those raised on appeal.

6. Appeal and Error— preservation of issues—expert testimony

Defendant Wal-Mart's contention in a negligence action arising from a prescription that testimony by a pharmacist was erroneously based upon a national standard was not properly before the Court of Appeals in light of Wal-Mart's failure to move to strike the standard of care testimony, its presentation on cross-examination of essentially the same testimony, and its further failure to object to the tender of the witness as an expert or to request a voir dire to explore the basis for his opinion.

Appeal by defendant from judgment filed 2 June 1998, order filed 3 June 1998, and order and judgment filed 29 June 1998 by Judge Russell G. Walker, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 16 February 2000.

Alexander, Ralston, Speckhard & Speckhard, L.L.P., by Stanley E. Speckhard, for plaintiff-appellee.

Smith, Helms, Mulliss & Moore, L.L.P., by James G. Exum, Jr., Caroline H. Lock, John J. Korzen, and Amie Flowers Carmack, for defendant-appellant Wal-Mart Stores, Inc.

JOHN, Judge.

Defendant Wal-Mart Stores, Inc. (Wal-Mart) appeals judgment entered upon jury verdict in favor of plaintiff Robert F. Brooks. We conclude the trial court committed no error.

Pertinent facts and procedural history include the following: Defendant James L. Deterding, M.D. (Dr. Deterding), an employee of defendant Carolina Kidney Associates, P.A. (CKA), began treating plaintiff in October 1991. On 11 September 1992, Dr. Deterding prescribed the drug Prednisone (the prescription) for plaintiff's loss of kidney function. Dr. Deterding intended that the prescription reflect a dosage of eighty milligrams (80 mg) per day.

Plaintiff presented the prescription to pharmacist Kimberly Stutts (Stutts) at Wal-Mart's Asheboro, North Carolina, store on Saturday, 12 September 1992. According to Stutts, the prescription indicated plaintiff was to take 80 mg of Prednisone four times per day, a daily total of three hundred twenty milligrams (320 mg). Stutts stated she telephoned CKA to inquire whether 320 mg was the intended dosage, and that a female answered the call, placed Stutts on hold, and subsequently returned and confirmed the dosage level as 320 mg. Stutts thereupon filled the prescription at 320 mg per day, and it was subsequently refilled at the same level on 26 September 1992 by pharmacist Charles Adams (Adams) in Wal-Mart's Greenville, South Carolina, pharmacy.

In later testimony, Dr. Ronald Garber, a nephrologist and president of CKA, maintained CKA was "never" open on Saturdays, that "no one answer[ed the office phone] line" on Saturdays, and that an answering machine activated on Friday afternoons received all weekend calls and directed the caller to contact an answering service if the "call [wa]s of an urgent nature."

On 28 September 1992, plaintiff was admitted to a hospital emergency room in Greenswood, South Carolina, and diagnosed with thrush, a fungal infection of the throat. Plaintiff continued ingesting 320 mg daily for twenty-three days until a 5 October 1992 follow-up visit with Dr. Deterding revealed plaintiff had been taking four times the amount of Prednisone intended by Dr. Deterding.

Plaintiff subsequently contracted nocardia, a bacterial infection of the lungs, and aspergillosis, a fungal infection of the brain, resulting in numerous operations and hospital stays. In a videotaped deposition taken 24 April 1998 and presented at trial, Dr. David Robirds

testified plaintiff had suffered permanent kidney failure and would "require dialysis for the rest of his life."

Plaintiff filed the instant suit 11 September 1995, alleging negligence by Dr. Deterding in writing and by Wal-Mart in dispensing the prescription, and claiming such negligence resulted in injuries to plaintiff which were "permanent and disabling." Dr. Deterding and CKA answered jointly 27 November 1995, denying negligence and alleging plaintiff had been contributorily negligent in failing to follow Dr. Deterding's verbal instructions to take 80 mg of Prednisone per day.

Dr. Deterding and CKA also cross-claimed against Wal-Mart, asserting that any negligence on the part of Dr. Deterding or CKA was insulated by the negligence of Wal-Mart. By answer filed 28 November 1995, Wal-Mart denied negligence, pleaded plaintiff's contributory negligence in bar of his claim, and cross-claimed for contribution and indemnity against Dr. Deterding and CKA.

Trial of the action commenced 7 May 1998. At the close of plaintiff's evidence, each defendant moved for directed verdict pursuant to N.C.G.S. § 1A-1, Rule 50(a) (1999), which motions were denied by the trial court 18 May 1998. On 19 May 1998, plaintiff's attorney informed the trial court a settlement (the settlement) had been reached with Dr. Deterding and CKA in the amount of $10,000.00. Following a hearing, the court entered orders dismissing with prejudice plaintiff's claims, as well as Wal-Mart's cross-claims, against Dr. Deterding and CKA (the 19 May 1998 order).

The jury verdict returned 22 May 1998 stated plaintiff was injured by the negligence of Wal-Mart and was not contributorily negligent. The jury awarded plaintiff $2,500,000.00 in compensatory damages and, upon finding Wal-Mart's negligence was accompanied by aggravated conduct, awarded plaintiff $1.00 in punitive damages. The trial court entered judgment 2 June 1998 reflecting the verdict and taxing costs to Wal-Mart.

Wal-Mart moved for judgment notwithstanding the verdict (JNOV), *see* N.C.G.S. § 1A-1, Rule 50(b) (1999), for new trial, *see* N.C.G.S. § 1A-1, Rule 59(a) (1999), and to alter or amend the judgment, *see* N.C.G.S. § 1A-1, Rule 59(e) (1999). The trial court granted the latter motion 3 June 1998 so as to allow credit for the $10,000.00 settlement with Dr. Deterding and CKA against plaintiff's compensatory damage award, the judgment thereby reflecting that plaintiff was entitled to recover $2,490,000.00 from Wal-Mart. Wal-Mart's

remaining motions were denied 29 June 1998, and it timely appealed both the denial of its motions and the court's 2 June 1998 judgment. Wal-Mart subsequently retained its current appellate counsel to pursue the appeal in lieu of trial counsel.

[1] Wal-Mart originally asserted thirty-four assignments of error, presently condensed into four issues for our review. Wal-Mart first attacks the trial court's 19 May 1998 order, arguing the trial court erred by finding therein that the settlement was reached in good faith and by failing to conduct an "evidentiary hearing" on that issue.

Preliminarily, we note plaintiff objects that Wal-Mart did not "serve Dr. Deterding or CKA with its motion for a new trial . . . or with notice of appeal," and did not take notice of appeal from the 19 May 1998 order. *See* N.C.R. App. P. 3(d) (Rule 3(d)) ("notice of appeal . . . shall designate the judgment or order from which appeal is taken"). Accordingly, plaintiff continues, the 19 May 1998 order is not properly before this Court for review.

However, plaintiff cites no authority supporting his position that failure to serve Dr. Deterding and CKA "precludes a new trial," the ultimate remedy sought by Wal-Mart on appeal, and we thus do not discuss plaintiff's contention in that regard. *See Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C.App. 59, 64, 401 S.E.2d 126, 129 ("[b]ecause the appellee cites no authority for this argument, it is deemed abandoned"), *aff'd*, 330 N.C. 439, 410 S.E.2d 392 (1991); *cf.* N.C.R. App. P. 28(b)(5) (assignments of error for which no authority is cited will be taken as abandoned).

Further, although Wal-Mart's notice of appeal did not reference the 19 May 1998 order as required by Rule 3(d), N.C.G.S. § 1-278 (1999) provides "another avenue by which an appellate court may obtain jurisdiction to review an interlocutory order" absent compliance with Rule 3(d). *Floyd and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51, 510 S.E.2d 156, 158-59 (1999).

Appellate review pursuant to G.S. § 1-278 is proper under the following conditions:

> (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.

Gaunt v. Pittaway, 135 N.C. App. 442, 445, 520 S.E.2d 603, 606 (1999).

All three prerequisites have been met herein. First, Wal-Mart registered its objection at trial to the 19 May 1998 order when entered, thus preserving the issue for appellate review. *See* N.C.R. App. P. 10(b)(1). Further, in its notice of appeal, Wal-Mart specifically appealed denial of its new trial motion, predicated in part upon the trial court's failure to prohibit the settlement and to conduct an evidentiary hearing upon whether it had been reached in good faith. In short, plaintiff indisputably was put on notice that Wal-Mart intended to question on appeal the 19 May 1998 dismissal of Dr. Deterding and CKA from the case, and was not prejudiced by Wal-Mart's failure to include the 19 May 1998 order in its formal notice of appeal. *See Floyd*, 350 N.C. at 52, 510 S.E.2d at 159 ("it is quite clear from the record that plaintiffs sought appeal" of order not specifically appealed pursuant to Rule 3(d)); *see also Smith v. Insurance Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979) (mistake in designating judgment appealed from should not result in loss of appeal if intent to appeal from specific judgment may fairly be inferred from notice and appellee is not misled by mistake).

Second, the orders dismissing Dr. Deterding and CKA were interlocutory orders, as they were

> made during the pendency of [the] action [and] d[id] not dispose of the case, but le[ft] it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. City of Durham, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Interlocutory orders are not immediately appealable

> unless the order deprives the appellant of a substantial right which he will lose if the order is not reviewed before the final judgment.

Floyd, 350 N.C. at 51, 510 S.E.2d at 158.

In the case *sub judice*, Wal-Mart's potential right of contribution from Dr. Deterding and CKA was indisputably affected by dismissal of each from the case. However, the right to contribution is "adequately protected by exception to entry of the interlocutory order," *J&B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987), in that any claim of contribution may be independently determined in a proceeding separate from that resolving the issue of negligence. The 19 May 1998 order thus was interlocutory and not immediately appealable, *see Floyd*, 350 N.C. at 51, 510 S.E.2d at 158 (order immediately appealable only if substantial right would

be lost absent appeal before final judgment), and Wal-Mart is entitled to appellate review thereof under G.S. § 1-278

> incident to an appeal from a final judgment or order [if the] intermediate orders "involv[ed] the merits and necessarily affect[ed] the judgment,"

In re Foreclosure of Allan & Warmblod Const. Co., 88 N.C. App. 693, 696, 364 S.E.2d 723, 725, *disc. review denied*, 322 N.C. 480, 370 S.E.2d 222 (1988) (citing G.S. § 1-278).

The 19 May 1998 order deprived Wal-Mart of its claims against Dr. Deterding and CKA, and effectively rendered Wal-Mart solely liable on any judgment in favor of plaintiff. The 19 May 1998 order thereby "involv[ed] the merits [of the suit] and necessarily affect[ed] the [final] judgment." G.S. § 1-278; *see Floyd*, 350 N.C. at 51, 510 S.E.2d at 159 (order depriving party of one of its claims involved merits and affected judgment). Accordingly, the 19 May 1998 order is properly presented for our review incident to Wal-Mart's appeal of the final judgment, *see* G.S. § 1-278; *see also In re Allan & Warmblod*, 88 N.C. App. at 696, 364 S.E.2d at 725, referenced in Wal-Mart's notice of appeal, *see* Rule 3(d).

[2] We therefore turn to the Uniform Contribution among Tort-Feasors Act (the Act), N.C.G.S. §§ 1B-1-1B-6 (1999), to consider the propriety of the trial court's dismissal of Dr. Deterding and CKA from the case. The Act provides:

> [e]xcept as otherwise provided in this Article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

G.S. § 1B-1(a). However,

> [w]hen a release or a covenant not to sue or not to enforce judgment is given *in good faith* to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

G.S. § 1B-4 (emphasis added).

The Act is silent as to what constitutes "good faith" and as to the procedure by which it may be determined whether a good faith settlement has been reached, and our courts have not previously addressed the question. Wal-Mart's appeal thus presents an issue of first impression.

Although courts in states which have adopted the Act have generally agreed a hearing is required to resolve whether a settlement has been reached in good faith under the Act, those courts remain divided in prescribing the nature of the requisite hearing. *See* Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. Rev. 427, 443 (1993) [hereinafter Kornhauser & Revesz, *Settlements*]; *see also Copper Mount., Inc. v. Poma of Am., Inc.*, 890 P.2d 100, 105 (Colo. 1995) (courts are "sharply divided as to which is the appropriate test").

Three distinct approaches have emerged. Under the first, courts are directed to "scrutinize the substantive adequacy of the settlement," Kornhauser & Revesz, *Settlements* at 443, by examining factors such as

> a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, . . . a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial[,] . . . the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants.

Tech-Bilt, Inc. v. Woodward-Clyde & Assoc., 698 P.2d 159, 166-67 (Cal. 1985).

The second approach "involve[s] only a procedural inquiry about the absence of collusion between the plaintiff and the settling defendant." Kornhauser & Revesz, *Settlements* at 443; *see also Noyes v. Raymond*, 548 N.E.2d 196, 199 (Mass. App. Ct. 1990) (lack of good faith "includes collusion, fraud, dishonesty, and other wrongful conduct," but circumstance of low settlement amount in comparison to plaintiff's estimate of damages by itself is "not material"), and *Copper*

Mount., 890 P.2d at 108 ("a settlement is reached in 'good faith' in the absence of collusive conduct").

By contrast, courts adopting the third approach

> hold that determination of good faith should be left to the discretion of the trial court based upon all relevant facts available, and that, in the absence of an abuse of that discretion, the trial court's findings should not be disturbed.

Velsicol Chemical Corp. v. Davidson, 811 P.2d 561, 563 (Nev. 1991); *see also Dubina v. Mesirow Realty Development*, 719 N.E.2d 1084, 1088 (Ill. App. Ct. 1999) (good faith determination is matter within discretion of trial court); *Mahathiraj v. Columbia Gas of Ohio, Inc.*, 617 N.E.2d 737, 741 (Ohio Ct. App. 1992) (same), *jurisdictional motions overruled*, 612 N.E.2d 1245 (Ohio 1993).

Further,

> [t]he type of hearing that should be conducted to produce the facts necessary to determine whether a settlement was made in good faith is [also] committed to the discretion of the trial court.

Readel v. Towne, 706 N.E.2d 99, 104 (Ill. App. Ct. 1999); *see also Mahathiraj*, 617 N.E.2d at 742.

The first approach has been criticized

> both for its potentially negative impact on the policy encouraging settlement and for the additional burdens it creates for trial courts in conducting evidentiary hearings . . . .

Copper Mount., 890 P.2d at 105 (citations omitted). Additionally, the statute at issue in the case originally promulgating that approach, *Tech-Bilt*, 698 P.2d 159,

> specifically required that a court conduct a hearing on the issue of good faith at the request of an interested party,

Mahathiraj, 617 N.E.2d at 741. The *Tech-Bilt* court thus was delineating requisite factors to be considered during the statutorily prescribed hearing. However, North Carolina's version of the Act, G.S. § 1B-4, contains no hearing requirement. In the absence thereof, we deem it inappropriate to direct consideration by our trial courts of a specified set of factors on each occasion the good faith nature of a settlement is questioned. *Accord Mahathiraj*, 617 N.E.2d at 741.

In any event, we conclude the third view accords best with our previous expressions of the purpose of the Act, *i.e.*, that it "contemplates that settlements are to be encouraged," *Wheeler v. Denton*, 9 N.C. App. 167, 171, 175 S.E.2d 769, 772 (1970), and that "it is . . . desirable that settlements be made promptly and with finality," *Matthews v. Hill*, 2 N.C. App. 350, 354, 163 S.E.2d 7, 10 (1968).

Further, the third approach provides maximum flexibility to our trial courts and is "more workable," *Mahathiraj*, 617 N.E.2d at 741, in that

> the court considers the totality of the circumstances to determine if a settlement has been reached in good faith,

id.; *see also Velsicol Chemical*, 811 P.2d at 563 (court should base decision on "all relevant facts available"). Thus, a trial court may, without being specifically obligated to do so, consider any of the factors delineated in *Tech-Bilt*, or examine whether the settlement was collusive as required by the second approach if such inquiry is warranted by the facts of the individual case. However, mandating that the court perform the foregoing functions in every case would indisputably be disruptive of, and discouraging to, settlement.

As the Massachusetts Appeals Court has written,

> [t]he goal of encouraging settlements may be achieved only to the extent that motions for discharge based upon settlements are routinely allowed, with extended hearings on the question of good faith the exception. If it were otherwise, a party seeking to avoid trial by settling a claim could rarely achieve that objective; either the issue of good faith would be the subject of a full trial, or . . . a defendant who settles with a plaintiff may, nevertheless, be forced to stand trial on the merits of the tort claim. Faced with such prospects, a defendant would have little incentive to enter into a settlement.

Noyes, 548 N.E.2d at 199.

In short, we adopt the "totality of the circumstances" approach announced in *Mahathiraj*, 617 N.E.2d at 741, which involves consideration of all available relevant facts, *see Velsicol Chemical*, 811 P.2d at 563, and "places [both] the decision of whether or not a settlement is made in good faith," *Mahathiraj*, 617 N.E.2d at 741, and what "type of proceeding [to] conduct to determine good faith in an individual case," *id.* at 742, in the sound discretion of the trial court.

Accordingly, the trial court's determination of whether a settlement was made in good faith pursuant to G.S. § 1B-4 may be reversed only if the

> court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

State v. Hennis, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Moreover,

> [t]he mere showing that there has been a settlement is not enough to show there has been a lack of good faith. [Finally, t]he burden of showing a lack of good faith is upon the party asserting it.

Wheeler, 9 N.C. App. at 171, 175 S.E.2d at 772.

[3] In the case *sub judice*, Wal-Mart claims the settlement between plaintiff and Dr. Deterding and CKA was not in good faith and that Wal-Mart should have been allowed

> to examine counsel for the settling parties under oath (outside the presence of the jury) regarding the nature, terms, and timing of the settlement.

When the settlement was announced to the trial court, Wal-Mart sought permission to "*voir dire* both attorneys on the record" for the purpose of determining "whether or not [it] wish[ed] to make a motion with respect to the good faith issues of the settlement." Although assuring the court it did not intend to "cast . . . aspersions" on counsel, Wal-Mart argued it

> should be entitled to inquire . . . [into] the nature of the settlement, how it arose, how it came to be, its timing, in order to establish a record sufficient for your Honor to make findings other than the representations of counsel in argument . . . .

Counsel for Dr. Deterding and CKA thereupon related to the court, without being placed under oath, the circumstances surrounding the settlement:

> As the court knows, . . . three weeks ago, [plaintiff] made a settlement demand of $50,000.00 to my clients. We had rejected that and made a counter offer of $25,000.00, and, as the trial progressed, with the incurring of additional defense costs, my client decided not to—not to keep the $25,000.00 there, and it went down, your Honor . . . .

Plaintiff's counsel concurred and added that he believed

> the case against [CKA] and the doctor is a weak one, in light of the testimony that has developed. There would have been considerable costs that could have been taxed to my client, even if we win against Wal-Mart, from Dr. Deterding and [CKA] . . . . So, I just felt that it was in the best interest of my client to [settle].

The trial court then stated:

> I can say from my sitting here listening to the evidence over the last two weeks that the—in my opinion, your [plaintiff's] case as against Dr. Deterding and [CKA] has been—has been going south all along, and I have no question in my mind that, knowing the three of you, and having been in the courtroom with you for two weeks, that there is good reason for this renegotiation and good reason for this settlement.
>
> I'm satisfied without anything further that it's in good faith, . . . but I'm used to having officers of the court tell me the truth, and I don't think I've been told anything other than the truth here this morning, and I'm just not willing to go through an exercise of having one or both of these lawyers put on the witness stand to be examined . . . when, from all I have seen and heard in the trial of this case, I'm satisfied that this is a good faith settlement . . . .

Although denying Wal-Mart's request to examine counsel for plaintiff and Dr. Deterding and CKA under oath, the court allowed Wal-Mart to continue its argument on the good faith issue. Wal-Mart emphasized that

> the timing of this matter [together with] the nature with which the plaintiff ha[d] conducted the presentation of his opening *voir dire* and evidence,

indicated the settlement was not made in good faith. Moreover, according to Wal-Mart, plaintiff had "no . . . good reason to settle" after winning the directed verdict motions, and that part of plaintiff's "long-term trial strategy" was

> to get rid of the doctor and [CKA] at some point during the trial in a way that leaves the jury with no doubt in its mind that his entire focus, his entire case, has not been the doctor, has not been [CKA], but [has been] Wal-Mart all along . . . . And trial strategy or not, your Honor, . . . that prejudices Wal-Mart . . . .

The trial court subsequently entered the 19 May 1998 order concluding the settlement was in good faith and dismissing Dr. Deterding and CKA as parties. Given the trial court's familiarity with the case, parties, and attorneys; the lack of evidence no more substantive than mere intimation of wrongdoing on the part of plaintiff and the settling defendants; and the burden of Wal-Mart to make a showing of lack of good faith, *see Wheeler*, 9 N.C. App. at 171, 175 S.E.2d at 772; we cannot say the trial court's 19 May 1998 order was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision," *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

In addition, we perceive no abuse of discretion in the procedure utilized by the trial court to reach its decision. *See Readel*, 706 N.E.2d at 104. In the words of the Illinois Court of Appeals, Wal-Mart's claim that opposing counsel should have been questioned under oath

> is not well taken. Forcing opposing counsel to testify as witnesses during trial is an extreme measure which would have been wholly unwarranted here. The [trial] court was thoroughly familiar with this litigation, and [opposing] counsel . . . described to the court, in detail and on the record, how, when, and under what terms the settlements were achieved.
>
> The court had no reason not to take these attorneys at their word.

Lewis v. Illinois Cent. R. Co., 600 N.E.2d 504, 512 (Ill. App. Ct. 1992), *appeal denied*, 610 N.E.2d 1265 (Ill. 1993).

We note that the North Carolina Rules of Professional Conduct (the Rules) mandate that "[a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal." N.C.R. Prof. Cond. 3.3(a)(1). The comment to this Rule explains that

> an assertion purporting to be on the lawyer's own knowledge, as in . . . a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

N.C.R. Prof. Cond. 3.3 cmt. Failure to comply with the Rules "is a basis for invoking the disciplinary process." N.C.R. Prof. Cond. 0.2.

In light of the factors noted in *Lewis* and counsel's ethical responsibilities set out in the Rules, we hold the trial court under the circumstances *sub judice* did not abuse its discretion in "tak[ing] the[]

attorneys [for Dr. Deterding and CKA and for plaintiff] at their word," *Lewis*, 600 N.E.2d at 512, and denying Wal-Mart's request to examine them under oath.

[4] Wal-Mart next contends it was error for the trial court to deny its directed verdict and JNOV motions because

> [a] plaintiff has no cause of action for negligence against a pharmacy when its pharmacist filled a prescription as directed by a physician.

Wal-Mart cites this Court's opinion in *Batiste v. Home Products Corp.*, 32 N.C. App. 1, 231 S.E.2d 269, *disc. review denied*, 292 N.C. 466, 233 S.E.2d 921 (1977), as support for its proposition. However, whether Wal-Mart's formulation correctly states our law or indeed is applicable to the instant case in which a critical factual issue was whether Stutts in actuality filled the prescription as written by Dr. Deterding, is beyond the scope of our review because Wal-Mart has failed to preserve this issue for appeal.

As grounds for its directed verdict motion at the close of plaintiff's evidence, Wal-Mart asserted "plaintiff ha[d] failed to carry the burden of proof [on his negligence claim] as to medical proximate cause," *i.e.*, as to whether the Prednisone overdose was the cause of the injuries plaintiff claimed at trial, and had not introduced sufficient evidence to support his punitive damages claim. At the close of all evidence, Wal-Mart renewed its motion for directed verdict "on all the grounds previously moved," but added that "no credible evidence" had been presented that the South Carolina standard of care had been violated in conjunction with refilling of plaintiff's prescription at the Greenville, South Carolina, Wal-Mart, nor was there any credible evidence that "Stutts did not call the prescribing physician's office to confirm the prescription." Wal-Mart's post-trial JNOV motion renewed its directed verdict motion "on the same grounds."

At no point prior to appeal, therefore, did Wal-Mart assert plaintiff's claim was barred because its pharmacists had filled the prescription as written by Dr. Deterding. Wal-Mart thus

> cannot assert this on appeal because it failed to raise this issue before the trial court on its motions for directed verdict and judgment notwithstanding the verdict.

Smith v. Carolina Coach Co., 120 N.C. App. 106, 114, 461 S.E.2d 362, 367 (1995); *see also Broyhill v. Coppage*, 79 N.C. App. 221, 225, 339

S.E.2d 32, 36 (1986) (motion for directed verdict must state grounds therefor, G.S. § 1A-1, Rule 50(a), "and grounds not asserted in the trial court may not be asserted on appeal"), and N.C.R. App. P. 10(b)(1) (to preserve question for appellate review, party must have presented to the trial court motion "stating the specific grounds for the ruling . . . desired"). We therefore decline to address Wal-Mart's second argument.

[5] Similarly, we do not consider the third contention advanced on appeal by Wal-Mart, maintaining the trial court

> erred in instructing the jury regarding loss of use of part of the body as a partial measure of damages, because the instruction was not supported by the law or by the evidence.

Preliminarily, we grant Wal-Mart's motion to amend the record to incorporate into its assignment of error related to this issue the record and page line references to the challenged portion of the jury charge. Given our disposition of the alleged error, moreover, we do not discuss plaintiff's contention that Wal-Mart has abandoned this assignment of error.

It is well established that

> [a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, *stating distinctly that to which he objects and the grounds of his objection* . . . .

N.C.R. App. P. 10(b)(2) (emphasis added). Although Wal-Mart objected at trial to the jury instruction at issue, the grounds asserted before the trial court were markedly different from those raised on appeal.

The following exchange occurred during the charge conference:

> [Wal-Mart's counsel]: [The court should not give an instruction on] loss of use of part of the body . . . . I think there's no permanent partial disability here of 80 percent of the back or [a] cut off finger.
>
> [Plaintiff's counsel]: [Plaintiff] lost part of the skull.
>
> [Wal-Mart's counsel]: That's a scar issue. I think you get the disfigurement or scar for the skull, and I think you get permanent injury on—

> [Plaintiff's counsel]: [Plaintiff] lost part of—lost his kidneys.
>
> [Wal-Mart's counsel]: I hope you're jesting. He did lose his kidneys, but that's a permanent injury. It's not part of loss of use of the body.

Although Wal-Mart acknowledged at oral argument that its objection at trial may not have been entirely "clear," it is apparent from the foregoing that Wal-Mart's stated basis for opposing the jury instruction at issue was that plaintiff's loss of kidney function should have been characterized as a permanent injury rather than loss of use of part of the body. By contrast, Wal-Mart argues in its appellate brief that evidence linking Wal-Mart's alleged negligence to plaintiff's kidney failure "did not rise above the level of mere possibility and conjecture," such that the instruction should not have been submitted to the jury.

Therefore,

> [a]lthough defendant objected to the instructions, [it] did not object on the ground upon which [it] now asserts error. . . . As the objections at trial in no way supported the defendant's assignment of error on appeal, we conclude that defendant did not preserve this error for appellate review pursuant to Rule 10(b)(2).

State v. Francis, 341 N.C. 156, 160, 459 S.E.2d 269, 271 (1995).

[6] Finally, Wal-Mart contends the trial court erred by allowing Greensboro, North Carolina, pharmacist Joseph Franklin Burton (Burton) to testify regarding the standard of care applicable to Adams, Wal-Mart's Greenville, South Carolina, pharmacist who refilled plaintiff's prescription. Again, this argument is not properly before us.

Wal-Mart asserts "Burton was not competent to testify" as to the applicable Greenville, South Carolina, standard of care and that his testimony "revealed a total dearth of knowledge of or familiarity with the practice of pharmacy in that community," such that his testimony should have been excluded.

> As a general rule, testimony of a qualified expert is required to establish the standard of care and breach thereof in medical malpractice cases,

Heatherly v. Industrial Health Council, 130 N.C. App. 616, 625, 504 S.E.2d 102, 108 (1998), as in the instant case. Further,

> [t]he competency of a witness to testify as an expert in the particular matter at issue is addressed primarily to the sound discretion of the trial court, and its determination is not ordinarily disturbed by the reviewing court.

Food Town Stores v. City of Salisbury, 300 N.C. 21, 37, 265 S.E.2d 123, 133 (1980).

N.C.G.S. § 90-21.12 (1999) provides in pertinent part:

> the defendant shall not be liable . . . unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

Pharmacists fall within the definition of "health care provider." N.C.G.S. § 90-21.11 (1999).

> In order for plaintiff's . . . witness[] to qualify as [an] expert[] with regard to the [pharmacy] standard of care applicable to [Adams], plaintiff was required under G.S. [§] 90-21.12 to lay a foundation showing the witness[] w[as] familiar with the standard of practice (1) among [pharmacists] with similar training and experience, (2) who were situated in the same or similar communities, (3) at the time plaintiff's [prescription was re-filled.]

Haney v. Alexander, 71 N.C. App. 731, 735, 323 S.E.2d 430, 433 (1984), *cert. denied*, 313 N.C. 329, 327 S.E.2d 889 (1985).

Burton testified on direct examination by plaintiff that he received his pharmacy degree from the University of North Carolina at Chapel Hill, was currently licensed to practice pharmacy in North Carolina, and had worked in the Greensboro, North Carolina, area as a pharmacist for the past 28 years. Wal-Mart interposed no objection to the tender by plaintiff of Burton as "an expert in the field of pharmacy."

In addition, Burton was questioned by counsel for Dr. Deterding and CKA as follows:

> Q: Sir, let me ask you if you are familiar with the standards of practice for pharmacists who had training and experience similar

> to that of Charles Adams who practiced pharmacy in Greenville, South Carolina, or similar communities, in September 1992?
>
> . . . .
>
> A: Yes, I believe I am.

Wal-Mart's objection to the question was overruled and Wal-Mart interjected no subsequent motion to strike the testimony. *See State v. Beam*, 45 N.C.App. 82, 84, 262 S.E.2d 350, 352 (1980) ("failure of counsel to move to strike . . . an answer, even though the answer *is* objected to, results in a waiver of the objection").

Burton then went on to express the opinion that Adams violated the applicable standard of care by refilling plaintiff's prescription in that

> once the prescription was in his hands, his responsibility is no different from any pharmacist seeing that prescription for the first time. His obligation, first and foremost, is, again, to the patient's welfare. He should know that that dose created a situation of potential harm to the patient, and . . . the ultimate responsibility . . . falls . . . to him . . . to not dispense . . . a dose as excessive as that.

Although the foregoing testimony was received over Wal-Mart's objection, Wal-Mart interposed no motion to strike the testimony, *see id.*, nor a request to *voir dire* Burton pursuant to N.C.G.S. § 8C-1, Rule 705 (1999) concerning "the underlying facts or data," *id.*, supporting his opinion.

Thereafter, Wal-Mart's counsel cross-examined Burton in pertinent part as follows:

> Q: And you also testified that you are familiar with the practice of pharmacy as to its standards in Green[ville], South Carolina. Did I understand you to say that?
>
> A: No. I think what I said was that the standards of care of a pharmacist, no matter where they are practicing, are, basically, the same, that they would not vary that much pertaining to certain areas of standard of practice.
>
> Q: So, . . . are you unfamiliar with the standard of care in Green[ville], South Carolina?

A: I don't think I'm unfamiliar with the standard of care in Green[ville], South Carolina, because I don't feel that that standard of care is any different from any other area that a pharmacist might practice in.

. . . .

Q. How do you know [the standard of care is] not different from what you do in Greensboro, North Carolina?

A. Well, I—when I'm referring to the standard of care in Green[ville], South Carolina, or Asheboro, North Carolina, or Greensboro, North Carolina, I'm regarding—I'm referring to what a pharmacist's responsibility to the patient is. . . .

. . . .

Q: You don't really know whether the standard of care in Green[ville], South Carolina, is similar to or different from Greensboro, North Carolina, do you?

A: Yes. I—again, my opinion is that the standard of care would not be different in Green[ville], South Carolina, or any other location that a pharmacist is practicing.

When asked by Wal-Mart the basis for his statement that the standard of care did not differ, Burton replied:

The basis is that pharmacists attend pharmacy school and are taught standards of care and standards of practice in relation to your responsibility to the patient, and those pharmacists then go out from pharmacy school and may work in any varied—a variety of practice settings, and it doesn't matter whether that's in one state or another . . . . Still, the basic criteria for your standard of care is what's in the patient's best interest.

Wal-Mart further cross-examined Burton about the filling of the prescription:

Q. . . . [Is] a pharmacist . . . left to his or her own judgment as to whether or not to fill a prescription after it's been confirmed by a prescriber's office . . . ?

. . . .

A. . . . The pharmacist at that point must exercise his or her own judgment as to whether that dosage, even if confirmed by the prescriber, would be harmful to the patient, and, if determining that

that dosage would be harmful to the patient, has an obligation not to fill the prescription.

Regarding the 320 mg dosage, Burton also testified during cross-examination that "it was so excessive as to not be a gray area," and that a pharmacist should have refused to fill a Prednisone prescription in that amount even if confirmed by the prescriber's office. Further, Burton reiterated, "there's no gray area when you get to 320 milligrams a day."

Burton also admitted he was not familiar with South Carolina statutes or administrative regulations governing the practice of pharmacy, that he had not attended any seminars discussing such statutes or regulations, and that he had not discussed the instant case with any South Carolina pharmacist.

By failing to move to strike Burton's standard of care testimony elicited by Dr. Deterding and CKA, and by eliciting on its cross-examination essentially the same testimony to which it had previously objected, Wal-Mart thereby waived the benefit of the earlier objection. *See Beam*, 45 N.C.App. at 84, 262 S.E.2d at 352 (failure to move to strike answer previously objected to results in waiver of objection), and *State v. Townsend*, 99 N.C. App. 534, 537, 393 S.E.2d 551, 553 (1990) ("settled law of this State, unchanged by the adoption of the North Carolina Rules of Evidence, is that '[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost' ") (citation omitted).

Accordingly, in light of Wal-Mart's failure to move to strike the standard of care testimony by Burton which it now challenges on appeal, *see Beam*, 45 N.C.App. at 84, 262 S.E.2d at 352, and its presentation on cross-examination of essentially the same testimony of Burton to which it had previously objected, *see Townsend*, 99 N.C. App. at 537, 393 S.E.2d at 553, and its further failure to object to the tender of Burton as an expert in pharmacy or to request a *voir dire* hearing pursuant to Rule 705 to explore the bases for his opinion, *see Hedden v. Hall*, 23 N.C. App. 453, 455, 209 S.E.2d 358, 360 (failure to request *voir dire* examination of witness offered as expert and failure to object specifically to qualification of witness as expert constituted waiver of objections), *cert. denied*, 286 N.C. 334, 211 S.E.2d 212 (1974), the present argument of Wal-Mart, *i.e.*, that G.S. § 90-21.12 does not encompass a nationwide standard of care for pharmacists and that Burton's testimony concerning the standard of care applica-

ble to Adams was erroneously based upon a nationwide standard, is not properly before us.

In any event, we note this Court last year rejected a similar argument in *Marley v. Graper*, 135 N.C. App. 423, 428, 521 S.E.2d 129, 134 (1999) (although " 'it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health providers,' if the standard of care for a given procedure is 'the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community' ") (citations omitted), *cert. denied*, 351 N.C. 358, — S.E.2d — (2000). Wal-Mart's final assignment of error is therefore unavailing.

No error.

Judges LEWIS and EDMUNDS concur.

STATE OF NORTH CAROLINA v. JAN C. GILBERT

No. COA99-677

(Filed 29 August 2000)

1. Constitutional Law— standing—constitutional challenge of statute as applied

Although N.C.G.S. § 15A-534.1 relating to bail and pretrial release in domestic violence situations does not apply to defendant's second-degree kidnapping charge, defendant has standing to raise a constitutional challenge as to this statute because the statute was applied to defendant.

2. Constitutional Law— state—domestic violence—kidnapping—bail and pretrial release—due process—double jeopardy

N.C.G.S. § 15A-534.1 which relates to bail and pretrial release in domestic violence situations is not facially violative of the North Carolina Constitution's protections relating to due process and double jeopardy because: (1) the North Carolina Supreme Court has previously found this statute did not violate the Fifth and Fourteenth Amendments to the United States Constitution, and the North Carolina Constitution's law of the land clause has

been held equivalent to the Fourteenth Amendment's Due Process Clause; and (2) the double jeopardy guarantees in the United States and North Carolina Constitutions are equivalent, and our Supreme Court has already held that this statute survives a facial constitutional challenge on double jeopardy grounds under the United States Constitution.

3. Constitutional Law— due process—bail and pretrial release—domestic violence—kidnapping—no delay in post-detention process

The magistrate did not unconstitutionally delay the post-detention process in a kidnapping case to which defendant was entitled under the due process clause of the Fifth Amendment and Article I, Section 19 of the North Carolina Constitution by its application in this case of N.C.G.S. § 15A-534.1 which relates to bail and pretrial release in domestic violence situations, because: (1) there is no evidence that an arbitrary limit was placed on the time defendant would be held in detention before seeing a judge; (2) defendant was taken into custody and the magistrate ordered that defendant be taken before a judge at the first opportunity; and (3) defendant was brought before a judge as soon as one was available.

4. Bail and Pretrial Release— domestic violence—kidnapping—conditions

The trial court's order requiring defendant to remain in custody until 2:00 p.m. for a kidnapping charge was not an unconstitutional application of N.C.G.S. § 15A-534.1, which relates to bail and pretrial release in domestic violence situations, because: (1) a judge conducting a hearing under N.C.G.S. § 15A-534.1 may retain defendant in custody for a reasonable period of time beyond the initial forty-eight hours authorized by the statute if the judge determines that release of defendant will pose a danger of injury to the alleged victim; and (2) the approximately five additional hours of detention ordered by the trial court were not unreasonable.

5. Constitutional Law— double jeopardy—bail and pretrial release—domestic violence—kidnapping

The trial court did not violate defendant's right to be free from double jeopardy when it applied N.C.G.S. § 15A-534.1 which relates to bail and pretrial release in domestic violence situations to defendant's kidnapping case, because: (1) defendant's deten-

tion was only to await hearing before the first available judge; and (2) the judge's order requiring defendant to remain in custody until 2:00 p.m. was merely a condition of defendant's release.

6. Kidnapping— motion to dismiss—no written findings of fact required

The trial court did not err by denying defendant's motion to dismiss a kidnapping charge even though the trial court did not make any written findings of fact concerning defendant's pretrial release, because while a judge is permitted to make certain determinations under N.C.G.S. § 15A-534.1, there is no requirement that there be any written record of those determinations.

7. Criminal Law— motion for a mistrial—kidnapping—verdict sheet—caption in name of a different defendant

The trial court did not commit plain error by denying defendant's motion for a mistrial in a kidnapping case after discovering that the jury had returned a verdict on a verdict sheet that was captioned in the name of a different defendant, because: (1) the verdict sheet lists the proper file number for the case; (2) the proper charges listed are consistent with the evidence presented at trial and with the trial court's instructions; (3) the transcript and exhibits are replete with reference to defendant by his proper name; and (4) after the verdict was returned, the jury was polled and each juror affirmed his or her vote that defendant was guilty.

8. Criminal Law— motion for a mistrial—kidnapping—juror's post-conviction doubts about accuracy of verdict

The trial court did not commit plain error by denying defendant's motion for a mistrial in a kidnapping case when a juror raised doubts about the accuracy of the verdict, because: (1) a juror's post-conviction doubts about a verdict are insufficient to impeach a defendant's verdict; (2) when the jury was polled upon the original return of the verdict, all jurors assented the guilty verdict against defendant; and (3) the trial court could have amended the verdict without reconvening the jury to make the verdict sheet conform to the intentions of the jury.

Appeal by defendant from judgment entered 3 March 1999 by Judge J. Richard Parker in Pitt County Superior Court. Heard in the Court of Appeals 18 April 2000.

Michael F. Easley, Attorney General, by Amy C. Kunstling, Assistant Attorney General, for the State.

Robert L. Shoffner, Jr., Public Defender, by James Kevin Antinore, Assistant Public Defender, for defendant-appellant.

EDMUNDS, Judge.

Defendant Jan C. Gilbert appeals from jury verdicts finding him guilty of second-degree kidnapping and assault on a female. We find defendant's conviction to be free from prejudicial error.

Defendant's challenges focus on the procedures followed in his case. On Saturday, 27 September 1997, defendant was arrested for assault on a female and assault by pointing a gun and was held pursuant to N.C. Gen. Stat. § 15A-534.1 (1995). On the morning of Monday, 29 September 1997, defendant appeared before a district court judge and was released on bond. Thereafter, on 30 October 1997, defendant was arrested for second-degree kidnapping, a charge predicated on the same incident that led to the earlier assault charges. Defendant was received at the detention facility at 9:14 p.m. on 30 October 1997 and was held pursuant to section 15A-534.1. A hearing was set for 9:00 a.m. the next morning. At that hearing, defendant appeared before a district court judge, who ordered that defendant be released on an unsecured bond, but only after 2:00 p.m. that afternoon.

Prior to trial, defendant moved to dismiss the charge of second-degree kidnapping, on the grounds that section 15A-534.1 does not apply to kidnapping charges and that his detention from 9:14 p.m. on 30 October 1997 to 2:00 p.m. on 31 October 1997 violated his due process and double jeopardy constitutional rights. The trial court denied defendant's motion, and the case proceeded to trial.

The State presented evidence that defendant had been involved in a five-year, extra-marital affair with the victim and had fathered the victim's two children. When the victim told defendant in February or March 1997 that she wanted to end their affair, he replied that she would not get out of the relationship alive, fired a gun at her, and told her the shot was a warning and that next time he would not miss. During the following six or seven months, the victim repeatedly told defendant that she wanted to end their relationship. Defendant always responded by telling the victim that she would not get out of the relationship alive and that "[h]e would fix [her] for the next man."

On 25 September 1997, defendant came to the victim's trailer at around 4:30 p.m., where he drank and watched television. A friend of the victim twice stopped by to ask the victim to come play cards with her. The victim declined, saying that she did not want to upset defendant. When the friend told defendant that she wanted the victim to come play cards, defendant responded that the victim was not leaving and that he would shoot the friend and her brother, Malcolm Tyson (Tyson), if defendant discovered that the victim had been seeing Tyson. After the friend departed, defendant started beating the victim. He pushed her onto a couch, sat on top of her, and hit her in her head and stomach. Defendant told the victim he would kill her if he found out that she was seeing anyone else, then pulled the victim onto another couch, pinned her arms behind her, and continued beating her. The victim testified that at some point during the assault, defendant put a gun to the back of her head. He showed her a bullet and said that it had a hollow point and would tear up her insides. The victim tried to leave the trailer but was restrained by defendant.

The victim finally was able to leave her trailer the next morning, after defendant departed. She testified that she suffered a bruised eye, a bruise under her nose, a scratch on her nose, and that some of her fingernails had been pulled off at the roots during the struggle. The victim went to her friend's home, where she told Tyson that defendant had beaten her. The victim's mother took her to the magistrate's office to swear out a warrant against defendant and then to the hospital emergency room.

Defendant testified that he went to the victim's trailer at around 9:30 p.m. on the evening in question. The victim was smoking marijuana and acting "out of it." Her friend came by the trailer twice. When the victim saw a photograph of defendant's wife in his wallet, she tried to grab the wallet to tear up the photograph. The victim bit defendant's forearm in an attempt to retrieve the photograph, then fell against the side of the couch, hurting her shoulder. According to defendant, the victim began crying, then "all of a sudden she just grabbed herself, took her hands and just hit herself right in the face." Defendant grabbed the victim's forearm until she calmed down. He denied ever pointing a gun at the victim.

Defendant's wife testified that defendant came home around 2:30 a.m. on 26 September 1997, showed her an injury on his arm, and told her that the victim had bitten him. She acknowledged that she had obtained a restraining order against defendant in October 1997, claiming that defendant threatened to kill her and tormented her one

night. She testified, however, that she lied when she sought the restraining order.

The jury found defendant guilty of second-degree kidnapping and assault on a female and not guilty of assault by pointing a gun. The trial court consolidated defendant's convictions and sentenced him to a term of imprisonment of twenty-nine to forty-four months. After the jury was excused, the trial court discovered that the wrong defendant's name was printed at the top of the verdict form. Defendant made a motion for a mistrial, which the trial court denied. The trial court ordered the jury to return the next day, at which time the jury foreman signed and dated a corrected jury verdict sheet. As the corrected verdict sheet was passed to the other jurors, one juror advised the court, "I find myself having reasonable doubt about the verdict we passed. Is it too late to say that since we're reviewing this now?" The trial court responded that it was too late to change the verdict. Defendant renewed his motion for a mistrial, which again was denied. The trial court readopted the sentence and appellate entries. Defendant appeals.

I.

Defendant first contends the trial court erred by denying his pretrial motion to dismiss the charge of second-degree kidnapping. He argues that, because he was illegally held without bond after his arrest, he was denied his constitutional due process rights and his protections against double jeopardy.

A trial court's authority to dismiss charges against a criminal defendant is governed by N.C. Gen. Stat. § 15A-954 (1999), which states in pertinent part:

> (a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> (1) The statute alleged to have been violated is unconstitutional on its face or as applied to the defendant.
>
> . . . .
>
> (4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

The Release Order that was filled out when defendant was arrested on 30 October 1997 and held overnight contains a handwritten notation citing "15A-534.1," which apparently was added by the magistrate who completed the form that evening. Section 15A-534.1 applies to a defendant "charged with assault on or communicating a threat to . . . a person with whom the defendant lives or has lived as if married," N.C. Gen. Stat. § 15A-534.1(a), and states that such "[a] defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made under this section by a judge," *id.* § 15A-534.1(b). Therefore, section 15A-534.1 applied to defendant's 27 September 1997 arrest for assault on the victim, but not to his 30 October 1997 arrest for kidnapping.

Defendant argued that "the magistrate's and district court judge's failure to set pretrial release conditions from 9:14 p.m. on October 30, 1997 to 2:00 p.m. on October 31, 1997 resulted in defendant's illegal incarceration." Consequently, defendant continued, the illegal incarceration resulting from defendant's second arrest arising out of the same incident "created an improper infringement upon defendant's liberty interests and constituted a sufficient violation of defendant's state and federal constitutional Due Process rights, his protections from Double Jeopardy, and his statutory rights under N.C.G.S. [§] 15[A]-954(a)(4) to dictate that the charge of Second Degree Kidnapping be dismissed." At the conclusion of the hearing, the trial court made the following findings of fact:

> [T]he defendant was arrested on a charge of second-degree kidnapping according to the release order which has been marked for identification as Defendant's Exhibit 3 at 9:14 p.m., on the 30th day of October 1997; that the defendant was taken before a magistrate, whose name I could not discern, and was held without bond pursuant to 15A-534.1; that the defendant was subsequently taken before District Court Judge James Martin on the morning of October 31st, 1997, at which time Judge Martin set conditions of release, including the condition that the defendant be released upon giving unsecured bond in the amount of $1,000 to be effective at 2 p.m. on the 31st day of October, 1997, and that the defendant was released at that time.
>
> . . . .
>
> And that the defendant was held without bond for a period of less than 24 hours prior to his release from jail.

Based upon these findings, the trial court concluded:

> [T]he magistrate who initially processed the defendant pursuant to G.S. 15A-534.1 mistakenly believed that second-degree kidnapping was one of the offenses covered by said statute and was of the opinion that he would not be in a position to set a bond without the defendant appearing before a judge as required by G.S. 15A-534.1; that the defendant subsequently appeared before a district court judge on the morning of October 31, 1997, and, according to Defendant's Exhibit 3 was released upon an unsecured bond at 2 p.m. on that same date; that the Court cannot discern why Judge Martin made the effective release of the defendant at 2 p.m. rather than some other time, but can only speculate that Judge Martin was also of the opinion that General Statute 15A-534.1 applied to the second-degree kidnapping; that although the defendant was held in custody from 9:14 p.m. on the 30th day of October 1997 until 2 p.m. on the 31st day of October 1997, upon the mistaken belief that General Statute 15A-534.1 applied to the second-degree kidnapping charges, the defendant has not shown that his constitutional rights have been violated resulting in irreparable prejudice as required by G.S. 15A-954(a)(4).

Accordingly, the trial court denied defendant's motion.

However, the trial court did not rule specifically on the constitutionality of section 15A-534.1; instead, it ruled only that "the defendant has not shown that his constitutional rights have been violated resulting in irreparable prejudice as required by G.S. 15A-954(a)(4)." Defendant argued double jeopardy during the hearing on his motion to dismiss, and after the trial court recited its findings of fact and conclusions of law, defense counsel requested additional findings regarding defendant's claim of double jeopardy. The trial court refused to make the additional findings and noted defendant's objection. Defendant now contends the trial court erred because it "failed to use the proper standard when it based its ruling solely on the 'irreparable prejudice' standard of 15A-954(a)(4)."

Defendant does not assign error to the trial court's conclusion based upon section 15A-954(a)(4), and thus we do not address that issue. Instead, we turn to whether the trial court's failure to address defendant's constitutional challenges (pursuant to section 15A-954(a)(1)) resulted in prejudicial error.

A.

[1] We first address defendant's standing to raise a constitutional challenge to section 15A-534.1. The State contends that "[b]ecause § 15A-534.1 does not apply to the kidnapping charge, this Court need not decide defendant's facial and 'as applied' due process and double jeopardy challenges to § 15A-534.1." However, the statute at issue was applied to defendant, whether improperly or not, and we therefore believe that defendant now has standing to challenge its constitutionality in that application. *See Messer v. Town of Chapel Hill*, 346 N.C. 259, 260, 485 S.E.2d 269, 270 (1997) (per curiam) (" 'Standing to challenge the constitutionality of a legislative enactment exists where the litigant has suffered, or is likely to suffer, a direct injury as a result of the law's enforcement.' "); *State v. Fredell*, 283 N.C. 242, 247, 195 S.E.2d 300, 304 (1973) ("Uniformly, the accused has been permitted to assert the invalidity of the law only upon a showing that his rights were adversely affected by the particular feature of the statute alleged to be in conflict with the Constitution.").

B.

[2] Defendant asks this Court to find that section 15A-534.1 is facially violative of the North Carolina Constitution's protections relating to due process and double jeopardy. Our Supreme Court recently addressed this issue with regard to the Fifth and Fourteenth Amendments to the United States Constitution and found the statute to be valid. *See State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998). Defendant's arguments relating to the North Carolina Constitution focus on the "due process" aspects of the case. However, because our Constitution's "law of the land" clause (N.C. Const. art. I, § 19) has been held equivalent to the Fourteenth Amendment's Due Process Clause, *see State v. Collins*, 169 N.C. 323, 84 S.E. 1049 (1915); *Buchanan v. Hight*, 133 N.C. App. 299, 515 S.E.2d 225, *disc. review denied*, 351 N.C. 351, 539 S.E.2d 280 (1999), we believe that our Supreme Court's holding in *Thompson* is controlling. Therefore, we hold that section 15A-534.1 does not violate the North Carolina Constitution on due process grounds.

Defendant also claims he was subjected to double jeopardy, in violation of our state constitution. A defendant in North Carolina is protected against double jeopardy through the "law of the land" provision of the state constitution. *See State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954). In a criminal jury case in North Carolina, "jeopardy attaches when a defendant in a criminal prosecution is placed on

trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case." *State v. Bell*, 205 N.C. 225, 228, 171 S.E. 50, 52 (1933) (citation omitted). Similarly, under federal law, jeopardy in a criminal jury trial attaches when the jury is empaneled and sworn. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 51 L. Ed. 2d 642 (1977); *Downum v. United States*, 372 U.S. 734, 10 L. Ed. 2d 100 (1963). Because the key factor for determining jeopardy—the empaneling and swearing of the jury—is the same in both systems, it does not appear to us that the state constitution grants any greater rights than those provided by the federal constitution. Accordingly, we hold that the double jeopardy guarantees in the United States and North Carolina constitutions are equivalent. Therefore, consistent with our Supreme Court's holding in *Thompson*, we hold that section 15A-534.1 "survives defendant's facial constitutional challenge on double-jeopardy grounds." *Thompson*, 349 N.C. at 496, 508 S.E.2d at 285.

C.

[3] Defendant also contends section 15A-534.1, as applied in this case, violated defendant's state and federal constitutional rights. Defendant argues that "the magistrate unconstitutionally delayed the post-detention process to which defendant was entitled under the Due Process Clause of the Fifth Amendment and Article I, Sec. 19 of our state's Constitution." As noted above, when defendant was brought before the magistrate at 9:14 p.m. on 30 October 1997, the magistrate ordered defendant held without bond until 9:00 a.m. the next day and noted "15A-534.1" on the Release Order. Defendant was brought before a judge the next morning, and conditions of release were established (permitting defendant's release at 2:00 p.m. upon payment of an unsecured bond).

Turning first to defendant's due process concerns as they relate to the delay in receiving a bond hearing, we have found only two cases that have discussed the "as applied" constitutionality of section 15A-534.1. In *Thompson*, 349 N.C. 483, 508 S.E.2d 277, the defendant was arrested at 3:45 p.m. on a Saturday. The magistrate's order of commitment did not authorize the defendant's release from jail for a bond hearing until 3:45 p.m. the following Monday, forty-eight hours later. In accordance with this order, the defendant was held until Monday afternoon, instead of being brought into court before a judge

at the start of court on Monday. The Supreme Court held that this delay of approximately six hours and forty-five minutes was "unnecessary, unreasonable, and thus constitutionally impermissible." *Thompson*, 349 N.C. at 500, 508 S.E.2d at 288. In so holding, the Court looked at the following factors:

> "[T]he importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken."

Id. at 499, 508 S.E.2d at 287 (quoting *FDIC v. Mallen*, 486 U.S. 230, 242, 100 L. Ed. 2d 265, 279 (1988)). Applying these factors to the facts before the Court, the *Thompson* Court stated:

> [I]t is beyond question that the private interest at stake, liberty, is a fundamental right. "Th[e] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." . . .
>
> Delay in post-deprivation judicial review under N.C.G.S. § 15A-534.1(b) may result in significant harm to a defendant's private interest in liberty prior to trial. . . .
>
> . . . The State has a legitimate interest in providing that a legally trained judge perform individualized determinations of bail and set conditions of release in domestic-violence cases. The State, however, also claims a corollary interest in detaining a domestic-violence arrestee while securing a judge to perform this function. . . . Here, once a judge became available to conduct a post-detention hearing on Monday morning, further delay in providing this hearing did not serve any underlying interest of the State. All such interests had been served in full. . . .
>
> . . . .
>
> Th[e] "cooling off" justification for detaining a domestic-violence arrestee beyond the time at which a judge is available to consider the conditions of that arrestee's pretrial release has no relationship to the State's interest in having a judge, rather than a magistrate, conduct domestic-violence, pretrial-release hearings under N.C.G.S. § 15A-534.1(b). . . .
>
> . . . .

> We now consider the final *FDIC* factor: "the likelihood that the interim decision [to detain defendant] may have been mistaken." A first magistrate determined that there was probable cause to arrest defendant on a domestic-violence charge based upon the allegations of one individual. A second magistrate ordered defendant detained based solely upon that probable-cause determination. When his case came to trial, defendant pled not guilty and asserted that he did not commit a crime of domestic violence. There is no record evidence establishing definitively whether detention was warranted.

Id. at 499-502, 508 S.E.2d at 287-88 (internal citations omitted) (second and last alterations in original). Accordingly, the Supreme Court reversed the decision of this Court and remanded for further remand for entry of an order of dismissal. *See id.* at 503, 508 S.E.2d at 289.

The second case, *State v. Malette*, 350 N.C. 52, 509 S.E.2d 776 (1999), distinguished *Thompson*. In *Malette*, the defendant was arrested on 3 December 1995 and was taken before a magistrate on that date. The magistrate ordered that the defendant be held pursuant to section 15A-534.1, and on 4 December 1995, the defendant was taken before a district court judge, who set a secured bond of $10,000. On 7 December 1995, the State and defense counsel agreed to a secured bond of $1,000 on the condition that the defendant have no contact with the victim. The defendant was then released. When his case was called for trial, the defendant moved to dismiss the charge on constitutional grounds. The trial court granted the defendant's motion, and the State appealed to superior court, which found the statute constitutional and remanded the case for trial. This Court affirmed. Our Supreme Court affirmed this Court's decision, stating the following:

> In the case *sub judice*, the record does not indicate that there was unreasonable delay in holding the post-detention hearing. On Sunday, 3 December 1995, defendant was arrested and taken before a magistrate who ordered that he be brought before a judge pursuant to N.C.G.S. § 15A-534.1(b) on the very next day, Monday, 4 December 1995. Defendant was in fact brought before District Court Judge Carolyn Johnson on Monday, 4 December 1995, and she set a secured bond of $10,000, which subsequently was reduced to $1,000. There is no evidence here that the magistrate arbitrarily set a forty-eight-hour limit as in *Thompson* or that the State did not move expeditiously in bringing defendant before a judge.

Id. at 55, 509 S.E.2d at 778. Accordingly, the statute was constitutional as applied to the defendant in *Malette*.

We believe that the case at bar is determined by *Malette*. As in *Malette*, and unlike *Thompson*, there is no evidence here that an arbitrary limit was placed on the time defendant would be held in detention before seeing a judge. Defendant was taken into custody on the evening of 30 October 1997, and the magistrate ordered that he be taken before a judge at the first opportunity. Accordingly, defendant was presented to a district court judge at the start of court the next day, 31 October 1997. At that point, the judge determined conditions of release; defendant was to be detained until 2:00 p.m. that afternoon, at which time defendant could be released upon a $1,000 unsecured bond. Because defendant was brought before a judge as soon as one was available, defendant was heard " 'at a meaningful time and in a meaningful manner.' " *Thompson*, 349 N.C. at 503, 508 S.E.2d at 289 (citation omitted). The delay in receiving a bond hearing did not violate defendant's due process rights. *See State v. Jenkins*, 137 N.C. App. 367, 527 S.E.2d 672, *disc. review denied*, 352 N.C. 153, — S.E.2d — (2000).

[4] We next address defendant's contention that the district court judge's order requiring defendant to remain in custody until 2:00 that afternoon was an unconstitutional application of section 15A-534.1. Assuming that the judge was applying section 15A-534.1(a) when he delayed defendant's release, our Supreme Court in *Thompson* stated that such a delay by a judge is permissible. "A judge conducting [a hearing pursuant to section 15A-534.1] 'may retain the defendant in custody for a reasonable period of time' beyond the initial forty-eight hours authorized by N.C.G.S. § 15A-534.1(b) if the judge determines that 'release of the defendant will pose a danger of injury to the alleged victim.' " *Thompson*, 349 N.C. at 501, 508 S.E.2d at 288 (quoting N.C. Gen. Stat. § 15A-534.1(a)). The approximately five additional hours of detention ordered by the trial court were not unreasonable.

D.

[5] Although no case has addressed whether section 15A-534.1 violates a defendant's right to be free from double-jeopardy on an "as applied" basis, the *Thompson* Court did state:

> [W]hen an individual arrested upon an allegation of domestic violence undergoes regulatory detention under N.C.G.S. § 15A-534.1(b) for a brief period of time while awaiting the first

> available judge to hold a pretrial release hearing under N.C.G.S. § 15A-534.1(a), no double-jeopardy concern arises.

349 N.C. at 496, 508 S.E.2d at 284-85. Accordingly, because the detention was only to await hearing before the "first available judge," defendant was not exposed to double jeopardy for the kidnapping charge. Similarly, we hold that the judge's order requiring defendant to remain in custody until 2:00 p.m. as a condition of defendant's release pursuant to section 15A-534.1(a) does not give rise to double jeopardy.

In light of our preceding analysis, any error by the trial court in not directly addressing the constitutionality of the statute was harmless. Defendant's constitutional assignments of error are overruled.

II.

[6] Alternatively, defendant contends that the trial court erred by denying his motion to dismiss based on the district court judge's failure to make findings of fact. Section 15A-534.1(a)(1) and (b) speak of different determinations that may be made by the court. However, the statute sets forth no requirement that the judge make findings of fact to support any of these determinations.

We considered an analogous situation in *State v. O'Neal*, 108 N.C. App. 661, 424 S.E.2d 680 (1993), where we analyzed N.C. Gen. Stat. § 15A-534 (1992) (procedure for determining conditions of pre-trial release). Section 15A-534 required the judicial official to consider:

> the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

In *O'Neal*, we stated:

> While it is clear from the statute that the judicial official imposing pretrial release must consider these factors, it is less certain what record he must make of his considerations. In *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), the record appears to have contained specific findings of fact by the trial court regard-

ing the conduct of the magistrate in setting bail. Based on these findings, our Supreme Court concluded that the statute had been violated to the detriment of the defendants. *Id.* at 545-47, 369 S.E.2d at 564-65. This Court, in *State v. Overton*, 60 N.C. App. 1, 298 S.E.2d 695 (1982), . . . noted that the judicial official determining the conditions of pretrial release was required to consider the factors in N.C. Gen. Stat. § 15A-534(c), but made no indication that a *written* record of that consideration existed, nor that the lack of such a writing would warrant the conclusion that the factors had not been properly considered. *Id.* at 32-33, 298 S.E.2d at 714 (based on the statutory factors, $1 million bail was not unreasonable for conspiracy to manufacture, to sell or deliver, or to possess heroin).

. . . .

The defendant in the present case correctly asserts that the record is devoid of any written findings regarding the imposition of the secured bond, and there is no indication that the trial judge considered the factors in N.C. Gen. Stat. § 15A-534(c) when he established the conditions of the defendant's pre-trial release. . . . [S]ection 15A-534(c) requires the judicial official to consider the factors listed but does not require him to keep a written record of such consideration. We are, therefore, not willing to conclude, as the defendant contends, that the absence of such findings in the record indicates noncompliance with the statute. . . . Neither the transcript from [the pretrial] hearing, nor anything else in the record, indicates that the judge *did not* consider the appropriate factors in either the initial establishment of the bond, in the later modification, or in subsequent refusals to modify. Absent some evidence to the contrary from the defendant, we must conclude that the law relating to pretrial release was properly applied to him.

108 N.C. App. at 664-65, 424 S.E.2d at 682.

A similar analysis applies to the case at bar. While the judge is permitted to make certain determinations under the statute, there is no requirement that there be any written record of those determinations. Following the language of *O'Neal*, "[a]bsent some evidence to the contrary from the defendant, we must conclude that the law relating to pretrial release was properly applied to him." *Id.* at 665, 424 S.E.2d at 682. Accordingly, this argument is without merit.

III.

[7] Defendant's next argument is that the trial court erred in denying his motion for a mistrial after discovering that the jury had returned a verdict on a verdict sheet that was captioned in the name of a different defendant. He concedes that "[he] has no case law to present the Court in support of this assignment," but nevertheless "contends that State and Federal Due Process protections and concepts of Fundamental Fairness dictate that a man should not be sentenced to prison by a judgment that is based upon a verdict sheet that does not even have the defendant's name on it."

We review denials of motions for mistrial under an abuse of discretion standard. *See State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 90 (1996). "An abuse of discretion occurs only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 308, 470 S.E.2d at 91 (citation omitted).

We begin by reviewing the action taken by the trial court. Upon discovering the error in the verdict sheet, the trial court stated the following:

> Let me put this in the record. It has come to my attention that . . . [t]he verdict sheet in the case of State of North Carolina versus Jan C. Gilbert was incorrectly prepared and shows the name of the defendant being Russell Edward Manning. The Court did not catch the error prior to submitting the verdict sheet to the jury; that the verdict sheet was prepared by the court reporter from her computer which obviously had the wrong defendant's name contained thereon. This is a typographical error as far as the Court is concerned, not detected by the clerk of court while she polled the jury and only after the sentence was invoked and the jury left the courtroom, did it come to the attention of the presiding judge of the name of the defendant on the verdict sheet.

When the trial court inquired of the parties, "[b]efore sending the verdict sheet to the jury to allow them to begin their deliberations, are there any requests, corrections or additions to the charge[?]," no objections were tendered; in fact, no one noticed the discrepancy until after the jury had been released. Absent such a timely objection to the error, *see Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 667, 391 S.E.2d 831, 833 (1990), our review is limited to plain error.

Although we agree with defendant that there is no case law on point with regard to this issue, we are not without guidance in our analysis. First, N.C. Gen. Stat. § 15A-1237(a), (b) (1999) establishes that a verdict must be (1) in writing, (2) signed by the foreman, (3) made a part of the record in the case, (4) unanimous, and (5) returned by the jury in open court. We interpreted this section in *State v. Sanderson*, 62 N.C. App. 520, 302 S.E.2d 899 (1983). In *Sanderson*, where the defendant challenged the sufficiency of the verdict, we stated:

> [S]ection [15A-1237] is intended to aid the trial court in avoiding the taking of verdicts which are flawed by the inadvertent omission of some essential element of the verdict itself when given orally. A verdict form is sufficient for this purpose if it provides the court a proper basis upon which to pass judgment and sentence the defendant appropriately.

Id. at 524, 302 S.E.2d at 902 (internal citations omitted). Accordingly, in determining whether there was error in the failure to include an essential element of a drug violation, we stated:

> When the indictments, the court's charge, and the verdict form are considered together, we believe (1) that it can be inferred that the jury found the [omitted] element . . . and (2) that the form itself, although improperly omitting that element, sufficiently identified the offenses found by the jury to enable the court to pass judgment on the verdict and sentence defendant appropriately.

Id.

Second, in *State v. McCoy*, 105 N.C. App. 686, 414 S.E.2d 392 (1992), this Court found no prejudicial error when the jury sheet called upon the jury to determine whether the defendant was guilty of trafficking in 28 to 400 grams of cocaine, when the defendant was actually charged with trafficking a 28- to 200-gram quantity. We held that because "the record shows this discrepancy was merely a clerical error," the error "had no resulting prejudice since the evidence before the jury clearly indicated defendant possessed and transported 38 grams of cocaine." *Id.* at 691, 414 S.E.2d at 395.

Finally, a brief survey of other jurisdictions shows that unless the error is fundamental, *see Pittman v. State*, 621 So. 2d 351 (Ala. Crim. App. 1992) (holding that verdict form submitting a crime of "intent to commit murder" as opposed to "attempted murder" was insufficient

to bestow upon the trial court jurisdiction to pronounce judgment); *Com. v. DeHart*, 650 A.2d 38 (Pa. 1994) (holding that language requiring the jury to weigh "one aggravating circumstance" against "any mitigating circumstance" instead of "mitigating circumstances" may have led to an "improper weighing process" and thus remanding for new sentencing), errors will not be considered prejudicial, *see Lyons v. State*, 690 So. 2d 695 (Fla. Dist. Ct. App. 1997) (finding no prejudicial error in verdict form that listed "Conspiracy to Commit Robbery" instead of "conspiracy to commit armed robbery or robbery with a dangerous weapon" because error was merely "a typographical oversight" and jury was properly instructed); *Broadus v. State*, 487 N.E.2d 1298 (Ind. 1986) (holding that error in indicating burglary instead of robbery on verdict sheet was harmless where jury was well-acquainted with crime charged, instructions repeatedly referred to robbery, and jury polled after verdict); *Lindsey Masonry Co. v. Jenkins & Assoc.*, 897 S.W.2d 6 (Mo. Ct. App. 1995) (finding no error when typographical error on one of three verdict sheets inverted the parties to read, "On the claim of defendant Jenkins and Associates[,] Inc. against plaintiff Lindsey Masonry Company, Inc.," instead of "On the claim of [p]laintiff Lindsey Masonry[,] Inc. against defendant Jenkins & Associates, Inc.").

In the case at bar, the verdict sheet lists the proper file number for the case, and the proper charges listed are consistent with the evidence presented at trial and with the court's instructions. The transcript and exhibits are replete with references to defendant by name, Jan C. Gilbert. After the verdict was returned, the jury was polled, and each juror affirmed his or her vote that defendant was guilty. We do not perceive that the error in the verdict form resulted in any prejudice to defendant. This assignment of error is overruled.

IV.

[8] Finally, defendant contends the trial court erred in denying defendant's motion for a mistrial when a juror raised doubts about the accuracy of the verdict. After the jury returned its verdict and defendant was sentenced, the trial court realized the error in the verdict sheet. To rectify the discrepancy, the trial court reconvened the jury the next morning and explained the error on the verdict sheet. The trial court then directed the foreman, "if [he] deem[ed] appropriate," to conform the amended verdict sheet to the original verdict sheet. The court had the amended verdict sheet passed to the other jurors. We commend the trial judge for his diligence in

addressing the error in the verdict form. Nevertheless, as if to prove Murphy's Law, one juror stated while the corrected form was being circulated: "I find myself having reasonable doubt about the verdict we passed. Is it too late to say that since we're reviewing this now?" The trial court said, "Yes, ma'am," then noted the juror's concerns for the record. Defendant renewed his motion for a mistrial, which again was denied.

It has long been the law of this state that a juror's post-conviction doubts about a verdict are insufficient to impeach a defendant's verdict. *See, e.g., State v. Black*, 328 N.C. 191, 400 S.E.2d 398 (1991). When the jury was polled upon the original return of the verdict, all jurors assented the guilty verdict against defendant.

> The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered. If the jury is unanimous at the time the verdict is returned, the fact that some of them change their minds at any time thereafter is of no consequence; the verdict rendered remains valid and must be upheld.

Id. at 198, 400 S.E.2d at 402 (internal citations omitted). The trial court could have amended the verdict without reconvening the jury to make the verdict sheet conform to the intentions of the jury. *See Cox v. R.R.*, 149 N.C. 86, 88, 62 S.E. 761, 762 (1908) (" 'From the earliest period the courts have freely exercised the power of amending verdicts so as to correct manifest errors, both of form and of substance, to make them conform to the intention of the jury.' "). The trial court's scrupulousness in having the corrected verdict form signed by the foreperson of the recalled jury and in allowing the jurors to view the corrected form did not change the general rule (subject to statutory exceptions) that a juror may not impeach his or her own verdict. *See* N.C. Gen. Stat. § 15A-1240 (1999); *State v. Carter*, 55 N.C. App. 192, 284 S.E.2d 733 (1981). This assignment of error is overruled.

No error.

Judges GREENE and McGEE concur.

SUSAN F. JOHNSON, PLAINTIFF v. THE TRUSTEES OF DURHAM TECHNICAL COMMUNITY COLLEGE, DEFENDANT

No. COA99-676

(Filed 29 August 2000)

1. Employer and Employee— retaliatory discharge—failure to renew employment contract

The failure to renew an employment contract qualifies as a retaliatory action in violation of the Retaliatory Employment Discrimination Act under N.C.G.S. § 95-240(2) because it constitutes an adverse employment action.

2. Employer and Employee— retaliatory discharge—employee filed workers' compensation claim

The trial court did not err by granting summary judgment in favor of defendant employer as to plaintiff employee's claims that she was discharged by her employer in retaliation for filing a workers' compensation claim, because: (1) the evidence does not suggest that defendant failed to renew plaintiff's contract in order to forestall the filing of another workers' compensation claim since plaintiff's second injury was not work-related; and (2) defendant entered into three additional contracts with plaintiff after she filed a workers' compensation claim, and defendant's refusal to renew plaintiff's contract was not close in time to her workers' compensation claim.

3. Disabilities— qualified individual—teacher at a jail—wheelchair—banned from jail—anonymous allegations of illegal misconduct

The trial court erred by directing verdict on claims under the Americans with Disabilities Act against plaintiff employee who sat in a wheelchair and taught literary skills to inmates at a jail because viewing the evidence in the light most favorable to plaintiff reveals that plaintiff was a qualified individual under 42 U.S.C. § 12111(9) to teach at the jail, even though plaintiff was banned from the jail after the program director confirmed anonymous allegations of plaintiff's illegal conduct, since: (1) defendant decided not to renew plaintiff's contract before the anonymous phone calls of plaintiff's misconduct were received and before plaintiff was banned from the jail; and (2) an employer may not rely on evidence of employee misconduct which is acquired after

the employment decision in question to defend the employment decision.

4. Disabilities— qualified individual—teacher at a jail—wheelchair—poor attendance

The trial court erred by directing verdict on claims under the Americans with Disabilities Act against plaintiff employee who sat in a wheelchair and taught literary skills to inmates at a jail because viewing the evidence in the light most favorable to plaintiff reveals that plaintiff was a qualified individual under 42 U.S.C. § 12111(9) to teach at the jail, even though defendant alleges that plaintiff had poor attendance at her job, since: (1) plaintiff was able to teach three out of five employment periods without incident, and one employment period in which she missed only two weeks out of twelve weeks of classes; (2) it was only during one employment period that plaintiff missed a significant number of classes; (3) plaintiff's absences were due solely to complications related to her disability and did not establish a clear pattern of absenteeism; (4) following her significant period of absence during the third employment period, defendant did not express that the extended absence was disruptive or excessive and even offered her two additional periods of employment; and (5) plaintiff's employment relationship with defendant did not end solely because of excessive absenteeism.

5. Disabilities— teacher at a jail—wheelchair—no presumption of non-discrimination for employer

Defendant employer was not entitled to a directed verdict on plaintiff employee's claims under the Americans with Disabilities Act based on the presumption of non-discrimination that arises when the same person who hired plaintiff also fired her.

Appeal by plaintiff from judgment entered 23 December 1997 by Judge Henry V. Barnette and judgment entered 18 December 1998 by Judge Narley L. Cashwell in Superior Court, Durham County. Heard in the Court of Appeals 14 March 2000.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher and Caitlyn Fulghum, for plaintiff-appellant.

Haywood, Denny & Miller, L.L.P., by George W. Miller, Jr. and George W. Miller, III, for defendant-appellee.

Patterson, Harkavy & Lawrence, L.L.P., by Burton Craige, for the North Carolina Academy of Trial Lawyers and the American Civil Liberties Union of North Carolina Legal Foundation, amici curiae.

TIMMONS-GOODSON, Judge.

The present case arises out of Susan F. Johnson's ("plaintiff") charges of discrimination filed against Durham Technical Community College ("defendant" or "Durham Tech") under the Retaliatory Employment Discrimination Act and the Americans with Disabilities Act. Plaintiff appeals adverse rulings that resulted in a denial of her claims.

Plaintiff taught literacy skills to inmates at the Durham County Jail Annex. She obtained the job by signing a contract with Durham Tech as a part-time instructor of a basic skills course. Pursuant to the contract, plaintiff taught from November of 1993 until mid-February of 1994. Over a two-year period, plaintiff and defendant entered into seven more contracts, for employment periods which lasted for a term of one to three months, depending on the length of the literacy course.

Plaintiff is unable to walk without crutches as a result of having contracted polio as a child. Prior to moving to North Carolina, she taught Latin in Troop County, Georgia. In 1986, plaintiff applied for and received permanent partial disability from her post as a teacher in Georgia and permanent total disability from the Federal Government.

In order to teach her class at the jail annex, plaintiff drove to the jail in her own car, entered on crutches, transferred into a wheelchair she kept at the jail, and taught class from the wheelchair. On 8 June 1994, plaintiff fell from her crutches while opening a security door at the jail, breaking a vertebra in her spine. She filed for workers' compensation benefits on 10 June 1994 and received payment for medical bills and temporary total disability. On 2 January 1995, plaintiff returned to the jail to teach under her fourth employment contract period. Following her fall, plaintiff used her wheelchair exclusively because walking was more difficult. From her home, plaintiff was lifted in her wheelchair onto a public transport van which drove her to the jail. She then rolled into the jail annex and taught her class from her wheelchair.

In February of 1995, plaintiff fell in a bathtub at home and broke her leg. She returned to the jail approximately two weeks later and continued to teach from her wheelchair with her leg in a cast.

Administrators at Durham Tech grew increasingly concerned about the possibility plaintiff would suffer another accident at the jail, exposing Durham Tech to liability. Additionally, the administrators were concerned about plaintiff's absences as a result of her injuries and her requirements of accommodations such as having guards at the jail assist her to open and close doors.

On 16 June 1995, plaintiff met with Russ Conley ("Conley"), the Director of the Adult and Basic Skills program at Durham Tech. Conley proposed that plaintiff teach on campus rather than at the jail at the expiration of her contract. Conley stated that having plaintiff teach at the jail "could prove to be a liability for Durham Tech." Conley discussed the possibility of plaintiff teaching students with disabilities and mental illnesses. Plaintiff refused the transfer, stating that she had no special education training. Conley informed plaintiff on 16 June 1995 that she would not be returning to the jail and that he had already hired someone to replace her.

On 21 June and 24 June 1995, the Dean of Adult and Continuing Education at Durham Tech, Art Clark, received anonymous phone calls alleging that plaintiff used drugs, gave drugs to inmates, carried a loaded weapon, supplied inmates with bullets, and had sex with inmates. Larry Haverland ("Haverland"), Deputy Director for Inmate Programs, testified that he corroborated some of the anonymous charges against plaintiff on 23 June 1995. Haverland did not know who had conducted the informal investigation of the anonymous charges or whether that individual was reliable. The corroborated charges were that plaintiff had taken contraband into the jail in the form of "possibly lighters or matches or something" and that plaintiff had visited an inmate at another prison. Haverland testified that a teacher does not violate jail rules by visiting an inmate at another prison. Plaintiff was not asked to answer the charges of the anonymous caller until after she filed charges of discrimination against Durham Tech in the fall of 1995.

On 26 June 1995, Conley approached plaintiff at the jail annex and informed her that her position would end on 28 June 1995 when her contract expired. Plaintiff was not offered another teaching contract with Durham Tech.

During the week before trial, Durham Tech identified the anonymous caller as Cynthia Wilson ("Wilson"), a nursing aide who had worked in plaintiff's home. At trial, plaintiff denied Wilson's charges. Two nursing aides who assisted plaintiff at the same time as Wilson testified that they had never seen any signs of drug use or improper conduct by plaintiff.

Plaintiff initiated charges of discrimination with the North Carolina Department of Labor under the Retaliatory Employment Discrimination Act and with the Equal Employment Opportunity Commission under the Americans with Disabilities Act. After exhausting her administrative remedies, plaintiff filed a complaint alleging that defendant had removed her from its employment in violation of state and federal law.

On 23 December 1997, Judge Henry V. Barnette of the Superior Court, Durham County partially allowed defendant's Motion for Summary Judgment, dismissing plaintiff's claims brought pursuant to the North Carolina Retaliatory Employment Discrimination Act, but denying summary judgment as to plaintiff's cause of action brought pursuant to the Americans with Disabilities Act. Specifically, Judge Barnette denied plaintiff's Motion for Summary Judgment as to whether plaintiff was a "qualified individual with a disability" for purposes of the Americans with Disabilities Act.

On 18 December 1998, Judge Narley L. Cashwell of the Superior Court, Durham County granted defendant's Motion for Directed Verdict as to plaintiff's claim under the Americans with Disabilities Act. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred in: (I) granting defendant's Motion for Summary Judgment as to plaintiff's claims under the Retaliatory Employment Discrimination Act; and (II) directing a verdict against plaintiff as to her claims under the Americans with Disabilities Act.

I. RETALIATORY DISCRIMINATION ACT CLAIM

By her first assignment of error, plaintiff argues that the trial court erred in granting defendant's Motion for Summary Judgment as to plaintiff's claims under the Retaliatory Employment Discrimination Act. We cannot agree.

Summary judgment is proper where there is no genuine issue as to any material fact. *Alltop v. Penney Co.*, 10 N.C. App. 692, 179 S.E.2d

885 (1971). An issue is genuine where it is supported by substantial evidence. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). A genuine issue of material fact is of such a nature as to affect the outcome of the action. *Smith v. Smith*, 65 N.C. App. 139, 308 S.E.2d 504 (1983). The moving party bears the burden of establishing the lack of a triable issue of fact. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970). The motion must be denied where the non-moving party shows an actual dispute as to one or more material issues. *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972). As a general principle, summary judgment is a drastic remedy which must be used cautiously so that no party is deprived of trial on a disputed factual issue. *Billings v. Harris* Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976).

The North Carolina Retaliatory Employment Discrimination Act ("REDA"), enacted in 1992, prohibits discrimination against an employee who has filed a workers' compensation claim. N.C. Gen. Stat. § 95-240, *et. seq.* (1999). In pertinent part, the Act provides:

> (a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:
>
> (1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:
>
> a. Chapter 97 of the General Statutes.

N.C. Gen. Stat. § 95-241 (1999).

REDA replaced North Carolina General Statutes section 97-6.1, the purpose of which was to promote an open environment in which employees could pursue remedies under the Workers' Compensation Act without fear of retaliation from their employers. *Abels v. Renfro Corp.*, 108 N.C. App. 135, 423 S.E.2d 479 (1992), *aff'd in part, rev'd in part*, 335 N.C. 209, 436 S.E.2d 822 (1993). The former law merely protected employees against discharge and demotion. N.C. Gen. Stat. § 97-6.1(a) (repealed 1992). By enacting REDA, however, the General Assembly expanded the definition of retaliation to include "the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment." N.C. Gen. Stat. § 95-240(2) (1999).

In a claim brought pursuant to the former provision, section 97-6.1(a), this Court stated that an employee bears the burden of proof in retaliatory discharge actions. *Morgan v. Musselwhite*, 101 N.C. App. 390, 399 S.E.2d 151 (1991). "The statute does not prohibit all discharges of employees who are involved in a workers' compensation claim, it only prohibits those discharges made *because* the employee exercises his compensation rights." *Id.* at 393, 399 S.E.2d at 153 (citation omitted). Furthermore, our appellate courts indicated in applying the former provision that a plaintiff fails to make out a case of retaliatory action where there is no close temporal connection between the filing of the claim and the alleged retaliatory act. *See Shaffner v. Westinghouse Electric Corp.*, 101 N.C. App. 213, 398 S.E.2d 657 (1990); *Morgan*, 101 N.C. App. 390, 399 S.E.2d 151.

[1] As a preliminary matter, we must address the issue of whether the failure to renew an employment contract may qualify as a retaliatory action in violation of REDA. As stated above, in enacting REDA, the General Assembly broadly defined retaliatory action as "the discharge, suspension, demotion, retaliatory relocation of an employee, or *other adverse employment action* . . . ." N.C.G.S. § 95-240(2) (emphasis added). As the failure to renew an employee's contract produces the adverse result of terminating her employment, the plain language of the statute suggests that non-renewal of an employment contract falls within the scope of REDA. Furthermore, while our appellate courts have not spoken on this issue, we find persuasive authority from other jurisdictions holding that the failure to renew an employment contract may constitute actionable conduct. *See, e.g., Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471 (1977); *Perry v. Sinderman*, 408 U.S. 593, 33 L. Ed. 2d 570 (1972); *Kramer v. Logan County School District No. R-1*, 157 F.3d 620 (8th Cir. 1998); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, *reh'g denied*, 660 F.2d 497 (5th Cir. 1981); *Daly v. Exxon Corp.*, 63 Cal. Rptr. 2d 727 (Cal. Ct. App. 1997). We therefore hold that the failure to renew an employment contract constitutes an adverse employment action for purposes of REDA.

[2] We now address plaintiff's argument that a genuine issue of material fact existed as to whether defendant took retaliatory action against her because she filed a workers' compensation claim or threatened to do so. *See* N.C.G.S. § 95-241. In the present case, plaintiff filed a workers' compensation claim on 10 June 1994 after she broke a vertebra in her spine while opening a security door at

the jail annex. Defendant entered into three new contracts with plaintiff after she filed the claim. Plaintiff's final contract with Durham Tech expired on 28 June 1995, over a year after she filed for compensation.

Plaintiff argues that she was terminated after a second injury similar to the employee in *Abels*, 335 N.C. 209, 436 S.E.2d 822, and that a discharge following a second injury is sufficient to show that an employee was discharged to prevent the filing of a workers' compensation claim. However, plaintiff's second injury occurred in the home when she fell in a bathtub on 11 February 1995 and broke her leg. Durham Tech would not have anticipated a workers' compensation claim based on plaintiff's second injury as it was not work related. In contrast to *Abel*, the circumstantial evidence in the case *sub judice* does not suggest that defendant failed to renew plaintiff's contract in order to forestall the filing of a workers' compensation claim. Defendant entered into three new contracts with plaintiff after she filed a workers' compensation claim, and defendant's refusal to renew plaintiff's contract was not closely temporally related to her workers' compensation claim in that it took place over a year after she filed for compensation. *See Shaffner*, 101 N.C. App. 213, 398 S.E.2d 657.

We conclude that there was no genuine issue of material fact as to whether defendant took retaliatory action against plaintiff because she filed a workers' compensation claim or threatened to file one. As such, we hold that the trial court did not err in granting defendant's Motion for Summary Judgment on plaintiff's claims under the REDA.

II. AMERICANS WITH DISABILITIES ACT CLAIM

[3] By her second assignment of error, plaintiff argues that the trial court erred in directing a verdict against her on her claims under the Americans with Disabilities Act. We agree.

In deciding whether to direct a verdict at the close of all of the evidence, "the trial court must determine whether the evidence, when considered in the light most favorable to the nonmovant, is sufficient to take the case to the jury." *Southern Bell Telephone and Telegraph Co. v. West*, 100 N.C. App. 668, 670, 397 S.E.2d 765, 766 (1990), (citations omitted), *aff'd*, 328 N.C. 566, 402 S.E.2d 409 (1991) (citations omitted). If there is more than a scintilla to support a plaintiff's case, the motion must be denied. *Edwards v. West*, 128 N.C. App. 570, 495 S.E.2d 920, *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998). "Where the question of granting a directed verdict is a close one, the better

practice is for the trial judge to reserve his decision on the motion and submit the case to the jury." *Id.* at 573, 495 S.E.2d at 923 (citation omitted).

The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* (1994), provides in pertinent part:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (1994). To prevail on an ADA claim, the plaintiff must prove that: (1) she has a disability as defined by the ADA; (2) she is qualified for the job; and (3) she was unlawfully discriminated against by an employer because of her disability. *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997).

Under the ADA, the term "disability" is defined as "a physical . . . impairment that substantially limits one or more of the major life activities of such individual[.]" 42 U.S.C. § 12102(2)(A) (1994). In the present case, plaintiff contracted polio at the age of four, and her limited movement and mobility required the use of a wheelchair and crutches since the onset of the disease. At trial, plaintiff's physician testified that plaintiff's major life activity of walking was substantially limited by her condition. Based upon these and other pertinent facts relating to plaintiff's limitations, we conclude that plaintiff presented sufficient evidence indicating that she was disabled for purposes of the ADA.

Only a "qualified individual with a disability" may prevail on a discrimination claim under the ADA. "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (1994). "Essential functions" of the job are the fundamental job duties of the person with the disability "that bear more than a marginal relationship to the job at issue." *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993) (citation omitted).

The term "reasonable accommodation" may include—

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

In the present case, defendant argues that plaintiff was not a qualified individual in that Haverland, inmate programs director, banned plaintiff from entering the jail after he confirmed anonymous allegations of plaintiff's illegal conduct. According to defendant, plaintiff was therefore unable to perform the essential function of her job of teaching at the jail. We cannot agree.

Durham Tech received the anonymous calls on 21 June and 24 June 1995. Haverland confirmed the allegations of the first call to his satisfaction on 23 June 1995. However, Conley informed plaintiff on 16 June 1995 that she would not be returning to the jail and that he had already replaced her. As such, construing the evidence in the light most favorable to the plaintiff, reasonable fact-finders could conclude that defendant had decided not to renew plaintiff's contract before the anonymous phone calls were received and before plaintiff was banned from the jail. *See Chardon v. Fernandez*, 454 U.S. 6, 70 L. Ed. 2d 6 (1981) (holding that discriminatory act occurs on the date an employee is notified of an impending discharge rather than on the date employment ends). An employer may not rely on evidence of employee misconduct which is acquired after the employment decision in question to defend the employment decision. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 130 L. Ed. 2d 852 (1995). As a reasonable juror could conclude that the anonymous phone calls were after-acquired evidence, defendant's argument that plaintiff was not a qualified individual because she was banned from the jail must fail.

[4] Defendant further argues that plaintiff was not a "qualified individual" because her "poor attendance made her nonqualified to teach in the jail." Before addressing defendant's specific issue, we note that by all accounts, plaintiff was an excellent teacher who was able to carry out the instructional functions of her job using her wheelchair. Certainly, plaintiff's qualifications as an instructor are not at issue here. However, this does not end our inquiry.

"In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis." *Tyndall v. National Educ. Centers*, 31 F.3d 209, 213 (4th Cir. 1994); *see also Waggoner v. Olin Corp.*, 169 F.3d 481 (7th Cir. 1999) (holding that regular attendance was an essential function); *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994) (holding same in relation to federal Rehabilitation Act); *Jackson v. Veterans Admin.*, 22 F.3d 277, *reh'g and suggestion for reh'g en banc denied*, 30 F.3d 1500 (11th Cir. 1994) (same). Accordingly, "a regular and reliable level of attendance is a necessary element of most jobs." *Tyndall*, 31 F.3d at 213 (citations omitted).

> [I]t is not the absence itself but rather the excessive frequency of an employee's absences in relation to that employee's job responsibility that may lead to a finding that an employee is unable to perform the duties of [her] job. Consideration of the degree of excessiveness is a factual issue well suited to a jury determination.

Haschmann v. Time Warner Entertainment Co., L.P., 151 F.3d 591, 602 (7th Cir. 1998).

Plaintiff entered several contracts with Durham Tech for five periods of employment beginning in November 1993. Plaintiff taught through the first two periods, ending May 1994, without incident. For the third period, plaintiff's contract specified that she was to teach for thirteen weeks, beginning 30 May 1994 and ending 26 August 1994. However, on 8 June 1994, only a week after beginning the third contract period, plaintiff fell at the jail and, as a result, was unable to complete the third employment period.

For the fourth employment period, plaintiff was to teach twelve weeks, beginning 8 January 1995 and ending 22 March 1995. However, following her fall at home in February, plaintiff missed approximately two weeks of the twelve-week period. Plaintiff, with the assistance of a wheelchair, taught the entire fifth employment period without incident.

Dean Clark testified that good and dependable attendance was an important function for instructors affiliated with Durham Tech, especially in incarcerated, "off site" situations. Clark explained, "[T]o get substitute teachers who are pre-qualified, for example, who have been cleared, oriented, etcetera, who are suitable for teaching in an incarcerated environment, is a problematic matter." Clark further tes-

tified that plaintiff's attendance record was a concern in the decision to offer her a transfer.

To support its argument that plaintiff's attendance record did not support a finding that plaintiff was qualified, defendant cites *Tyndall*, 31 F.3d 209. However, the facts of *Tyndall* are distinguishable from the facts *sub judice*. In *Tyndall*, the Fourth Circuit found an ADA claimant was not qualified for her position as a business school instructor based upon her attendance record. The employee missed a total of forty days of a seven-month work period. With the exception of ten days, the employee's absences were unrelated to her disability.

Prior to returning to work as scheduled following almost a month of leave, the plaintiff employee requested yet another extended absence. The plaintiff's employer in *Tyndall* informed the employee that she could return to work as scheduled without penalty. However, the employer would not agree to yet another extended absence. The employer explained that if the employee was unable to return to work as scheduled, she would miss the beginning of an instructional cycle for a third time. The employer further explained that students and other teachers had complained about the employee's absence and that any further period of absence would disrupt the school's operation.

In the instant case, plaintiff was able to teach three out of five employment periods without incident and one employment period in which she missed only two weeks out of twelve weeks of classes. It was only during one employment period that plaintiff missed a significant number of classes. Unlike the employee in *Tyndall*, plaintiff's absences were due solely to complications related to her disability and did not establish a clear pattern of absenteeism. Furthermore, following her significant period of absence during the third employment period, defendant did not express that the extended absence was disruptive or excessive and even offered her two additional periods of employment. Finally, unlike in *Tyndall*, plaintiff's employment relationship with defendant did not end solely because of excessive absenteeism.

Federal circuit courts that have found employees unqualified because of their attendance records generally do so based on more egregious absenteeism than existed in the instant case. *See, e.g.*, *Waggoner*, 169 F.3d 481 (finding disabled employee unqualified where she was on medical leave for five and a half months and further

missed work or was late forty times during a twenty-month period of employment); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191 (4th Cir. 1997) (finding employee unqualified under ADA where he missed forty-six days of a six-month employment period and further expressed he was unable to work for an additional five months at the time of his termination); *Carr*, 23 F.3d 525 (finding employee unqualified under similar federal Rehabilitation Act provision where employee missed months at a time over a period of several years, did not explain some of the absences, and did not improve her attendance record even after employer's reasonable accommodations). *But cf. Jackson*, 22 F.3d 277 (finding temporary employee unqualified under Rehabilitation Act where employee missed six days out of a two and one-half month employment period).

While we recognize that determining whether plaintiff was a "qualified individual" is a close question, there are arguments which support a finding that plaintiff's absences were excessive in light of her unique employment situation—substitute teachers were hard to find, the classes were only for a short period of time and thus, any absence may be significant, etc. However, viewing the evidence in the light most favorable to the plaintiff, we conclude that a reasonable jury could find, based upon all of the evidence, that plaintiff was qualified even in light of her attendance record.

Finally, the ADA specifies that no employer "shall discriminate . . . *because of* the disability of [an] individual." 42 U.S.C. § 12112(a) (emphasis added). The term "discriminate" includes "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee," 42 U.S.C. § 12112(b)(1), as well as "denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant[,]" 42 U.S.C. § 12112(b)(5)(B).

With the exception of the Sixth Circuit, all federal circuit courts that have addressed this issue in a published opinion have found that "because of" does not mean solely because of; rather, to establish a violation of the ADA, a plaintiff need only prove that discrimination based on her disability was a determining or motivating factor in an adverse employment action. *Baird ex rel. Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999); *Butler v. City of Prairie Village, Kan.*, 172 F.3d 736

(10th Cir. 1999); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131 (8th Cir.), *cert. denied*, 528 U.S. 818, 145 L. Ed. 2d 51 (1999); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029 (7th Cir. 1999); *Walton v. Mental Health Assoc.*, 168 F.3d 661 (3d Cir. 1999); *Newberry v. East Texas State University*, 161 F.3d 276 (5th Cir. 1998); *Feliciano v. State of R.I.*, 160 F.3d 780 (1st Cir. 1998); *McNely v. Ocala Star-Banner* Corp., 99 F.3d 1068 (11th Cir. 1996). *But see Brohm v. JH Properties, Inc.*, 149 F.3d 517 (6th Cir. 1998). In the case *sub judice*, the trial court erroneously directed a verdict in favor of Durham Tech because plaintiff had failed to prove that she was terminated based solely upon her disability. Applying the correct standard, we conclude that a reasonable jury could find plaintiff's disability was at least a motivating or determinative factor in her discharge. Defendant admitted to plaintiff, among other things, that her presence at the jail and the possibility that she would suffer another fall "could prove to be a liability for Durham Tech." Certainly, defendant presented evidence of other concerns considered in the decision, such as plaintiff's attendance record and her safety. However, to recover, plaintiff need not prove that her disability was the sole reason defendant took the adverse employment action, but only that it was a motivating factor. As such, the court erred in directing a verdict based on this issue.

[5] Defendant contends that even if the "determining factor" test is applicable to the instance case, it was still entitled to a directed verdict. Defendant argues that there is a "powerful presumption" of non-discrimination because the same person who hired plaintiff, fired her. We must disagree.

In *Proud v. Stone*, 945 F.2d 796, 797-98 (4th Cir. 1991), the Fourth Circuit held, in an age discrimination case, that where the employer advances a legitimate, nondiscriminatory reason for its adverse action,

> the hirer and the firer are the same individual[,] and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.

The "*Proud* inference" has been extended to a variety of employment discrimination cases, including those arising under the ADA. *See, e.g.*, *Tyndall*, 31 F.3d 209 (applying *Proud* to an ADA case).

In the instance case, the evidence was sufficient to indicate that the same person who hired plaintiff did not fire her. Conley, the per-

son who hired plaintiff, testified that at some point during the Spring of 1995, Dean Clark encouraged him to consider reassigning plaintiff to a location other than the jail. Conley further testified that Clark asked him to consider a reassignment after discussing it with Durham Tech's chief financial officer, Ed Moore. Conley stated that prior to his conversation with Clark, he was not concerned about having plaintiff teach at the jail.

When asked specifically who made the decision to not reassign plaintiff to the jail, Conley first testified that it was a consensus of Clark, another administrator, and himself. However, further testimony revealed that in his deposition, Conley stated that prior to informing plaintiff she would not be reassigned to the jail, Clark had already instructed Conley not to reassign plaintiff to her present position. As such, the evidence, construed in the light most favorable to the plaintiff, demonstrates that the same person did not hire and fire plaintiff, and therefore, defendant was not entitled to an inference of nondiscrimination. Accordingly, we hold that the court erred in directing a verdict for defendant with regard to plaintiff's claim under the ADA.

For the reasons stated herein, we affirm the trial court's order granting defendant's summary judgment motion based on plaintiff's state law claim of retaliatory discharge. Furthermore, we reverse the decision of the trial court directing a verdict based on plaintiff's ADA claim and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part.

Judges GREENE and WALKER concur.

STATE OF NORTH CAROLINA, EX REL. MICHAEL F. EASLEY, ATTORNEY GENERAL, PLAINTIFF v. RICH FOOD SERVICES, INC., DEBRA K. SINGLETARY, ROY BALDWIN, VERNICK FINANCIAL SERVICES, KEARNEY CREDIT INCORPORATED, AND FAIR FINANCE COMPANY, DEFENDANTS

No. COA99-1021

(Filed 29 August 2000)

1. Appeal and Error— partial summary judgment—possibility of inconsistent verdicts

The appeal of a partial summary judgment was addressed on its merits where it was reasonably foreseeable that inconsistent verdicts could result if the appeal was dismissed. If the case proceeded to trial, the State might obtain a verdict against defendants Rich and Singletary, but the defendants for whom summary judgment was granted would not be bound and, should those summary judgments then be reversed, those defendants would be entitled to a new trial on the same issues.

2. Unfair Trade Practices— retail installment sales contracts—liability of finance company purchasing contract

The trial court erred by granting partial summary judgment for finance companies which had been included as parties to a Chapter 75 action brought by the Attorney General against a retail food installment sale company where the finance companies had purchased retail installment sales contracts from the food company. Although the finance companies argued that there was no showing that they participated in any deceptive practices, under N.C.G.S. § 25A-25 the purchased contracts were subject to the same claims and defenses that consumers could assert against the seller. The provisions of Chapter 75 authorize the Attorney General to bring a civil action on behalf of North Carolina consumers to enforce the prohibition against deceptive sales practices, and the finance companies here must be parties to the litigation in order to provide a full and meaningful remedy to the consumers for whom the Attorney General is acting.

3. Estoppel— investigation of retail installment sales company—no notice to finance company—action by Attorney General not barred

The Attorney General's claims against finance companies who purchased retail installment sales contracts from a door-to-door food plan company were not barred by equitable estoppel,

and the trial court erred by granting partial summary judgment for them, where the Attorney General did not notify the finance companies of its investigation of the food company for two-and-a-half years prior to filing the suit, during which time the finance companies continued to accept assignment of contracts from the food company to their prejudice. There were no allegations in the answer of defendant finance companies which would support the elements of equitable estoppel and the trial court erred insofar as estoppel was the basis for its judgment. Moreover, N.C.G.S. § 25A-25 does not require notice to an assignee of commercial paper that the seller is being investigated for violations of Chapter 75, and estoppel normally does not act to bar the actions of the State or its agencies.

4. Damages and Remedies— election of remedies—deceptive sales practices—partial settlement

The trial court erred by granting partial summary judgment for defendant finance companies in a Chapter 75 action against a retail installment sales food company and the assignees of its contracts where the finance companies argued that the Attorney General elected his remedies by entering into a consent agreement with the food company enjoining certain sales practices and requiring that existing contracts be honored. Defendants did not plead an election of remedies in bar of plaintiff's claims, and, even if the plea of election of remedies was properly before the Court of Appeals, it was premature because a plaintiff in a deceptive sales practices action under N.C.G.S. § 75-1.1 may allege inconsistent remedies and need not make its election until prior to jury instructions or after return of the verdict.

5. Unfair Trade Practices— retail installment sales company—employee—proper party

The trial court erred by granting summary judgment for defendant Baldwin in an action brought by the Attorney General arising from the retail installment sales of food products where Baldwin contended that he should not have been a party to the litigation because the Attorney General is not authorized to bring an unfair and deceptive trade practices action against him as an employee and that there was insufficient evidence that he acted as a managing agent of the food company. The plain language of N.C.G.S. § 75-9 allows the Attorney General to investigate agents, officers, and employees of corporations and its is unlikely that the Legislature would have authorized investigations

without intending that such persons be held to answer for violations of Chapter 75. Furthermore, there was ample evidence that Baldwin was a key agent and employee of the food company; his effort to minimize his management role at most raises a question of fact.

Appeal by plaintiff from orders entered 12 May 1999 and 13 May 1999 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 6 June 2000.

On 2 April 1998, the State of North Carolina, on relation of Attorney General Michael F. Easley, filed this civil action on behalf of North Carolina consumers against Rich Food Services, Inc., Debra Singletary, Roy Baldwin, and three finance companies: Vernick Financial Services, Kearney Credit Incorporated, and Fair Finance Company. The verified complaint alleged that defendant Rich Food Services, Inc. (Rich Food), is a Wyoming corporation with its principal place of business in Knightdale, North Carolina. Defendant Debra Singletary (Singletary) is the president, director and majority shareholder of Rich Food. The complaint alleged that defendant Roy Baldwin (Baldwin) is a "managing agent" for Rich Food who "exerts authority and control over the operations of" Rich Food. The State also submitted evidence that Baldwin advised Singletary, developed policy and training materials, hired and directed the sales force, and conducted many of Rich Food's dealings with its franchiser, the defendant finance companies and consumers.

Rich Food is engaged in the business of door-to-door sales of home food service plans, freezers, cookware, and other services and goods. During its in-home sales presentations, Rich Food offers potential customers a large order of frozen foods including bulk meat, fruits, vegetables, beef, poultry, seafood, pork and "specialty items." The food plans do not include many of the items consumers usually purchase at the grocery store, such as dairy items, cereal, flour, spices, cleaning fluids, dish detergent, and paper products. Rich Food also represents that all food will be frozen, packaged, delivered to the customer's home and placed in the customer's freezer by agents of Rich Food. Rich Food offers discounts on future food purchases, sells freezers to its customers and offers them limited warranties on freezer repairs.

The Rich Food salesperson gives numerous booklets and documents to purchasers, but does not provide buyers a single document which discloses the price of the individual food items, service

charges, or the total plan price. The parties disagree about whether Rich Food was required to summarize all transactions in one document. After each customer's three-day right to cancel expires, Rich Food delivers the purchases to the consumer's home.

Rich Food offered financing of its retail installment sales contracts through various finance companies. Defendants Vernick Financial Services (Vernick), Kearney Credit Incorporated (Kearney), and Fair Finance Company (Fair Finance) have purchased retail installment sales contracts from Rich Food.

At the time it filed its Answer in this case, Rich Food did not maintain contractual liability insurance or reimbursement insurance to guarantee that it could meet future obligations and fulfill its warranties. In addition to alleging that Rich Food sold "insurance" in violation of statutory provisions, the State alleged—among other things—that Rich Food's sales practices deceived purchasers by representing to them that they would save money with the Rich Plan, by failing to disclose the unit price of the food sold, and by misrepresenting the value of the goods and services being sold.

On 12 May 1998, Rich Food, Baldwin, and Singletary, entered into an Order for Preliminary Injunction by Consent, which provided in part that they would honor the membership and service agreements they had sold to consumers pending the outcome of this litigation.

On 5 March 1999, defendant finance companies filed a joint motion for summary judgment on the grounds that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law. On 31 March 1999, plaintiff also filed a motion for summary judgment against all defendants. The State supported its motion for summary judgment with the affidavits of 26 disgruntled consumers who had made purchases from defendant Rich Food. On 12 May 1999, the trial court entered summary judgment in favor of defendant Roy Baldwin and denied plaintiff's motion for summary judgment against Rich Food on the issue of damages, civil penalties and attorney fees. The trial court granted summary judgment for the plaintiff on the issue of whether the Rich Plan Service Agreement constitutes "insurance" within the meaning of Chapter 58 of the North Carolina General Statutes. On the following day, the trial court denied plaintiff's motion for summary judgment as to Debra Singletary and granted partial summary judgment in favor of the three defendant finance companies. Plaintiff timely filed notice of appeal, assigning error.

Attorney General Michael F. Easley, by Assistant Attorneys General Barbara A. Shaw and K. D. Sturgis, for the State.

Allen & Pinnix, P.A., by D. James Jones, Jr., for Roy Baldwin defendant appellee; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robin K. Vinson, for Vernick Financial Services, Kearney Credit Incorporated and Fair Finance Company defendant appellees.

HORTON, Judge.

[1] Plaintiff argues the trial court erred in granting summary judgment for Roy Baldwin and partial summary judgment for the defendant finance companies. Defendants contend, however, that we should dismiss the State's appeal without reaching its merits, because the entries of summary judgment are merely interlocutory orders, from which no appeal of right lies.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "An appeal does not lie to the [appellate courts] from an interlocutory order of the Superior Court, unless such order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Id.*

Plaintiff contends that it has a substantial right to avoid the possibility of two trials on the same issues. " 'Ordinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.' " *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation omitted). Here, it is reasonably foreseeable that, if we dismiss this appeal and defer consideration of the errors assigned by the State, inconsistent verdicts might well result.

The State contends, among other things, that Rich Food, its President Singletary, and Managing Agent Baldwin, have violated the provisions of Chapters 75 and 58 of our General Statutes by engaging in a pattern of deceptive practices and by selling insurance without being licensed to do so. The State seeks to enjoin such practices, can-

cel contracts entered into in violation of law, and obtain restitution for consumers. The State further contends that it cannot obtain full relief for consumers injured by the actions of Rich Food without the presence of the defendant finance companies because they are the assignees of the contracts in question. As we will discuss more fully below, the State contends that the defendant finance companies are subject under the provisions of N.C. Gen. Stat. § 25A-25 to the same claims and defenses which can be asserted against Rich Food. However, if we dismiss the State's appeal as premature, the defendant finance companies would not be bound by any verdict or judgment against Rich Food. A later reversal of the entries of partial summary judgment which are the subject of this appeal would then necessitate another trial on the same issues, with the possibility of inconsistent verdicts.

Likewise, as to the defendant Baldwin, a subsequent trial against him would involve many of the same issues involved in the trial of the charges against Rich Food, because the State contends that Baldwin has engaged in the same deceptive acts as Rich Food.

In summary, if the case proceeds to trial in its present posture, the State might well obtain a verdict and judgment against Rich Food and Singletary, but the defendant finance companies and Baldwin would not be bound by its terms. Should we then reverse the orders of the trial court granting summary judgment for Baldwin and for the finance company defendants, those defendants would be entitled to a new trial on the same issues. That is particularly true in the case of the defendant finance companies, as those defendants have requested a trial by jury. Therefore, we hold that inconsistent verdicts might well result from a fragmentation of the trial of this matter, and we will address this appeal on its merits.

I.

[2] Defendant finance companies first contend that they may not properly be included as parties to this action against Rich Food and its officials. The defendant finance companies argue that there is no showing they have participated in any deceptive practices, nor were they put on notice that the Attorney General was investigating Rich Food for possible violations of Chapter 75. Thus, they argue the State is estopped from seeking to cancel the retail sales contracts and seeking restitution from them. We disagree, and reverse the entry of summary judgment in their favor.

In 1969, our General Assembly amended Chapter 75 by adding N.C. Gen. Stat. § 75-1.1, which declared unfair or deceptive acts or practices affecting trade or commerce to be unlawful. 1969 N.C. Sess. Laws ch. 833. The section was amended in 1977 to strike the reference to "trade," and thus to broaden the scope of the statute. N.C. Gen. Stat. § 75-16 (1999) allows any person, firm or corporation injured by the act of another to "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." *Id.* It is obvious that the Legislature intended to provide a civil means to encourage ethical dealings between persons engaged in business and the consuming public within the State and to enable a person injured by deceptive acts or practices of such business people to recover treble damages from a wrongdoer. *Hardy v. Toler*, 24 N.C. App. 625, 630, 211 S.E.2d 809, 812-13, *modified on other grounds*, 288 N.C. 303, 218 S.E.2d 342 (1975). The provisions for trebled damages and for an allowance of attorney fees enable private citizens to obtain counsel and prosecute actions which might otherwise involve prohibitive expense.

In addition to the power of individual consumers to bring actions for alleged unfair or deceptive practices, the Attorney General is both authorized and directed to investigate "all . . . corporations or persons in North Carolina doing business in violation of law . . . ." N.C. Gen. Stat. § 75-9 (1999). The Attorney General may prosecute civil actions in the name of the State to obtain mandatory orders, such as injunctions and restraining orders, to carry out the provisions of Chapter 75. N.C. Gen. Stat. § 75-14 (1999). Chapter 114 of our General Statutes also empowers the Attorney General

> [t]o intervene, when he deems it to be advisable in the public interest, in proceedings before any courts, regulatory officers, agencies and bodies, both State and federal, in a representative capacity for and on behalf of the using and consuming public of this State. He shall also have the authority to *institute and originate proceedings* before such courts, officers, agencies or bodies and shall have authority to appear before agencies on behalf of the State and its agencies and citizens in all matters affecting the public interest.

N.C. Gen. Stat. § 114-2(8)(a) (1999) (emphasis added).

Clearly, the Attorney General had authority on behalf of the State, to institute this action against Rich Food, which he contends

has engaged in a continuing pattern of violations of N.C. Gen. Stat. § 75-1.1 (1999). The defendant finance companies argue, however, that the Act did not contemplate the maintenance of such an action against defendants who have not participated in the deceptive practices.

The State premises liability of the finance companies on N.C. Gen. Stat. § 25A-25 (1999), which provides that:

> (a) In a consumer credit sale, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument or instruments of indebtedness, any claims or defenses available against the original seller, and the buyer may not waive the right to assert these claims or defenses in connection with a consumer credit sales transaction. Affirmative recovery by the buyer on a claim asserted against an assignee of the seller or other holder of the instrument of indebtedness shall not exceed amounts paid by the buyer under the contract.
>
> (b) Every consumer credit sale contract shall contain the following provision in at least ten-point boldface type:
>
> NOTICE
>
> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Id. The State argues that it may, pursuant to N.C. Gen. Stat. § 25A-25, assert its claims for unfair and deceptive trade practices both against the original seller (Rich Food) and against defendant finance companies as assignees of Rich Food. Further, the State contends that it is entitled pursuant to N.C. Gen. Stat. § 75-15.1 to seek cancellation of contracts and restitution on behalf of consumers injured by unfair and deceptive trade practices. The trial court disagreed with the State's position, however, and granted partial summary judgment in favor of defendants "as to any claims against them for money damages or restitution damages (affirmative damages) arising out of any of the transactions complained of prior to the date of the institution of this action and service of the complaints upon each separate defendant." In effect, the trial court ruled that the plaintiff could

maintain its action against defendant finance companies for cancellation and restitution relating to assignments of retail credit transactions entered into *after* the service of process on the individual finance company. The finance companies did not appeal from the ruling of the trial court as to their inclusion of defendants for the purposes of possible future liability, and the question is thus not before us. However, for the sake of clarity in this important area, we will consider the power of the Attorney General to include financial institutions as parties in an action pursuant to N.C. Gen. Stat. § 75-1.1 on behalf of North Carolina consumers.

As both Chapters 75 and 25A-25 share the common purpose of protecting consumers, we are to read the statutes *in pari materia* ("in the same matter," Black's Law Dictionary 794 (7th ed. 1999)). *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980); *see also Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981) (violation of certain statutes designed to protect consumers also constitutes a violation of unfair and deceptive trade practices). Since the plain language of N.C. Gen. Stat. § 25A-25 suggests that the defendant finance companies are subject to any claim or defense which might be asserted against Rich Food, and plaintiff has stated a cause of action against Rich Food for unfair or deceptive business practices, plaintiff may assert those same claims against the finance companies. If plaintiff is successful in the litigation, N.C. Gen. Stat. § 75-15.1 (1999) provides that the trial court may "upon a final determination of the cause, order the restoration of any moneys or property and the cancellation of any contract obtained by any defendant as a result of such violation." *Id.* In order for the consumers on whose behalf the State has instituted this litigation to obtain a full remedy, the three named finance companies must be bound by the results of the litigation, and must therefore be parties defendant.

The issue of whether the State is authorized to bring this action against defendant finance companies appears to be one of first impression in this jurisdiction. However, several of our sister states with similar statutory schemes have addressed this issue in well-reasoned and instructive opinions. In *State ex rel. McGraw v. Scott Runyon Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995), the West Virginia Attorney General sued an automobile dealership for unfair and deceptive trade practices arising from the allegedly unlawful sale of extended warranties for motor vehicles. General Motors Acceptance Corporation and Citizens National Bank of St. Albans (later, Bank One), both of which financed the sales of extended war-

ranties by the dealership, were named as additional defendants. The Supreme Court of West Virginia observed that West Virginia law requires finance companies to purchase consumer credit " 'subject to all claims and defenses of the buyer or lessee against the seller or lessor[,]' " and held that "the Attorney General clearly has the right to bring a civil action against an assignee to collect a *refund* of an excess charge imposed upon a consumer *regardless of whether the assignee committed any wrongdoing.*" *McGraw*, 194 W.Va. at 779, 461 S.E.2d at 525 (citation omitted) (emphasis added). In so holding, the Court reasoned that

> [l]ogic and experience dictate that if the types of lawsuits which the Attorney General could bring under the CCPA [Consumer Credit and Protection Act] did not include lawsuits against financial institutions such as the defendants, these institutions could, if unsavory, run in effect a "laundry" for "fly-by-night" retailers that seek to excessively charge their customers. Consequently, the real meaning of consumer protection would be stripped of its efficacy.

Id. at 780, 461 S.E.2d at 526. As additional bases for its holding, the *McGraw* Court reasoned that

> logic dictates that the burden of cost of the seller's misconduct in violation of the CCPA may be placed on the financing party to the transaction. Financing parties, more so than consumers, are in a position to police the activities of the seller-retailer and to protect themselves against misconduct.

Id. Finally, the *McGraw* Court notes that consumer claims seeking refunds often involve small sums, and an action by the Attorney General is a "practical way" to litigate such matters. *Id.*

In another case, *State v. Excel Management Services*, 111 Wis. 2d 479, 331 N.W.2d 312 (1983), the Wisconsin Attorney General sued a seller of swimming pools, alleging that it used deceptive trade practices. The Supreme Court of Wisconsin observed that, under applicable Wisconsin statutes, First Savings purchased the sales contracts from the seller " 'subject to all claims and defenses of the buyer or his successor in interest' " and thus could be held responsible for the seller's deceptive trade practices. *Excel*, 111 Wis. 2d at 487, 331 N.W.2d at 316 (citation omitted). The Court noted that Wisconsin law provides that " '[t]he court may in its discretion, prior to entry of final judgment make such orders or judgments as may be necessary to

restore to any person any pecuniary loss suffered because of the acts or practices involved in the action . . . .' " *Id.* at 486, 331 N.W.2d at 315 (citation omitted). Consistent with that purpose, the Court concluded that the Wisconsin Attorney General was authorized to sue First Savings in order to assist consumers in recovering their pecuniary losses. *Id.* at 488, 331 N.W.2d at 316.

In another case, *State v. Custom Pools*, 150 Vt. 533, 556 A.2d 72 (1988), the Vermont Attorney General sued a seller of above-ground pools for deceptive "bait-and-switch" tactics. Additional defendants were two financing parties. The trial court dismissed the action as to the financing parties on the grounds they had not committed unlawful practices. In reversing, the Supreme Court of Vermont stated, "[t]he Legislature intended to place the burden of the cost of seller misconduct violative of the Consumer Fraud Act on the financing parties to the transaction. Such parties, unlike consumers, are in a position both to police the activities of the seller and to protect themselves against misconduct." *Id. at* 536-37, 556 A.2d at 74.

In the case before us, the defendant finance companies purchased the retail installment sales contracts from the seller, Rich Food, subject to the same claims and defenses that consumers could assert against the seller, defendant Rich Food. N.C. Gen. Stat. § 25A-25. Therefore, it seems clear that an individual consumer could bring an action against Rich Food for fraudulent and deceptive sales practices, and include the assignee of the consumer's retail sales contract as a defendant. Without the presence of the financing party, a full remedy, including cancellation of the sales contract and restitution for payments pursuant to the invalid contract, would not be available to the consumer. The express provisions of Chapter 75 authorize the Attorney General to bring a civil action on behalf of North Carolina consumers to enforce the Chapter's prohibition against deceptive sales practices. We now hold that in such an action the Attorney General may join as party defendants the assignees of sales contracts which were allegedly obtained in violation of Chapter 75.

Our position is supported by the reasoning of the West Virginia Supreme Court in *McGraw*. Insulating the financing parties who are assignees of sales contracts from liability would allow unscrupulous sellers to "launder" their unlawfully obtained contracts and would vitiate the public policy expressed in N.C. Gen. Stat. § 25A-25. Although the financing parties may not be involved in the deceptive practices of a seller, such financing parties are in a better position than consumers to "police" the activities of the sellers with whom

they deal and protect themselves from loss. Thus, as between an innocent consumer and innocent financing party, the burden of loss must fall on the financing party. The financing party must then look to the seller to be made whole.

Although Chapter 75 gives a broad remedy to an aggrieved consumer, and seeks to make that remedy more attractive through the possibility of treble damages and attorneys' fees, the individual amounts involved in these consumer cases may make prosecution difficult. The Attorney General may, however, seek recovery on behalf of a large group of injured consumers, and may secure injunctive relief in protection of prospective customers. Thus, the resources of the State are brought to the aid of consumers who might be unable otherwise to obtain full redress for their losses.

Our position is also consistent with the provision of Chapter 75 that "[i]n any suit instituted by the Attorney General to enjoin a practice alleged to violate G.S. 75-1.1, the presiding judge may, upon a final determination of the cause, order the restoration of any moneys or property and the cancellation of any contract obtained by *any defendant* as a result of such violation." N.C. Gen. Stat. § 75-15.1 (emphasis added). In order to provide a full and meaningful remedy to the consumers on whose behalf the Attorney General is acting, and to do complete justice between the parties, the defendant finance companies must be parties to this litigation and thus be bound by any orders of restitution or cancellation entered by the trial court.

[3] Defendant finance companies contend, however, that the doctrine of equitable estoppel bars plaintiff's claims against them. Equitable estoppel arises when a party " 'by acts, representations, admissions, or by silence . . . induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his or her detriment.' " *Lewis v. Jones*, 132 N.C. App. 368, 372, 512 S.E.2d 87, 90 (1999) (citation omitted). Defendants argue that plaintiff "failed to inform the Finance Company Defendants that it was investigating Rich Food Services, Inc. for over the two-and-a-half years immediately prior to filing this suit." Defendants also argue, and the trial court apparently agreed, that they were prejudiced by the Attorney General's failure to notify them that the State was investigating Rich Food, that they continued to accept assignment of contracts from Rich Food to their prejudice, and that plaintiff should be estopped to seek cancellation of any of the contracts or to seek restitution for the involved consumers.

The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice. *Friedland v. Gales*, 131 N.C. App. 802, 807, 509 S.E.2d 793, 796-97 (1998).

Although defendants now attempt to raise the defense of estoppel in their brief to this Court, they did not plead estoppel as an affirmative defense in their answer, as required by our Rules of Civil Procedure. Rule 8(c) provides in pertinent part that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense." N.C. Gen. Stat. § 1A-1, Rule 8(c) (1999). Where estoppel is not raised as a defense in the answer, a defendant may not raise it for the first time in this Court. *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 598, 394 S.E.2d 643, 649 (1990), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991). Although defendant finance companies did not affirmatively plead estoppel, it appears that the trial court relied on an estoppel theory in its partial grant of summary judgment for them "as to any claims against them for money damages or restitution damages (affirmative damages) arising out of any of the transactions complained of prior to the date of the institution of this action and service of the complaints upon each separate defendant." There are no allegations in the answer of defendant finance companies which would support the elements of an equitable estoppel. Thus, insofar as estoppel was the basis for the trial court's partial grant of summary judgment, the trial court erred.

In any event, N.C. Gen. Stat. § 25A-25 does not require that notice be provided to a financial party which is an assignee of commercial paper, such as retail sales contracts; that the seller of that paper is being investigated for violations of Chapter 75; and that a lawsuit against both the seller and its assignee may occur. In the usual case, it appears that the transaction giving rise to an alleged violation of Chapter 75 would occur prior to the institution of a civil action to seek affirmative relief from the transaction. In the present case, the delay before this action was filed may be attributed to the extensive investigation undertaken by the Consumer Protection Division of the Attorney General's Office, the efforts to obtain information from Rich

Food, and intensive--although unsuccessful--efforts to arrive at a fair resolution of the issues involved in this case. Although defendant finance companies complain that they were unjustly prejudiced by plaintiff's failure to give them notice of the ongoing investigation, they did not plead plaintiff's alleged inaction in bar of this claim as required. We note that estoppel does not normally operate to bar the actions of the State or its agencies, and arises only "if such an estoppel will not impair the exercise of the governmental powers of the county." *Washington v. McLawhorn*, 237 N.C. 449, 454, 75 S.E.2d 402, 406 (1953). *See also Hicks v. Freeman*, 273 F. Supp. 334, 338 (M.D.N.C. 1967) ("estoppel should be applied with great caution to the Government and its officials"), *aff'd*, 397 F.2d 193 (4th Cir. 1968), *cert. denied*, 393 U.S. 1064, 21 L. Ed. 2d 707 (1969).

[4] Likewise, defendant finance companies now seek to argue that plaintiff has elected its remedy by entering into a consent judgment with Rich Food enjoining certain sales practices, and requiring that Rich Food honor the terms of contracts to which Rich Food has already entered. Again, we note that the defendant appellants did not plead an election of remedies in bar of plaintiff's claims against them. Election of remedies is merely a form of estoppel, which must be pled as an affirmative defense under the provisions of Rule 8. *See Baker v. Edwards*, 176 N.C. 229, 233-34, 97 S.E.2d 16, 18 (1918); N.C. Gen. Stat. § 1A-1, Rule 8(c).

Further, in an action under N.C. Gen. Stat. § 75-1.1 based on deceptive sales practices, a plaintiff may allege inconsistent remedies, and need not make its election until either prior to jury instructions or after return of the jury verdict. *See First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 256-57, 507 S.E.2d 56, 65-66 (1998) ("entry of summary judgment against plaintiff on its unfair and deceptive trade practices claim would be inappropriate on the basis of inconsistent remedies."). Thus, even if defendants' plea of election of remedies were properly before us, it is prematurely made.

In summary, we hold that the trial court erred in granting partial summary judgment in favor of defendants Vernick Financial Services, Kearney Credit Incorporated and Fair Finance Company as to transactions which occurred prior to the institution and service of this action, and reverse its ruling.

II.

[5] The State also contends that the trial court erred in granting summary judgment in favor of defendant Roy Baldwin. Baldwin

argues that he should not be a party to this litigation for two reasons. First, he contends that the Attorney General is not authorized to bring a Chapter 75 action for unfair and deceptive trade practices against him as an employee of defendant Rich Food. Second, Baldwin contends there is, in any event, insufficient evidence to show that he acted as a "managing agent" of Rich Food during the times relevant to this action. We do not agree, but will discuss each of his contentions.

N.C. Gen. Stat. § 75-9, which sets out the broad authority of the Attorney General to investigate possible violations of Chapter 75, provides in part that it is the duty of the Attorney General to "investigate . . . the affairs of all corporations or persons doing business in this State . . . in violation of law . . . ." *Id.* The purpose of such investigation is to "acquir[e] such information as may be necessary to enable him to prosecute any such corporation, *its agents, officers and employees* for crime, or prosecute civil actions against *them* if he discovers *they* are liable and should be prosecuted." *Id.* (emphasis added).

The plain language of the statute allows the Attorney General to prosecute "agents, officers and employees" of corporations in either criminal or civil actions. Further, it is unlikely that the Legislature would have authorized the Attorney General to investigate "persons," without intending that such "persons" might be held to answer for their violations of Chapter 75. That could result in a situation where an alleged wrongdoer who held all the stock in a "shell" corporation could successfully plead the corporate existence in bar, and argue that only the corporation could be the subject of a lawsuit.

Further, there is ample evidence in this record that the defendant Baldwin was a key agent and employee of Rich Food. The State's proffer of evidence tends to show that Baldwin executed the franchise agreement between Rich Food and its franchisor. Baldwin was employed by Rich Food from 1996 through mid-1998. A former employee of Rich Food stated that Baldwin "ran the business . . . and made the decisions." Baldwin himself stated in his deposition that he advised President Singletary, developed corporate policy, instructed sales managers and employees, led sales meetings, developed the compensation program for salespersons, signed employment contracts, loaned money to the company, and acted as a trouble-shooter. Further, he transferred a customer list from his previous corporation to Rich Food for no consideration. In response,

Baldwin filed an affidavit with the trial court stating that he was not an officer, stockholder, or director of Rich Food and that he did not *personally* make sales to consumers. Although Baldwin now seeks to minimize his management role in Rich Food, his allegations at most raise a question of fact to be resolved by the trier of fact. Summary judgment in favor of Baldwin was improvidently entered, and is reversed.

Reversed and remanded.

Judges GREENE and HUNTER concur.

STATE OF NORTH CAROLINA v. BENJAMIN ALDRIDGE

No. COA99-957

(Filed 29 August 2000)

1. **Jury— allegations of juror misconduct—anonymous telephone call**

The trial court did not abuse its discretion in a first-degree murder case by refusing to conduct an inquiry into an alleged incident of possible juror misconduct based solely on an anonymous telephone call, because an examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous or where the witness did not overhear the juror or third party talk about the case.

2. **Appeal and Error— preservation of issues—failure to obtain a ruling**

The trial court did not abuse its discretion in a first-degree murder case by refusing to conduct an inquiry into an alleged incident of possible juror misconduct based on a juror informing the clerk during trial that he recognized two potential witnesses in the audience, because defendant failed to obtain a ruling on the request for an inquiry as required by N.C. R. App. P. 10(b)(1), and therefore, did not preserve this question for appellate review.

3. Evidence— hearsay—state of mind exception

The trial court did not err in a first-degree murder case by admitting statements which the victim made to another person six months prior to the murder about the victim's deteriorating relationship with defendant and her intent to end their marriage, because the state of mind exception under N.C.G.S. § 8C-1, Rule 803(3) allows for the introduction of hearsay evidence which tends to indicate the victim's mental condition by showing the victim's fears, feelings, impressions, or experiences at the time the statements were made, so long as the possible prejudicial effect does not outweigh its probative value under N.C.G.S. § 8C-1, Rule 403.

4. Evidence— opinion testimony—victim's state of mind

The trial court did not err in a first-degree murder case by admitting the testimony of two witnesses concerning the victim's mental state on the day before her death because opinion testimony, including lay opinion testimony, is admissible concerning the state of a person's appearance or emotions on a given occasion.

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

The trial court did not err in a first-degree murder case by denying defendant's motions to dismiss at the close of the State's evidence and at the close of all evidence, because there was sufficient evidence to show that defendant husband was the killer, including evidence that: (1) the victim was stabbed eleven times with knives from the kitchen of the residence; (2) there were no signs of forced entry; (3) money and other valuables were found on the kitchen table; (4) there was evidence that the victim wanted defendant to leave the residence and that she no longer wanted to be married; and (5) defendant on numerous occasions inquired as to the particulars of how an inmate murdered his girlfriend.

6. Evidence— prior crimes or acts—propensity to commit crime

Although the trial court erred in a first-degree murder case by admitting testimony of defendant's two former wives concerning his behavior towards them during their marriages based on the fact the evidence was only relevant to show defendant's propensity to commit the crime in this case, in violation of N.C.G.S.

§ 8C-1, Rule 404(b), the error was not prejudicial because a different result would not have been reached had the error not occurred. (Concurring in result opinion by Judge Smith with which Judge Timmons-Goodson joined.)

Judge SMITH concurring in result.

Judge TIMMONS-GOODSON joins in the concurring opinion.

Appeal by defendant from judgment entered 17 December 1998 by Judge Zoro J. Guice, Jr. in McDowell County Superior Court. Heard in the Court of Appeals 18 May 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Robert C. Montgomery, for the State.

C. Frank Goldsmith, Jr. for defendant-appellant.

WALKER, Judge.

Defendant was convicted of first degree murder and sentenced to life imprisonment without parole. The State's evidence tended to show that on 17 May 1997 at about 4:34 a.m., sheriff's deputies responded to a burglary report at the victim's and defendant's residence. When the deputies arrived at the residence, defendant stated that someone had broken into his home and stabbed his wife, Gwendolyn Aldridge (victim).

Deputy Roscoe Bailey testified that upon arrival at the residence at about 4:47 a.m. on 17 May 1997, defendant was standing outside and told Deputy Bailey that he needed help because someone had broken into his house and stabbed the victim. Defendant pointed to a basement door that appeared closed and undisturbed. Deputy Bailey followed defendant into the residence where he saw two knives at the foot of the steps and found the nude body of the victim lying face up in an upstairs bedroom. She had stab wounds and the area around her body was very bloody. Deputy Bailey also testified that when he arrived, he did not notice any activity in the area surrounding the residence.

Deputy Gerald Hicks testified that when he arrived at the residence, he noticed the defendant was wearing brown shorts, no shirt or shoes, and had blood on his chest, hands, arms and legs. Further, Deputy Hicks testified that defendant led him to the bedroom where the victim was lying, and the defendant pointed to the two knives at

the foot of the steps. Deputy Hicks was present when Detective Thomas Farmer interviewed the defendant, who repeatedly stated that he knew the sheriff and needed to speak with him.

Deputy Kevin Fineberg testified that when he and Deputy Randy Smith arrived, they did a security check of the residence and found an exterior wooden door in the basement that was slightly open. However, the screen door on the outside of this wooden door appeared to be locked. Additionally, he did not observe any footprints in the grass area close to this door, although there was a heavy dew on the ground. Finally, Deputies Fineberg and Smith testified that they did not observe any signs of forced entry.

Detective Farmer testified that when he observed the victim's body, there appeared to be hand prints on each of the victim's ankles. Detective Farmer also testified the defendant told him that around 8:30 p.m. on 16 May 1997, the defendant and victim were watching television and the defendant decided to go to bed. Defendant told the victim good night, left her in the bedroom watching television, and went to his bedroom and shut the door. Defendant stated that he and the victim slept in separate bedrooms since each snored heavily. Later, the telephone rang and the victim told him his daughter was calling to speak to him. Defendant spoke to his daughter and then returned to his bedroom and went to sleep. Around 4:00 a.m., the defendant awoke when he heard his wife screaming. The defendant thought he heard footsteps running down the hallway away from the victim's bedroom. The defendant followed the sounds of the footsteps to the kitchen area. He checked the back door and found it to be shut and locked. Defendant then went to the victim's bedroom where he found the victim had been stabbed and was slumped over the bed. He ran behind her, pulled her back, and laid her on the floor. Defendant then called 911. Defendant stated that the two knives at the foot of the steps were from the kitchen of the residence. Defendant stated that he and the victim always locked the doors to the residence at night, that all the doors were locked when he went to bed, and that he and the victim had never experienced problems with prowlers or suspicious people.

Agent Andrew Cline of the North Carolina State Bureau of Investigation (SBI) testified he was a crime scene specialist, that he examined the residence, and that he found no signs of forced entry. In the kitchen, he noticed a knife block was missing two knives. The two knives located at the foot of the steps matched the kitchen set of knives. He found an unzipped purse containing an empty wallet and a

bank envelope containing $200 cash on the dining room table. A set of keys was underneath the purse and a ladies' watch was also on the table.

SBI Agent Bruce Jarvis testified that on the morning of 17 May 1997, he interviewed the defendant, who stated defendant repeated the events of 16 May 1997 to Agent Jarvis. The defendant and the victim had been married almost ten years. The defendant had been married twice previously. Defendant admitted he struck his first wife Carolyn Aldridge on one occasion when they were married. Defendant stated that he and his second wife, Elaine Coffey, fought and argued all the time, but he did not know if he ever hit her. Defendant denied ever assaulting his previous wives with a weapon. Defendant works for the Department of Corrections and supervises inmates who are housed at the Burke County Jail.

Dr. Donald Jason performed the autopsy of the victim and testified that he observed eleven stab wounds on the victim, including two stab wounds to the vaginal area which were the last ones inflicted. Additionally, there were no wounds on the victim which would indicate she was attempting to defend herself.

David Spittle, a crime lab specialist with the SBI, testified that the two knives revealed the presence of blood, but that there was an insufficient amount to conduct any DNA analysis. Joyce Petzka, a fingerprint analyst with the SBI, testified there was insufficient fingerprint evidence on the knives to conduct a comparison with the defendant's fingerprints.

Geoffrey Austin, the victim's son, testified that his mother was usually very talkative but when he spoke to her on the telephone on 16 May 1997, she "seemed very quiet" and "somewhat withdrawn."

Barbara Powell, a co-worker and friend of the victim, testified that on 16 May 1997, the victim "seemed really pre-occupied, quiet, unusually quiet."

Josephine Reep, a co-worker and friend of the victim, testified to statements the victim made to her concerning the victim's marriage to the defendant. Ms. Reep testified that she and the victim had a conversation in November or December 1996, during which the victim stated that the defendant told her that because of the bad neighborhood in which they lived, one day he might come home to find her dead with her throat cut and her body sliced up with a knife. The victim stated that the defendant wanted her to sell her home "so he can

get a hold of some of my money." Additionally, the victim told Ms. Reep that she no longer wanted to be married and that she wanted the defendant to leave the residence and that if the defendant had not left by May 1997, she planned to "push the issue."

Robert Hurt, a co-worker of the defendant, testified that he overheard the defendant speaking to an inmate. The inmate was convicted of murdering his own girlfriend. Mr. Hurt testified that the defendant, on approximately twelve occasions, asked the inmate questions regarding how, when, and where the inmate committed his crime, and how and when it was reported to the authorities.

Defendant's first wife, Carolyn Aldridge, testified that she was married to the defendant for approximately eleven years and that near the end of their marriage she was "smacked" four or five times by the defendant. Additionally, when she left the defendant in 1981, an argument between them turned violent and as she drove away with their two daughters, the defendant fired two shots from a pistol.

Defendant's second wife, Elaine Coffey, testified they were married in 1983, and after about a week of marriage, the defendant "got really physically abusive. He would beat me, stomp me, choke me." Ms. Coffey left the defendant, but the two reconciled. After about two years of marriage, when she asked the defendant to leave the home she owned, he threw rocks at her and her children and threatened to "blow [her] brains out" and pointed a pistol at her. Ms. Coffey obtained a domestic violence order to keep the defendant away from her and they were later divorced. Defendant did not offer any evidence.

[1] Defendant first argues the trial court erred in refusing to conduct an inquiry into two incidents of possible juror misconduct.

On Monday of the second week of the trial, defense counsel reported to the trial court that upon his return to his office the previous Friday afternoon after court, he received the following message from his secretary:

> Thought you would like to know. This—a lady called. I asked for her name and she said the first name was Tina. She was reluctant at giving it, so it may not be her first name. She said Grace Ann Proffitt [Juror #2], one of your jurors, has been talking about the case with her mother-in-law, Geraldine Proffitt. Tina works at the same company that Geraldine does and overheard Geraldine

> talking to other ladies on the lunch break. She said that Geraldine said that [Juror #2] told her the day she came back from being picked as a juror that she thought [the defendant] was guilty just by the look on his face.

Defendant requested an inquiry into the possible misconduct of Juror #2, and the trial court took the matter under advisement. Prior to the trial court giving the jury instructions, defendant again requested the trial court make an inquiry into Juror #2's possible misconduct. After hearing arguments from both the State and the defendant, the trial court made extensive findings and concluded in part that:

> No credible, reliable, substantive or believable evidence has been presented to this court in order to justify the court bringing Juror #2 into open court and conducting an inquiry with respect to Juror #2. That to do so would serve no useful purpose but to embarrass Juror #2 and result in the necessity of the court then having to remove the said juror from this jury panel with prejudice most definitely resulting to the State and the defendant by such an inquiry and by such embarrassment.
>
> That such information is rank hearsay, which the Defendant has presented to this Court with respect to the said motion, cannot serve as any basis for any inquiry with respect to the said juror.
>
> . . .
>
> There is absolutely no credible, reliable evidence for the court to even make an assumption that Juror # 2, Grace Proffitt, has not complied with or followed the court's instructions which the court gave to her and told her that applied to all recess periods and instructed her to follow.

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). "The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge." *State v. Johnson*, 295 N.C. 227, 234-35, 244 S.E.2d 391, 396 (1978) (*quoting Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279 (1915)). The trial court's ruling on the question of juror misconduct will not be disturbed on appeal unless it is clearly an abuse of discretion. *See State v. Sneeden*, 274 N.C. 498, 504, 164 S.E.2d 190, 195 (1968). A denial of motions made because of alleged juror misconduct is equivalent to a finding that no prejudicial misconduct has been shown. *See State v. Jackson*, 77 N.C. App. 491, 502-03, 335 S.E.2d 903, 910 (1985). An examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous or where the witness did not overhear the juror or third party talk about the case. *See Jackson*, 77 N.C. App. at 503, 335 S.E.2d at 910-11.

Thus, based solely on an anonymous telephone call, the trial court did not abuse its discretion in failing to inquire further as to whether Juror #2 may have violated its instructions.

[2] Defendant's assignment of error also relates to the trial court's refusal to conduct an inquiry of a juror "who informed the clerk during the trial that he recognized two potential witnesses in the audience." When the defendant requested this inquiry, the trial court also took the matter under advisement. Defendant did not later obtain a ruling on the matter.

Pursuant to Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure, the complaining party must "obtain a ruling upon the party's request, objection or motion" in order to preserve a question for appellate review. Defendant failed to obtain a ruling on the request and thus did not preserve the question for appellate review.

Next, defendant argues the trial court erred in admitting testimony of defendant's two former wives concerning his behavior towards them during their marriages. Defendant contends the evidence was too remote in time and did not bear any similar circumstances to the alleged offense.

Character evidence may be admissible for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, iden-

tity, or absence of mistake, entrapment or accident. *See* 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 test of admissibility examines whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of Rule 403. *See State v. Wilson*, 106 N.C. App. 342, 348, 416 S.E.2d 603, 607 (1992); *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 299 (1996). Remoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered. *See Hipps*, 348 N.C. at 405, 501 S.E.2d at 642. Remoteness is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident. *Id.* It is not necessary that the similarities between the two situations rise to the level of the unique and bizarre. *See State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). Rather, the similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts. *Id.* Evidence of prior behavior following a rejection in a romantic relationship is admissible to prove motive and identity. *See State v. Parker*, 113 N.C. App. 216, 224, 438 S.E.2d 745, 750-51 (1994).

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, *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998) (citation omitted).

The trial court, after *voir dire* examinations of Carolyn Aldridge and Elaine Coffey, entered extensive findings and made the following conclusions in part:

That the said evidence is relevant and probative with respect to situations that develop at the time of a break-up of a marriage between the Defendant . . . and a wife. That the said evidence indicates and reveals that at the time of the break-up of every marriage that the Defendant . . . has acted violently and in this case criminally and in the other two cases criminally upon receiving information from his spouse as to the said break-up.

That the evidence in question in this case reveals and indicates the identity of the perpetrator of the said acts inflicted upon the body of the decedent . . . .

. . .

[T]hat remoteness in time does not under the law of North Carolina exclude evidence or make the said evidence excludable. That any remoteness or space of time deals with the weight of the evidence sought to be admitted and that the question of the weight of any evidence is a question to be determined by the jury and not by the Court . . . .

. . .

That the Supreme Court of North Carolina in *State v. Hipps* noted, "remoteness in time is less significant where the prior crime used is to show intent, motive, knowledge or lack of accident." That all of these facts are present in the case now before this Court . . . .

. . .

That the evidence in question indicates similar circumstances as a result of the separation by the Defendant from two prior wives which have a direct connection and relevance to the present state of affairs at the time of the occasion in question in this case . . . .

The evidence from defendant's two former wives tended to show that as the marriages deteriorated, defendant responded violently. There was evidence that the victim planned to separate from the defendant about the time of the murder. The trial court properly concluded the testimonies of Carolyn Aldridge and Elaine Coffey were relevant in establishing the identity of the perpetrator of the murder. Defendant has failed to show the trial court abused its discretion in admitting this evidence, and this assignment of error is overruled.

[3] Next, defendant argues the trial court erred in admitting statements which the victim made to Josephine Reep. Defendant contends this evidence should have been excluded pursuant to Rules 804(b)(5), 803(3) and 403 of the North Carolina Rules of Evidence.

The State filed a notice of intent to use the victim's statements on 16 November 1998. On 7 December 1998, the defendant filed a *motion in limine* to exclude any evidence of alleged hearsay statements made by the victim. The trial court deferred ruling on the motion until trial. After a *voir dire* examination of Ms. Reep, the trial court entered findings and conclusions and denied defendant's motion.

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and is inadmissible unless it is subject to a recognized exception. N.C. Gen. Stat. § 8C-1, Rule 801 (1999); *see also* N.C. Gen. Stat. § 8C-1, Rule 802 (1999). Rule 803(3) excepts from the hearsay rule:

> A statement of 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), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

N.C. Gen. Stat. § 8C-1, Rule 803(3) (1999).

The state of mind exception allows for the introduction of hearsay evidence which tends to "indicate the victim's mental condition by showing the victim's fears, feelings, impressions or experiences," so long as the possible prejudicial effect of such evidence does not outweigh its probative value under Rule 403. *State v. Corpening*, 129 N.C. App. 60, 66, 497 S.E.2d 303, 308, *disc. review denied*, 348 N.C. 503, 510 S.E.2d 659 (1998) (*quoting State v. Walker*, 332 N.C. 520, 535, 422 S.E.2d 716, 725 (1992), *cert. denied*, 508 U.S. 919, 124 L. Ed. 2d 271 (1993)). Rule 803(3) does not refer to the victim's state of mind at the time of death, but refers to the victim's state of mind at the time the statements were made. *See State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 302 (1993), *cert. denied*, 511 U.S. 1046, 128 L. Ed. 2d 220 (1994).

In *McHone*, our Supreme Court held that hearsay testimony was admissible under Rule 803(3) where witnesses testified to the victim's statements, made at least six months prior to the murder, regarding

her fear of the defendant. The hearsay statements recited threats made to the victim by the defendant and the victim's fear that defendant would kill her. Defendant argued that the prejudicial effect outweighed the probative value since the statements were made six months prior to the murder. The *McHone* court disagreed and held, "the evidence tended to show a stormy relationship over a period of years leading up to the murders in this case, and the fact that the last incident testified to occurred six months prior to the murders does not deprive the evidence of its probative value." *McHone*, 334 N.C. at 637-38, 435 S.E.2d at 302.

Here, Ms. Reep testified to statements made by the victim approximately six months prior to the murder, which consisted of the following: she and the defendant were not getting along well; she no longer wanted to be married; if the defendant had not left by May 1997, she would "push the issue" for him to leave; and the defendant told her that one day he would come home and find her dead with her throat cut and her body sliced up with a knife; and the victim believed the defendant wanted her to sell her house so he could get some of her money. Under these circumstances, the trial court did not err in admitting the statements of the victim. *See State v. Murillo*, 349 N.C. 573, 587, 509 S.E.2d 752, 759 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999) (holding that victim's hearsay statements indicating that she intended to end the marriage reflected her state of mind and were admissible under Rule 803(3)); *see also State v. Holder*, 331 N.C. 462, 485, 418 S.E.2d 197, 210 (1992) (where the Court upheld admitted hearsay statements under the state of mind exception since they "tended to show the nature of the victim's relationship with defendant and the impact of defendant's behavior on the victim's state of mind prior to the murder").

[4] Next, defendant contends the trial court erred in admitting testimony concerning the victim's mental state on the day before her death. Defendant contends the testimonies of Geoff Austin and Barbara Powell, about the victim's emotional state, were "beyond the bounds of competent testimony."

Opinion testimony, including lay opinion testimony, is admissible concerning the state of a person's appearance or emotions on a given occasion. *See State v. Burke*, 343 N.C. 129, 153, 469 S.E.2d 901, 913, *cert. denied*, 519 U.S. 1013, 136 L. Ed. 2d 409 (1996) (holding that witness testimony that victim was "tense" and "scared of something" was admissible since it tended to show victim's state of mind at the time).

Austin, the victim's son, testified that his mother "seemed very quiet" and "somewhat withdrawn" when he spoke to her on the telephone the night before her death. Powell, the victim's friend and co-worker, testified that the victim seemed "pre-occupied" and "unusually quiet" on the day before her death. Both witnesses' testimonies tended to show the victim's state of mind and therefore defendant's argument is without merit.

[5] 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 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.

The State's evidence showed that the victim was stabbed eleven times with knives from the kitchen of the residence. There were no signs of forced entry, notwithstanding defendant's statement to the contrary about hearing footsteps in the residence. Money and other valuables were found on the kitchen table. There was evidence that the victim wanted the defendant to leave the residence and that she no longer wanted to be married. Additionally, the defendant on numerous occasions inquired as to the particulars of how an inmate murdered his girlfriend. Although the State's case centered around circumstantial evidence, a careful review of the record reveals that this evidence points to the defendant as the killer. Therefore, the evidence taken in the light most favorable to the State was sufficient to withstand defendant's motions to dismiss.

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

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

No error.

Judge SMITH concurs in the result with a separate opinion.

Judge TIMMONS-GOODSON joins in Judge SMITH'S concurring in the result opinion.

Judge SMITH concurring in result.

[6] I disagree with that portion of the majority opinion addressing N.C.G.S. § 8C-1, Rule 404(b) (1999) (Rule 404(b)). In relevant part, Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

As noted by the majority, "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.*" (emphasis added). I believe the evidence at issue herein elicited from defendant's ex-wives is relevant only to defendant's propensity to commit the crime, and I therefore disagree with that portion of the majority opinion which holds such evidence is admissible.

The trial court's findings stated that the evidence offered by defendant's ex-wives "indicates and reveals that at the time of the break-up of every marriage that the [d]efendant . . . has acted violently . . . upon receiving information from his spouse as to the said break-up." Defendant's first wife, Carolyn Aldridge, testified that near the end of their marriage in 1981 defendant "smacked" her four or five times and fired two shots from a pistol in her direction. Defendant's second wife, Elaine Coffey, testified that approximately two years after their 1983 marriage, defendant threw rocks at her and pointed a pistol at her when asked to leave her home.

The victim in this case, defendant's third wife, was stabbed eleven times on 17 May 1997. Simply put, the incidents involving defendant's ex-wives are not "sufficiently similar" to the murder in question as to

be relevant to any factor other than defendant's propensity towards violence. *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991) (test of admissibility is whether prior incidents are "sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in" N.C.G.S. § 8C-1, Rule 403 (1999)). Further, the incidents occurred over twelve years before the commission of the murder at issue, thus bringing into question whether the prejudicial effect of the ex-wives' testimony outweighs its probative value. *See id.*

Walker, J. cites *State v. Parker*, 113 N.C. App. 216, 224, 438 S.E.2d 745, 750-51 (1994) for the proposition that "[e]vidence of prior behavior following a rejection in a romantic relationship is admissible to prove motive and identity." However, in that case, Ms. Thomas, the witness offering the evidence in question, and Ms. Welborn, the murder victim,

> had rejected defendant in a relationship, [after which] defendant kept both women under constant surveillance; threatened to kill both women; threatened to commit suicide over both women; ran both women off the road with his vehicle; pulled weapons on both women; . . . stabbed Ms. Thomas,

id. at 225, 438 S.E.2d at 751; and shot and killed Ms. Welborn. The incident with Ms. Thomas took place five years before Ms. Welborn was murdered. *Id.* In the instant case, the incidents involving defendant's ex-wives and the victim took place over twelve years apart, and there are no similarities between the incidents other than defendant's general violent tendencies on learning of a break-up. Though the majority attempts to use the ex-wives' testimony to show identity, I believe the similarities are completely insufficient for this purpose.

Notwithstanding, I do not believe the trial court's error was so prejudicial to defendant that a different result would have been reached had the error not occurred. *See* N.C.G.S. § 15A-1443(a) (1999) (in order for error to be prejudicial, there must be a "reasonable possibility that, had the error in question not been committed, a different result would have been reached"); *see also State v. Jolly*, 332 N.C. 351, 363, 420 S.E.2d 661, 668 (1992) (though improper to admit evidence under Rule 404, error was not prejudicial to defendant). I therefore concur in the result.

Judge TIMMONS-GOODSON joins in the concurring opinion.

STATE OF NORTH CAROLINA v. ANTOINE DEPRAY JACKSON, DEFENDANT

No. COA99-393

(Filed 29 August 2000)

1. **Firearms and Other Weapons— possession by felon—inoperability—failure to instruct**

The trial court erred in a prosecution for possession of a firearm by a felon by failing to instruct on inoperability where defendant offered expert testimony that a spring and pin were missing from the pistol, that the gun was not normally operable in the condition in which the expert had received it, and that defendant would have had to alter the weapon manually to enable it to fire. Defendant's evidence raised the affirmative defense of inoperability and the trial court was thus obligated to address that defense in its charge to the jury.

2. **Firearms and Other Weapons— possession by felon—prior manslaughter conviction—stipulation only to felony conviction—rejected**

In a prosecution for carrying a concealed weapon, possession of a firearm by a felon, and resisting an officer that was reversed on other grounds, the trial court did not abuse its discretion and there was no plain error where the court admitted evidence of an earlier prior voluntary manslaughter conviction after rejecting defendant's tendered stipulation of a prior felony conviction which did not mention manslaughter. The interpretation of the federal Rule 403 in *Old Chief v. United States*, 519 U.S. 172, is not binding on our courts and that case can be distinguished in that defendant was not charged with any offenses similar to the prior conviction, thus reducing the potential of prejudice; nothing in the record reflects that the jury was told that defendant's prior conviction in any way involved use of a firearm; and N.C.G.S. § 14-415.1(b), which prohibits possession of a firearm by a felon, specifically provides that records of prior convictions of any offense shall be admissible.

Appeal by defendant from judgments entered 29 October 1998 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Robert C. Montgomery, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

JOHN, Judge.

Defendant appeals judgments entered upon convictions by a jury of carrying a concealed weapon, possession of a firearm by a convicted felon, and resisting a public officer. In pertinent part, defendant contends the trial court erred in portions of its jury instructions and in the admission of certain evidence. We award defendant a new trial on the possession of a firearm charge.

The State's evidence at trial tended to show the following: On 24 March 1998 at approximately 7:00 a.m., Charlotte-Mecklenburg Police Department (the Department) Officers Jeffrey Troyer (Troyer) and John Robert Garrett (Garrett) were dispatched to investigate a complaint of a man wearing a yellow jacket brandishing a gun into the air. Upon arriving at the scene, the officers noticed a man in a yellow jacket, later identified as defendant, and approached him from different directions.

Garrett asked defendant if he might talk with him. Defendant responded in the affirmative and Garrett stated he would first like to search defendant for weapons. Defendant agreed and during the search stated, "oh, you're looking for the guy that had the gun. I'll show you right where he's at." Garrett then requested that defendant raise his arms. As the latter complied, Troyer noticed a chrome-plated handgun in the waistband of defendant's pants. Troyer yelled, "gun," and was able to seize the weapon while Garrett held defendant's arms. Reaching for his handcuffs, Garrett advised defendant he was under arrest for carrying a concealed weapon. Defendant thereupon broke away and ran, but was apprehended after a brief chase.

Defendant did not testify, but called as a witness Todd Nordoff (Nordoff), a firearm and toolmark examiner with the Department Crime Laboratory. Nordoff testified he had examined a handgun, identified and admitted into evidence as the weapon recovered from defendant on 24 March 1998, and discovered it lacked an internal pin and spring. Nordoff stated the missing spring played an "integral" role in the chain reaction permitting the gun to fire, and that, absent the spring, the weapon "was not normally operable."

However, Nordoff further explained the gun could be fired by removing the grip, which Nordoff had done with a screwdriver, and manually tripping an internal mechanism. He also indicated the weapon could "possibl[y]" be fired "by hitting it hard on top of the weapon," but stated he had not attempted to do so. According to Nordoff, although he generally fired weapons being tested, he did not fire the handgun in question due to its unsafe condition.

The jury subsequently returned guilty verdicts as indicated above, and the trial court imposed a consolidated sentence of fifteen to eighteen months imprisonment on the concealed weapon and possession of a firearm convictions, and a consolidated suspended sentence of forty-five days on the resisting a public officer offense and defendant's plea of guilty to second degree trespass, the sentences to run consecutively. Defendant appeals.

[1] Defendant first contends the trial court erred by rejecting his written request that the court instruct the jury regarding the operability of the weapon at issue with reference to the offense of possession of a firearm by a felon. At the charge conference, the trial court stated it would not "instruct the[jury] that it's necessary [the gun] fire in order for it to be a handgun." The court further indicated:

> I will allow counsel in arguments to argue the point of operability on the question of whether or not this item constituted a handgun or a firearm.
>
> . . . I anticipate it's entirely possible that the jury will come back and ask the question in order for a gun to be a handgun does it have to be capable of firing.
>
> If the jury asks that question I'm going to instruct the jury substantially in the following manner: That is, members of the jury, the question of whether or not State's Exhibit Number 1 is a handgun is a question for you to decide. You are to decide whether or not that item is a handgun by its appearance and other characteristics based upon your examination of it in open court.

The jury was thereafter instructed at trial as follows:

> Now I charge that for you to find the defendant guilty of possessing a handgun after having been convicted of a felony the State must prove three things beyond a reasonable doubt; first,

> that on . . . October 15th, 1991 the defendant was convicted of the offense of voluntary manslaughter in Mecklenburg County Superior Court.
>
> . . . .
>
> Second, that thereafter the defendant possessed a handgun.
>
> . . . .
>
> And third, that this possession was not in the defendant's home or in his lawful place of business.

It is well settled that a trial court must instruct on all "substantive" or "material" features arising on the evidence and the law applicable thereto without a special request. *State v. Ward*, 300 N.C. 150, 155, 266 S.E.2d 581, 585 (1980) (failure to instruct on all substantive features of case "result[s] in reversible error"). Similarly, a

> defendant is entitled to have the jury consider and pass upon any and all defenses which arise upon the evidence, under proper instructions by the court.

State v. Faust, 254 N.C. 101, 111, 118 S.E.2d 769, 775 (no error in court's refusal to instruct on defense of accident and misadventure where evidence did not give rise to such defense), *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961).

N.C.G.S. § 14-415.1 (1999), prohibiting possession of firearms by convicted felons, provides:

> It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in [N.C.G.S. § 14-288.8(c) (1999)].

G.S. § 14-415.1(a).

A "firearm" is defined by N.C.G.S. § 14-409.39(2) (1999), as "[a] handgun, shotgun, or rifle which expels a projectile by action of an explosion." As with any essential element of a criminal offense, the State has the burden of proving beyond a reasonable doubt that the object possessed by a defendant charged under G.S. § 14-415.1(a) is indeed a "firearm." *See State v. McNeill*, 78 N.C. App. 514, 517, 337

S.E.2d 172, 174 (1985) (under G.S. § 14-415.1, State required to prove defendant possessed handgun), *disc. review denied*, 316 N.C. 383, 342 S.E.2d 904 (1986).

In *State v. Baldwin*, 34 N.C. App. 307, 237 S.E.2d 881 (1977), the defendant also was charged with possession of a firearm by a felon in violation of G.S. § 14-415.1, *id.* at 308, 237 S.E.2d at 881. Arguing the State was required to prove the weapon was operable in order to sustain a conviction under the statute, *id.*, the defendant cited cases from other jurisdictions construing similar statutes as intimating that "guns incapable of being fired were not 'firearms' within the meaning of th[os]e statutes," *id.* at 309, 237 S.E.2d at 882 (citing *Commonwealth v. Layton*, 307 A.2d 843, 844 (Pa. 1973) (statute "obviously intended to cover only objects which could cause violence by firing a shot")).

This Court distinguished the cited authorities by noting there was "uncontroverted evidence in each case that the gun[s] . . . w[ere] inoperable," *id.*, whereas in the case under consideration there had been no evidence of inoperability, *id.* In the absence of evidence of inoperability, we held the case was properly submitted to the jury. *Id.*; *see also Layton*, 307 A.2d at 844 (absent evidence of inoperability, fact finder may "infer operability from an object which looks like, feels like, sounds like or is like, a firearm").

In *State v. Fennell*, 95 N.C. App. 140, 382 S.E.2d 231 (1989), the defendant, convicted of possession of a "weapon of mass death and destruction" in violation of G.S. § 14-288.8, asserted the State was required to prove operability of the disassembled sawed-off shotgun in his possession as an element of the offense and that the trial court erred in failing to instruct that the shotgun could not be considered a "weapon" under the statute because it could not fire. *Fennell*, 95 N.C. App. at 141, 382 S.E.2d at 233. Initially, we noted G.S. § 14-288.8 excludes devices "not likely to be used as a weapon," *id.*, and therefore devices

> lose their status as weapons of mass death and destruction once they are found to be totally inoperable and incapable of being readily made operable.

Fennell, 95 N.C. App. at 144-45, 382 S.E.2d at 233.

Then, considering which party had the burden of proof concerning operability, we held that "operability is not an element of the crime to be proven by the State . . . [but] is, rather, an affirmative

defense," *id.* at 145, 382 S.E.2d at 233, and noted that "[t]hough this issue is one of first impression in this state, our holding is consistent with *State v. Baldwin*," *id.*

Specifically, we stated:

> In *Baldwin*, the defendant was charged with violating Section 14-415.1 . . . [and] we held that when the defendant fails to produce any evidence of *inoperability*, the State does not have to submit evidence of *operability*. Given that the statute [G.S. § 14-415.1] in question in *Baldwin* and the one at issue here [G.S. § 14-288.8] are materially the same, it logically follows that the burden of proof regarding inoperability of a weapon of mass death and destruction falls on the defendant.

Id. at 145, 382 S.E.2d at 233-34. We concluded the defendant had failed to meet his burden because he "simply rais[ed] the issue of potential inoperability" and offered no evidence or testimony to support such assertion. *Id.* at 145, 382 S.E.2d at 234.

Based upon *Baldwin* and *Fennell*, it is apparent inoperability constitutes an affirmative defense in a prosecution under G.S. § 14-415.1(a). *See id.* at 145, 382 S.E.2d at 233 ("operability is not an element of the crime to be proven by the State . . . [but] is, rather an affirmative defense"). As with all affirmative defenses, the burden, both of production and persuasion, rests at all times with the defendant. *State v. Hageman*, 307 N.C. 1, 27, 296 S.E.2d 433, 448 (1982). Finally, upon a defendant's presentation of evidence of the affirmative defense of inoperability, the trial court must subsequently instruct the jury regarding the effect of such evidence, with or without request. *See State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) ("[i]t is the duty of the [trial] court to charge the jury on all substantial features of the case arising on the evidence without special request . . . [a]nd all defenses presented by defendant's evidence are substantial features"; therefore, where defendant offered evidence of self-defense, trial court was required to instruct jury thereon) (citations omitted).

In re Cowley, 120 N.C. App. 274, 461 S.E.2d 804 (1995) reiterated the principles established in *Baldwin* and *Fennell* to distinguish "N.C. Gen. Stat. § 14-269.2(b) which makes it a felony to carry a firearm on educational property," *id.* at 274-75, 461 S.E.2d at 805, from, *inter alia*, G.S. § 14-415.1 and G.S. § 14-288.8, *id.* at 275, 461 S.E.2d at 805-06.

The defendant in *Cowley* argued operability was necessary for conviction under G.S. § 14-269.2(b), asserting

> North Carolina courts have interpreted three other criminal firearm statutes [including G.S. § 14-415.1 and G.S. § 14-288.8] as requiring operable weapons . . . to constitute a violation.

Id. at 275, 461 S.E.2d at 805.

However, we held G.S. § 14-269.2(b)

> [wa]s distinguishable from the[cited] statutes and d[id] not require that a gun be operable in order to establish a violation . . . .
>
> . . . [G.S.] § 14-269.2(b) states it is illegal to carry *any gun* on school property. [G.S.] § 14-288.8(c) is markedly different because it deals with "weapon[s] of mass death and destruction," going into great detail to define these weapons[, and because t]he focus of [G.S.] § 14-288.8 is considerably different from the concept of *any gun* used in [G.S.] § 14-269.2(b). Finally, [G.S.] § 14-415.1(a) prevents a convicted felon from . . . possessing "any handgun . . . with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction . . . ." We also find this statute encompasses a narrow range of guns, while [G.S.] § 14-269.2(b) prohibits *any gun* . . . .

Id. at 275, 461 S.E.2d at 805-06.

Finally, we concluded, "[p]ublic policy favors that [G.S.] § 14-269.2(b) be treated differently from the other firearm statutes," *id.* at 276, 461 S.E.2d at 806, which

> are concerned with the increased risk of endangerment, while the purpose of [G.S.] § 14-269.2(b) is to deter students and others from bringing any type of gun onto school grounds. The question of operability is not relevant [under G.S. § 14-269.2(b)] because [its] focus . . . is the increased necessity for safety in our schools.

Id.

Sub judice, defendant offered testimony by Nordoff, an expert in the field of firearm and toolmark examination, who examined the weapon at issue. Nordoff discovered "a spring and a pin missing inter-

nally in the pistol," and testified the missing spring played an "integral" role in the chain reaction necessary to fire the gun. Nordoff noted the weapon's firing "mechanism did not operate normally" because the gun never fired when he "pulled the trigger." He removed the grip with a screwdriver and was then able to move the mechanism manually so that it operated properly and could be fired. Nordoff also related the possibility that the gun might fire by "hit[ting] it hard enough" on top, but stated he had not attempted such method. Nordoff testified that the gun was "not normally operable" in the condition he received it, and that defendant would have had to alter the weapon manually, as Nordoff had done after removing the grip with a screwdriver, to enable it to fire.

Defendant's evidence thereby raised the affirmative defense of inoperability, *see Baldwin*, 34 N.C. App. at 309, 237 S.E.2d at 882, and *Fennell*, 95 N.C. App. at 145, 382 S.E.2d at 233, though not so completely as to foreclose consideration by the jury. The trial court was thus obligated to address such defense in its charge to the jury. *See Dooley*, 285 N.C. at 163, 203 S.E.2d at 818. In failing to instruct on inoperability under the circumstances *sub judice*, therefore, the trial court erred and defendant is entitled to a new trial on the charge of possession of a firearm by a convicted felon. *See Ward*, 300 N.C. at 155, 266 S.E.2d at 585.

[2] Because it is likely to recur on retrial, we also address defendant's contention that the trial court erred in admitting evidence of an earlier prior voluntary manslaughter conviction. Prior to trial, defendant offered to "stipulate that [he] . . . was on the date in question a convicted felon" under G.S. § 14-415.1, and requested that the jury be instructed on the stipulation without mention of the voluntary manslaughter conviction. The State rejected defendant's offer, stating it had

> alleged a prior felony conviction in the indictment . . . [and a]s part of the evidence [it] can bring that out and present that as an element of proving the crime.

The trial court declined to accept defendant's tendered stipulation, and thereafter allowed the State to introduce and publish to the jury a certified copy of the judgment and commitment reflecting that defendant had been found guilty of voluntary manslaughter on 15 October 1991. Subsequently, the State in its closing argument and the trial court in its jury instructions reiterated that defendant had been convicted of voluntary manslaughter.

Initially, we note defendant has failed to preserve this issue for appellate review. *See* N.C.R. App. P. 10(b)(1) (to preserve question for appellate review, defendant "must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make"). Defendant interposed no objection to the trial court's rejection of his proffered stipulation, nor to the court's jury charge or the prosecutor's argument reiterating the prior conviction.

Notwithstanding, on appeal defendant has "specifically and distinctly allege[d]" that admission of his prior conviction in lieu of the tendered stipulation constituted plain error, *State v. Alston*, 131 N.C. App. 514, 517, 508 S.E.2d 315, 318 (1998) ("where a party has not preserved a question for review, he must specifically and distinctly allege that the trial court's action amounted to plain error in order to have the error reviewed on appeal"), thereby allowing our review under N.C.R. App. P. 10(c)(4) (question not preserved at trial in criminal case "may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error").

Although the "plain error" rule permits appellate review of assignments of error not otherwise preserved for appellate review, *see State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983), the rule is to be applied

> "cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error,' "

id. (citation omitted).

> [I]n order to prevail under the plain error rule, defendant must convince this Court that (1) there was error and (2) without this error, the jury would probably have reached a different verdict.

State v. Najewicz, 112 N.C. App. 280, 294, 436 S.E.2d 132, 141 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

Defendant contends the trial court should have enforced his proffered stipulation and excluded evidence concerning his prior conviction because, although relevant, "the probative value of . . . [such evidence] was substantially outweighed by the danger of unfair prejudice." *See* N.C.G.S. § 8C-1, Rule 403 (1999) (Rule 403)

("[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"). Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986), and the court's ruling may be reversed under such standard only upon a showing that it could not have been the result of a reasoned decision, *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

Defendant relies upon *Old Chief v. United States*, 519 U.S. 172, 136 L. Ed. 2d 574 (1997). The defendant in *Old Chief* was charged with possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1) (1994). *Id.* at 174, 136 L. Ed. 2d at 584; *see* 18 U.S.C. § 922(g)(1) (unlawful for any person "convicted in any court of . . . a crime punishable by imprisonment for a term exceeding one year" to possess a firearm). The defendant offered to stipulate or admit his "felon" status in order to preclude introduction of evidence he had been convicted of assault causing serious bodily injury. *Old Chief*, 519 U.S. at 175, 136 L. Ed. 2d at 585; *see also* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 198 (5th ed. 1998) (judicial admission "is a formal concession made by a party (usually through counsel) in the course of litigation for the purpose of withdrawing a fact or facts from the realm of dispute," and may be made "by stipulation entered into before or at trial"). As in the case *sub judice*, the government rejected the offer, the trial court declined to enforce it, the evidence was introduced, and the defendant was convicted of the firearm offense. *Old Chief*, 519 U.S. at 177, 136 L. Ed. 2d at 585-86.

The United States Supreme Court ultimately reversed the conviction, holding that although the prior conviction was relevant to the charged offense because it accorded the defendant the legal status of a felon under 18 U.S.C. § 922(g)(1), *id.* at 178-79, 136 L. Ed. 2d 586-87, the probative value of the nature of the conviction was substantially outweighed by the danger of unfair prejudice under Fed. R. Evid. 403, *id.* at 191, 136 L. Ed. 2d at 595.

Acknowledging that prosecution of a criminal offense requires "evidentiary depth to tell a continuous story," *id.* at 190, 136 L. Ed. 2d at 593, and that as a general matter,

> a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the [prosecution] chooses to present it,

id. at 186-87, 136 L. Ed. 2d at 592; *see* 2 Broun, § 198 ("a stipulation or admission by the defendant cannot limit the State's *right* to prove all essential elements of its theory of the case"), the United States Supreme Court concluded such principles have

> virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him,

Old Chief, 519 U.S. at 190, 136 L. Ed. 2d at 593-94; *see also* Kathryn Cameron Walton, Note, *An Exercise In Sound Discretion: Old Chief v. United States*, 76 N.C.L. Rev. 1053, 1061 (1998) (*Old Chief* effectively "transcended the general rule that permits the prosecution to choose the evidence it will use to prove its case").

The official commentary to Rule 403 indicates our Rule 403 is identical to the federal Rule 403 applied in *Old Chief*. Rule 403 commentary. "[N]evertheless[, we] are not bound by the United States Supreme Court's holding in *Old Chief*." *State v. Faison*, 128 N.C. App. 745, 747, 497 S.E.2d 111, 112 (1998); *see also State v. Lamb*, 84 N.C. App. 569, 580, 353 S.E.2d 857, 863 (1987) (non-constitutional decision of United States Supreme Court "cannot bind or restrict how North Carolina courts interpret and apply North Carolina evidence law"), *aff'd*, 321 N.C. 633, 365 S.E.2d 600 (1988). In any event, we are not required to reject the holding of *Old Chief* because the facts therein are distinguishable from those herein.

In reversing the defendant's conviction in *Old Chief*, the Supreme Court emphasized that

> [w]here a prior conviction was for a gun crime . . . the risk of unfair prejudice would be especially obvious, and [defendant] sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, would take on added weight from the related assault charge against him.

Old Chief, 519 U.S. at 185, 136 L. Ed. 2d at 591. According to the United States Supreme Court, therefore, the danger of prejudice in *Old Chief* was "substantial[]," *id.* at 191, 136 L. Ed. 2d at 595; *see also* Rule 403, in that the defendant was charged, in addition to the possession of a firearm offense, with assault with a deadly weapon, an offense substantially similar to the crime of which he had been

previously convicted and upon which the government relied to establish his status as a "felon," *Old Chief*, 591 U.S. at 185, 136 L. Ed. 2d at 591.

By contrast, defendant herein was not charged with any attendant offenses similar to his prior conviction of voluntary manslaughter, thus reducing the potential of prejudice in comparison to *Old Chief*. Further, nothing in the record reflects the jury was informed defendant's prior conviction in any way involved use of a firearm.

In addition, we note that our statute prohibiting possession of a firearm by a convicted felon specifically provides as follows:

> When a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in the courts of any other state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section.

G.S. § 14-415.1(b). No similar provision may be found in the statute at issue in *Old Chief*. *See* 18 U.S.C. § 992.

In that our courts are not bound by *Old Chief*, *see Faison*, 128 N.C. App. at 747, 497 S.E.2d at 112, and in light of the foregoing distinctions between the circumstances in the present case and those in *Old Chief*, we are unable to say either that the trial court's decision to comply with G.S. § 14-415.1(b) and allow documentary evidence of defendant's prior felony conviction, notwithstanding defendant's tendered stipulation, or that the court's determination that the danger of unfair prejudice did not "substantially" outweigh the probative value of such evidence, *see* Rule 403, "could not have been the result of a reasoned decision," *Thompson*, 314 N.C. at 626, 336 S.E.2d at 82. The trial court therefore did not abuse its discretion in its ruling and defendant's assertion of error, much less "plain error," is unavailing. *See Najewicz*, 112 N.C. App. at 294, 436 S.E.2d at 141 (defendant must prove not only error, but also that without the error, "jury would probably have reached a different verdict"); *see also Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (claimed "plain" error must be a " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' " or a "'grave error which amounts to a denial of a fundamental right of the accused' ") (citations omitted).

Finally, defendant asserts "plain error" with reference to the charge of resisting a public officer. Suffice it to state we perceive no

"plain error" as alleged by defendant in the trial of that offense, but reverse and remand for a new trial defendant's conviction on the charge of possession of a firearm by a felon.

New trial in part; no error in part.

Judges LEWIS and EDMUNDS concur.

IN THE MATTER OF: JEREMY BRIM

No. COA99-1230

(Filed 29 August 2000)

1. Termination of Parental Rights— findings and conclusions—written order—recitation in open court

The trial court did not err in a parental rights termination case by including two findings in its written order that were not included in the trial court's recitation of its decision in open court, because: (1) N.C.G.S. § 7A-651 does not require the trial judge to announce in open court its findings and conclusions, but instead the terms of the disposition must be stated with particularity; (2) the two pertinent findings relate to the adjudication by the trial court under N.C.G.S. § 7A-289.32 to show that grounds for termination of respondent mother's parental rights existed at the time of the hearing, and do not relate to the court's disposition under N.C.G.S. § 7A-289.31; and (3) the order entered by the trial court is in general conformity with the disposition announced in open court.

2. Evidence— lay opinion—psychiatrist

Although the trial court erred in a parental rights termination case by considering certain letters written by one of respondent mother's treating psychiatrists who was not tendered as an expert witness stating that respondent had experienced micro psychotic episodes since it was a medical diagnosis beyond the allowable scope of testimony by a non-expert medical witness under N.C.G.S. § 8C-1, Rule 701, the error was not prejudicial because: (1) there is no indication that the trial court relied on opinions in the letter to support its conclusion that grounds existed at the time of the termination hearing to terminate respondent's

parental rights; and (2) there was substantial lay and medical evidence to support the findings of fact and conclusions of law.

3. Termination of Parental Rights— grounds—clear, cogent, and convincing evidence

The trial court did not err by finding that grounds existed under N.C.G.S. § 7A-289.32(2), (3), (4), and (7) to terminate respondent mother's parental rights, because there was clear, cogent, and convincing evidence that respondent's neglectful conduct continued and existed at the time of the termination hearing.

4. Termination of Parental Rights— best interests of child

The trial court did not abuse its discretion in its determination that it would be in the best interest of the child to terminate respondent mother's parental rights, because even though there was testimony that there was a reasonable hope that the family could be reunited, the evidence tended to show that after almost two years of diligent efforts by DSS, respondent was not able to demonstrate that she could adequately provide for the needs of the child.

Appeal by respondent mother from a judgment entered 8 October 1998 by Judge Laurie Hutchins in Forsyth County District Court. Heard in the Court of Appeals 6 June 2000.

Merri Elizabeth Mueller (respondent) appeals from a judgment terminating her parental rights to Jeremy Brim, her minor child. Upon finding that grounds existed under N.C. Gen. Stat. § 7A-289.32(2), (3), (4), and (7) to terminate respondent's parental rights, the trial court concluded that it was in the best interest of the child to terminate her parental rights.

At the termination hearing, the Forsyth County Department of Social Services (DSS) presented evidence which tended to show that Merri Mueller has been diagnosed with borderline personality disorder for which her doctors have prescribed medication. Jeremy was born on 8 November 1995 to respondent and Peter Brim. However, Mr. Brim lived with respondent and the child less than one month. Subsequent to Mr. Brim's departure, respondent's boyfriend, Robert Roy Evans, came to live with respondent and Jeremy.

In March 1996, the child was taken to the hospital and diagnosed with a spiral fracture of his upper arm. Jeremy was in the care of his

mother at the time of the injury. DSS was notified that the cause of the injury was determined to be some sort of trauma that could not have been self-inflicted. From March 1996 until mid-July 1996, DSS worked with respondent on a voluntary basis. On 18 July 1996, DSS filed a petition alleging that Jeremy was a neglected child and the court ordered him placed in the non-secure custody of DSS until the adjudication of the matter.

At the adjudicatory hearing held 18 December 1996, the trial court concluded that Jeremy was neglected within the meaning of N.C. Gen. Stat. § 7A-517(21), and ordered that he remain in the custody of DSS. In an effort to facilitate reunification of the child with respondent, the court also ordered that respondent demonstrate an ability to control her anger. The trial court further ordered that respondent continue in individual therapy in order to help her focus on the needs of the child, rather than her own needs; that respondent learn to protect the child from violence in the home; that respondent take her medication as prescribed; and that respondent become able to maintain her basic household expenses. Respondent was also ordered to refrain from harassing Jeremy's caretakers and others involved with the case, to attend all of the child's pediatric appointments, and to enter into a written plan with objectives aimed at establishing a permanent plan for her child.

Review hearings were held in January, September and December of 1997. At these hearings respondent was ordered to attend Structural Family Therapy with her boyfriend in order to address various issues, including violence in their relationship; adhere fully to the items specified in the prior service agreement; pay child support of $127.00 each month (later reduced to $63.50 each month); and cooperate with extensive family evaluation in order to assess her ability to raise Jeremy. On 27 April 1998, DSS filed a petition to terminate the parental rights of respondent and Peter Brim.

At the termination hearing, Mr. Brim voluntarily relinquished his parental rights. DSS offered testimony regarding respondent's level of cooperation and behavior during the period it offered services to respondent. Ms. Suzette Hager, a social worker with the Forsyth County Department of Social Services, testified that, although respondent loved Jeremy, respondent continued to be unable to apply things learned in parenting class to her interactions with the child. Despite Ms. Hager's efforts, respondent's home was not child-proofed. Ms. Hager also stated that respondent focused more on herself than on the child, became frustrated with the child during vis-

itations, was not aware of the child's "cues" such as indications that he did not need to be fed, and had difficulty controlling Jeremy's behavior. Ms. Hager further testified that respondent had exhibited belligerent and threatening behavior towards her. She noted that Jeremy had been in foster care for 23 months at the time of the termination hearing and was bonded with his foster family. Ms. Hager recommended that respondent's parental rights be terminated despite her love for her son because she could not provide an appropriate home for him.

Various psychiatrists and psychologists who treated or evaluated Ms. Mueller also testified. Dr. Chad Stevens, one of respondent's treating psychiatrists, testified that he had difficulty keeping respondent on medication to treat her condition because she would either refuse to take the medication or she would independently decide to quit taking it. Dr. Stevens further testified that respondent made threats against both him and DSS employees.

Dr. Howard T. Bosworth, an expert in clinical psychology, conducted a child custody evaluation. He noted that respondent has difficulty comprehending Jeremy's level of development. Dr. Bosworth further testified that his primary concern was respondent's level of stability and her ability to maintain any stability. He questioned whether respondent could stay on medication without supervision. His ultimate opinion was that respondent is not capable of providing for the general welfare and supervision of Jeremy and that the incapacity would not significantly change in the foreseeable future.

Dr. Frank B. Wood, an expert in neuropsychology, conducted a series of tests on Ms. Mueller as part of a psychological evaluation. He testified that in his opinion a child left in the care of respondent would be at risk. His opinion was based in part on his finding that respondent has a tendency to act out hostility and aggression, so that pharmacological treatment would be required for the foreseeable future. Dr. Wood also testified that he believed respondent to be a danger to anyone who made her angry.

Upon consideration of all the evidence presented, the trial court determined that grounds existed to terminate the parental rights of respondent, and that it would be in the best interest of the child that respondent's parental rights be terminated. Respondent appealed.

Forsyth County Department of Social Services, by Assistant County Attorney Theresa A. Boucher, for petitioner appellee.

Lisa S. Costner for Merri Mueller respondent appellant.

Teeter Law Firm, by Kelly S. Lee, for Guardian ad Litem respondent appellee.

HORTON, Judge.

Respondent contends that (I) the written termination order contained certain findings of fact not stated by the trial court in its oral entry of the order in open court; (II) grounds did not exist to terminate her parental rights; (III) termination of her parental rights was not in the best interest of the child; and (IV) certain letters written by Dr. Chad Stevens were erroneously received and considered as evidence. After careful consideration of the entire voluminous record, we affirm the judgment of the trial court.

We note initially that the North Carolina Juvenile Code, including provisions relating to the termination of parental rights, was extensively revised and renumbered as Chapter 7B of our General Statutes, effective 1 July 1999. 1998 N.C. Sess. Laws ch. 202. The petition for termination of parental rights in the case before us was filed on 27 April 1998, prior to the effective date of the revisions. Therefore, all references in this opinion are to the provisions of Chapter 7A then in effect.

I.

[1] First, respondent argues that the written order terminating her parental rights contains language not included in the trial court's recital in open court of his decision in this matter. Here, after a detailed recital in open court of its findings, which consumed more than 25 pages of the transcript, the trial court concluded that "grounds exist pursuant to N.C.G.S. § 7-A-289.32 [sic] to terminate parental rights under parens (2), (3), (4), (5), and (7)," and further concluded that termination was in the best interest of the child. The written order entered by the trial court contained a similar dispositional provision, and its detailed written order generally conforms with the oral statements made by the trial court.

Respondent argues, however, that the written order signed and entered by the trial court contained at least two findings not recited in open court. First, Finding of Fact No. 14 in the written order stated

in part that "[s]ince December 18, 1996, Merri Mueller has continued to neglect Jeremy Brim by failing to complete the terms of the Juvenile Court's Order which was specifically designed to alleviate the conditions which brought the child into foster care and facilitate reunification." Second, Finding of Fact No. 62 in the written order stated that "[p]lacement of Jeremy Brim into the care of Mary [sic] Mueller would result in a probability of a repetition of neglect."

Respondent argues that by adding additional findings to the oral recital of its order, the trial court violated N.C. Gen. Stat. § 7A-651, which provides that in juvenile cases the

> dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The judge shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

N.C. Gen. Stat. § 7A-651 (1995). We have previously held that this statute "does not require the trial judge to announce in open court his findings and conclusions . . . ." Instead, "the *terms* of the disposition [must] be stated in open court with 'particularity.' " *Matter of Bullabough*, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988).

Having carefully reviewed both the oral and written versions of the trial court's termination order, we hold that the trial court did not err. First, the findings about which respondent complains relate to the *adjudication* by the trial court pursuant to the provisions of N.C. Gen. Stat. § 7A-289.32 (1995) that grounds for termination of respondent's parental rights existed at the time of the hearing, not to the court's *disposition* pursuant to N.C. Gen. Stat. § 7A-289.31. N.C. Gen. Stat. § 7A-561 (1995), on which respondent relies, is a part of Article 41 of Chapter 7A and relates to dispositional orders entered in cases where juveniles have been adjudicated to be delinquent, undisciplined, abused, neglected, or dependent. Article 24B of Chapter 7A dealt with proceedings to terminate parental rights.

In support of her position, respondent cites *In re Bullabough*, but *Bullabough* involved a juvenile adjudicated to be delinquent, not a termination of parental rights. Even assuming, however, that N.C. Gen. Stat. § 7A-561 applied to the entry of dispositional orders in termination cases, the order entered by the trial court in this case is in

general conformity to the disposition announced in open court. At all relevant times, N.C. Gen. Stat. § 7A-289.31(a) entitled "Disposition," provided that

> [s]hould the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

Unlike N.C. Gen. Stat. § 7A-651, there is no requirement in N.C. Gen. Stat. § 7A-289.31(a) that the court orally state "with particularity" the exact terms of the disposition.

Here, following a lengthy and complicated termination trial with a transcript of more than 1,000 pages, the able trial court weighed the evidence, then recited forty detailed findings of fact in open court, made conclusions of law, and decreed the termination of respondent's parental rights. The written order later entered does not differ in substance from that announced in open court. This assignment of error is overruled.

II.

[2] Next, respondent assigns error to the trial court's consideration of certain letters written by Dr. Chad Stevens, a Resident in Psychiatry at Baptist Hospital. Respondent argues that the letters contained opinions that should not have been considered by the court because Dr. Stevens was not tendered as an expert witness. Specifically, respondent challenges Finding of Fact No. 16 in the Order terminating respondent's parental rights, in which the trial court stated that

> [a]t a periodic review hearing on January 23, 1997, Court reviewed a letter from Dr. Stevens, Ms. Mueller's psychiatrist on her progress. Dr. Stevens noted that she had to move out of her home, and had become agitated, and claimed she was being abused by a wide variety of people. Several "micro psychotic" incidents occurred where there was impaired reality, poor judgment, and that she really believed she was being abused.

Respondent argues that Rule 701 of the N.C. Rules of Evidence limits the scope of testimony given by one not tendered as an expert to that "(a) rationally based on the perception of the witness and (b)

helpful to a clear understanding of his testimony . . . ." N.C. Gen. Stat. § 8C-1, Rule 701 (1992). Respondent argues that Dr. Stevens' statement in his letter of 19 January 1997 (the letter) that respondent had experienced "micro psychotic" episodes was a medical diagnosis beyond the allowable scope of testimony by a non-expert medical witness.

A careful review of the record and transcript in this case reveals that Dr. Stevens' 19 January 1997 letter was received in evidence by the trial court at the 23 January 1997 review hearing. Following the 23 January 1997 hearing, Judge Spivey orally entered an Order which was reduced to writing and signed by him on 3 February 1997. Judge Spivey's Order recited, in part, that "[t]he Court received a letter from Dr. Chad Stevens, [respondent's] psychiatrist as to her progress." There is no indication in the record that there was any objection to Judge Spivey's consideration of the letter from Dr. Stevens.

Further, Dr. Stevens identified the letter, marked as Petitioner's Exhibit 5, during his testimony at the termination hearing, and recalled that the letter was prepared by him at the request of Mr. Elliott, then counsel for respondent. Respondent objected to the introduction of the letter into evidence on the grounds that Dr. Stevens had not been qualified as an expert, to which counsel for petitioner responded that the trial court had already agreed to take judicial notice of everything in the juvenile court file. Based on the statement of counsel for petitioner the trial court allowed the letter to be introduced into evidence. However, nothing in the transcript of the proceedings below indicates that the trial court agreed to take notice of the entire juvenile file. It appears, therefore, that the trial court erroneously admitted the January 1997 letter from Dr. Stevens based on a misstatement by counsel for petitioner. We do not agree, however, that the error was prejudicial in this case.

Apparently, it is not disputed that Dr. Stevens' letter of 19 January 1997, admitted as Petitioner's Exhibit Number 5, is authentic and was admitted into evidence at the 23 January 1997 review hearing. The trial court merely summarized the contents of the letter in its termination order, as a part of its meticulous recitation of the history of the case. There is no indication, however, that the trial court relied on opinions in the letter to support its conclusion that grounds existed *at the time of the termination hearing* to terminate respondent's parental rights. Further, there was substantial lay and medical evidence in the record to support the findings of fact and conclusions of law made by the trial court. Therefore, even assuming the trial court

erred in the admission of Dr. Stevens' 19 January 1997 letter, we cannot find that the error was prejudicial to respondent in light of the overwhelming evidence supporting the trial court's decision. Thus, this assignment of error is overruled.

III.

[3] Respondent next argues that the trial court erred in finding that grounds existed to terminate her parental rights. Termination of parental rights is a two-stage proceeding. At the adjudication stage the petitioner must show by clear, cogent and convincing evidence that grounds exist to terminate parental rights. *In Re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997). If one or more of the grounds listed in N.C. Gen. Stat. § 7A-289.32 are shown, then the court moves to the dispositional stage "to determine whether it is in the best interest of the child to terminate the parental rights." *Id.* at 247, 485 S.E.2d at 615.

Here, the trial court found that grounds existed under N.C. Gen. Stat. § 7A-289.32(2), (3), (4) and (7) to terminate respondent's parental rights to Jeremy. N.C. Gen. Stat. § 7A-289.32 (1995). We must first determine whether there is clear, cogent and convincing evidence establishing one or more of these statutory grounds before we review the trial court's disposition.

N.C. Gen. Stat. § 7A-289.32 provides that

> [t]he court may terminate the parental rights upon a finding of one or more of the following:
>
> * * * *
>
> (2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 7A-517(1), or a neglected child within the meaning of G.S. 7A-517(21).

N.C. Gen. Stat. § 7A-289.32(2) (1995). "Neglect" is defined in N.C. Gen. Stat. § 7A-517(21) (1995) as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's

> welfare; or who has been placed for care or adoption in violation of law.

Id.

"[A] prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In Re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). However, such prior adjudication, standing alone, will not suffice where the natural parents have not had custody for a significant period prior to the termination hearing. *Id.* Therefore, the court must take into consideration "any evidence of changed conditions in light of the evidence of prior neglect and *the probability of a repetition of neglect.* The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding.*" *Id.* at 715, 319 S.E.2d at 232 (citation omitted) (first emphasis added).

In this case the trial court specifically found that

> 14. Merri Mueller has neglected Jeremy Brim. On December 18, 1996, Jeremy Brim was adjudicated to be a neglected child within the meaning of G.S. 7A-517(21). Since December 18, 1996, Merri Mueller has continued to neglect Jeremy Brim by failing to complete the terms of the Juvenile Court's Order which was specifically designed to alleviate the conditions which brought the child into foster care and facilitate reunification. Ms. Mueller has:
>
> a.) Failed to demonstrate an ability to control her anger,
>
> b.) Failed to refrain from harassing her child's caregivers and using law enforcement in an inappropriate manner,
>
> c.) Failed to utilize the concepts learned in Structured Family therapy to insure a stable home environment for Jeremy Brim to return,
>
> d.) Failed to maintain suitable stable housing free of the risk of eviction,
>
> e.) Failed to maintain full-time employment,
>
> f.) Failed to demonstrate financial responsibility,
>
> g.) Failed to focus on and provide for Jeremy's needs,

h.) Failed to visit with the child on a regular visitation schedule,

i.) Failed to provide the Department of Social Services with the names of any relatives who could provide care for Jeremy,

j.) Failed to pay court ordered child support for the care and maintenance of Jeremy Brim.

These findings are fully supported by the evidence of record. The testimony of Drs. Stevens, Bosworth and Wood corroborate the trial court's finding regarding respondent's anger management skills. Testimony received from Mr. Robert Evans, respondent's live-in boyfriend, supports the court's finding regarding the financial situation of respondent. Mr. Evans testified that at the time of the hearing he and respondent were living at a motel; that they had been involved in arguments that developed into physical encounters before, during, and after undergoing Structural Family Therapy; and that he believed their living situation was worse at the time of the hearing than it was when the child was removed from the home because they had no secure place to live and no means of transportation.

Ms. Hager of DSS testified that respondent continued to harass Jeremy's caretakers, failed to demonstrate financial responsibility, could not focus properly on Jeremy's needs, missed scheduled visitations, and did not keep DSS informed of changes in her circumstances. Evidence that respondent's neglectful conduct continued, and existed *at the time of the termination hearing*, complied with the *Ballard* decision. *See also In Re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997).

In light of our holding that the trial court did not err in finding that grounds exist to terminate respondent's parental rights under N.C. Gen. Stat. § 7A-289.32(2), we need not discuss the remaining three grounds for termination asserted by petitioner.

IV.

[4] Finally, respondent assigns error to the trial court's determination that it would be in the best interest of the child to terminate respondent's parental rights. Even though the trial court found that one or more grounds existed which would warrant termination of respondent's parental rights, the trial court was not required to terminate her rights if the best interest of the child dictated otherwise. N.C. Gen.

Stat. § 7A-289.31 (1995); *In Re Becker*, 111 N.C. App. 85, 431 S.E.2d 820 (1993); *In Re Smith*, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982) (stating that the best interest of the child is paramount).

Respondent offered the testimony of Dr. Nawar M. Alnaquib, who testified as an expert in general medicine and psychiatry, pediatrics and child development. Dr. Alnaquib testified that she had been treating respondent since October 1997, that respondent was diagnosed with borderline and personality disorder, and that she treated respondent by changing her medication. Dr. Alnaquib testified that respondent had shown improvement over the course of treatment, and opined that if respondent remained compliant with her medication and therapy regimen, and if respondent was given a good support system, she could care for Jeremy. Dr. Alnaquib testified that respondent had not developed a close relationship with Jeremy, and recommended that the proceeding be delayed for that purpose. Dr. Alnaquib's supervisor, Dr. Wayne Denton, testified that with medication, therapy, and a support group, respondent could maintain a job and raise a family.

Respondent argues that, because of the improvements noted by Dr. Alnaquib, the court should have found that there was a "reasonable hope" that the family could be reunited. However, we cannot say that the trial court abused its discretion in ordering the termination of respondent's parental rights. While we are mindful of the perceived improvements in respondent's mental condition, we are also mindful that the evidence tended to show that after almost two years of diligent efforts by DSS, respondent was not able to demonstrate that she could adequately provide for the needs of Jeremy. We find particularly relevant the testimony of Ms. Jane Malpass and the findings based thereon.

Ms. Malpass is contractually employed by the North Carolina Division of Social Services as a Child Welfare Consultant, and testified as an expert in child development, child development permanency planning, foster care placement and social work practice. She testified to the diligent efforts of DSS to reunite respondent with her child. Ms. Malpass also testified regarding the effect of any further delay on a permanent placement of young Jeremy, given his age and close bond to his foster family. She stated that further delay would be detrimental because children Jeremy's age "are beginning to feel some real fears about separation in general. . . . Children who are removed from their homes at between the ages of two and four show

the most serious effect as adults." Ms. Malpass further testified that given Jeremy's positive relationship with his foster mother, the unlikelihood of his return to his natural mother in the near future, and his current stage of development, he should be cleared for adoption by his foster family.

Based on the foregoing findings and testimony, we cannot say that the trial court abused its discretion in finding and concluding that it was in Jeremy's best interest to terminate respondent's parental rights. Therefore, this assignment of error is overruled.

In conclusion, we find no prejudicial error in the proceeding to terminate respondent's parental rights. The order entered by the trial court is affirmed.

Affirmed.

Judges GREENE and HUNTER concur.

SHIRLEY S. CARPENTER, DIANE CARSON, AND SHAWN COLVARD, PLAINTIFF-APPELLEES v. GEORGE BROOKS, SALOMON SMITH BARNEY, INC., PINNACLE GROUP, INC., AND LEGG MASON WOOD WALKER, INC., DEFENDANT-APPELLANTS

No. COA99-878

(Filed 29 August 2000)

1. **Arbitration and Mediation— federal or state act—transaction involving commerce**

The trial court erred by failing to apply the Federal Arbitration Act (FAA) in an action arising from a dispute between a stock broker and his clients. The FAA applies where there is a contract evidencing a transaction involving commerce, and brokerage agreements fall within the broad construction of the term "involving commerce." Where it applies to a particular contract, the FAA supersedes conflicting state law even if the contract has a choice of law provision.

2. **Appeal and Error— appealability—interlocutory order—Federal Arbitration Act**

Although vacatur of an arbitration award is an interlocutory order, the FAA, applicable in this case, provides for immediate appeal from such orders.

3. Arbitration and Mediation— vacatur of award—sufficiency of evidence

The trial court's error in applying the North Carolina Uniform Arbitration Act rather than the Federal Arbitration Act (FAA) was prejudicial where findings involving the arbitration panel's alleged impatience with and harassment of plaintiffs, refusal to consider evidence, and partiality were not supported by the evidence. Further findings that the conduct of the arbitration panel rose to the level of misconduct and that plaintiffs were not given a fair and impartial hearing were more appropriately considered conclusions and were not supported by findings; even accepting the denomination as findings, there was insufficient supporting evidence. Under the FAA, an arbitration award is presumed valid and only clear evidence will justify vacating an award.

Appeal by defendant corporations from order entered 16 April 1999 by Judge James U. Downs in Graham County Superior Court. Heard in the Court of Appeals 8 May 2000.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Philip J. Smith, for plaintiff-appellees.

Kennedy Covington Lobdell & Hickman, L.L.P., by Cory Hohnbaum, for defendant-appellant Salomon Smith Barney, Inc.

Smith Helms Mulliss & Moore, L.L.P., by Bradley R. Kutrow, for defendant-appellant The Pinnacle Group.

Parker, Poe, Adams & Bernstein, L.L.P., by Jack L. Cozort, Regina J. Wheeler, and R. Bruce Thompson, II, for defendant-appellant Legg Mason Wood Walker, Inc.

EDMUNDS, Judge.

Defendants Salomon Smith Barney, Inc. (Smith Barney), Pinnacle Group, Inc. (Pinnacle), and Legg Mason Wood Walker, Inc. (Legg Mason), appeal the trial court's vacatur of an arbitration award. We reverse.

Plaintiffs Shirley S. Carpenter (Carpenter) and Diane Carson (Carson) were introduced to defendant George Brooks (Brooks) in the autumn of 1983. At that time, Brooks was an account executive and sales agent for Shearson Lehman Brothers, Inc. (Shearson), predecessor of defendant Smith Barney, in Charlotte.

According to plaintiffs' complaint, Brooks offered to assist plaintiffs in investing insurance proceeds, which plaintiffs had received as a result of their husbands' deaths in an aviation accident. Carpenter and Carson advised Brooks that the insurance funds had to be preserved because they wanted that money to last for their lifetimes and to provide for their children's educations. They told Brooks that they knew nothing about stocks and securities and were not interested in placing the money in risky investments, but "would prefer to leave the funds in certificates of deposit rather than put them in any investments which would be more likely to jeopardize the principal." Brooks assured plaintiffs that he would make only "safe" investments and guaranteed their funds would double in five years. Thereafter, both Carpenter and Carson opened accounts at Shearson with Brooks as their broker.

When Brooks left Shearson in May 1986 to work for defendant Pinnacle, Carpenter and Carson transferred their accounts to Pinnacle. In August 1988, Brooks left Pinnacle to work for defendant Legg Mason, and Carpenter and Carson again transferred their accounts to follow Brooks. However, in 1990, plaintiffs became unhappy with Brooks and directed Legg Mason that no further trades be made in their accounts.

In October 1992, plaintiffs Carpenter and Carson filed suit against defendants alleging unauthorized securities trading, misrepresentation, breach of fiduciary duty, and failure to supervise. (A third plaintiff in the suit, Shawn Colvard, is not a party to this appeal.) In addition to the background information recited above, the following allegations were included in the complaint: (1) while Brooks was at Pinnacle, he failed to comply with Carpenter's request that certain stock be sold, and, as a result, Carpenter lost $4,443.00, for which she was reimbursed by Pinnacle; (2) Brooks paid Carpenter $9,052.50 for failing to execute a sale order in Carpenter's IRA; (3) in 1989 or 1990, when Carpenter requested that Brooks sell a certain stock then selling at $17.00 per share, Brooks refused, contending that he would wait until the stock reached $22.00 per share; when the stock failed to reach that level, Brooks made an unauthorized sale of the stock at $1.25 per share; and (4) stocks were bought and sold without plaintiffs' authorization. Plaintiffs further contended that Shearson, Pinnacle, and Legg Mason failed to manage Brooks properly, failed to make proper inquiry into plaintiffs' needs and objectives before approving their accounts, and failed to supervise Brooks' discretion over accounts.

The several defendants answered individually, each raising affirmative defenses. Brooks answered and made a motion to dismiss, claiming that plaintiffs' action was time-barred. Brooks and Shearson made motions to compel arbitration, and Shearson moved for a stay of proceedings pending the outcome of arbitration; both claimed that plaintiffs entered into agreements to arbitrate and thus the dispute should be arbitrated pursuant to the North Carolina Uniform Arbitration Act (NCUAA), N.C. Gen. Stat. §§ 1-567.1 to -567.20 (1999). Pinnacle, alleging that both Carpenter and Carson executed agreements to arbitrate "any controversy arising out of their securities transactions with Pinnacle," made a motion to dismiss or to compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16 (1999), and the NCUAA. Finally, citing both the FAA and the NCUAA, Legg Mason moved to compel arbitration and to stay the proceedings pending arbitration as to Carpenter only, because she alone signed a "Customer's Margin and Loan Consent Agreement" in which she agreed to arbitrate any disputes.

In an order filed 25 June 1993, the trial court (1) denied Pinnacle's and Brooks' motions to dismiss; (2) granted Shearson's and Pinnacle's motions to compel arbitration as to Carpenter and Carson; (3) granted Legg Mason's motion to compel arbitration as to Carpenter; (4) granted Brooks' motion to compel arbitration as to all of Carpenter's claims and as to Carson's claims for the time Brooks was employed by Shearson and Pinnacle; (5) granted Shearson's, Pinnacle's, and Legg Mason's motions for stay pending arbitration; (6) *sua sponte* ordered that all claims against Brooks should be stayed; and (7) granted Shearson's, Pinnacle's, and Legg Mason's motions for protective orders.

Plaintiffs filed a statement of claim with the National Association of Securities Dealers (NASD). Defendants answered individually: Brooks raised various statutes of limitations as defenses against Carpenter and claimed that Carson's and Carpenter's claims were meritless; Shearson similarly raised the time limitation set out in the NASD Code (six years) as a defense against Carpenter and Carson; Pinnacle raised as defenses against both Carpenter and Carson statutes of limitations, waiver and estoppel, ratification, accord and satisfaction, contributory negligence, and failure to mitigate; and Legg Mason raised as defenses to both Carson and Carpenter failure to state a claim, statute of limitations, waiver and estoppel, contributory negligence, failure to mitigate, and ratification.

The arbitration hearing covered seven days. On 21 February 1996, the panel dismissed plaintiffs' claims against Pinnacle and Legg Mason, and on 16 July 1996 entered the following award:

1. That the issues of unauthorized trades were resolved to Claimants' satisfaction and thus are denied.

2. That there has been no evidence to support the claims of churning or failure to supervise and thus these claims are denied.

3. That there has been no evidence to support the claim of fraud or constructive fraud and thus these claims are denied.

4. That the claim of breach of fiduciary duty cannot be sustained since this panel is of the opinion that at the time they were made these investments were appropriate. Every person is charged with the knowledge that there is risk in any investment.

5. Each party is responsible for their own costs, including attorney's fees.

6. That any relief not specifically addressed herein is denied.

On 14 October 1996, plaintiffs filed in superior court a motion to vacate the arbitration award, contending that "the panel collectively harassed and badgered the Plaintiffs, their witnesses and counsel," "expressed their negative opinions about the Plaintiffs' claims," "refused to hear or consider relevant and appropriate evidence," "expressed impatience with the Plaintiffs," and "exhibited partiality to the Defendants." On 16 April 1999, the trial court granted plaintiffs' motion to vacate and set the case for trial. Defendants appeal.

[1] On appeal, the issue before us is not whether the panel's award was correct, but whether the trial court properly vacated that award. We begin by addressing the question of which statute controls this dispute. While defendants argue for the application of the FAA, 9 U.S.C.A. §§ 1-16, plaintiffs contend that the appropriate act is the NCUAA, N.C. Gen. Stat. §§ 1-567.1 to -567.20. The FAA "applies where there is 'a contract *evidencing a transaction* involving commerce.' " *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 130 L. Ed. 2d 753, 766 (1995) (quoting 9 U.S.C.A. § 2). "Commerce" under the FAA means interstate or foreign commerce, *see* 9 U.S.C.A. § 1, and this Court has stated that "[b]rokerage agreements . . . fall

within the broad construction of the term 'involving commerce,' " *Smith Barney, Inc. v. Bardolph*, 131 N.C. App. 810, 813, 509 S.E.2d 255, 257 (1998); *see also Ragan v. Wheat First Securities*, 138 N.C. App. 453, 531 S.E.2d 874 (2000). Accordingly, the dispute is governed by the FAA. *See Pinnacle Group, Inc. v. Shrader*, 105 N.C. App. 168, 170-71, 412 S.E.2d 117, 120 (1992).

Plaintiffs nevertheless contend the FAA should not apply because defendants "failed to preserve this issue properly for Appeal." However, even assuming the issue was not preserved (both Pinnacle and Legg Mason cited the FAA in various filings below), we have held that a defendant's failure to raise the FAA in response to a plaintiff's motion to vacate is not fatal. *See In re Cohoon*, 60 N.C. App. 226, 230, 298 S.E.2d 729, 731 (1983). This result is consistent with our Supreme Court's holding in *Board of Education v. Shaver Partnership*, 303 N.C. 408, 424, 279 S.E.2d 816, 825 (1981), that where the FAA applies to a particular contract, that Act supersedes conflicting state law even if the contract has a choice of law provision. Because the FAA applies to the case at bar, the trial court erred in failing to apply that Act in resolving plaintiffs' motion to vacate the arbitration award.

[2] Although vacatur of an arbitration award is an interlocutory order, the FAA provides for immediate appeal from such orders. *See* 9 U.S.C.A. § 16(a)(1)(E). Therefore, this appeal is properly before this Court. The standard of review of the trial court's vacatur of the arbitration award is the same as for any other order in that we accept findings of fact that are not "clearly erroneous" and review conclusions of law *de novo*. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48, 131 L. Ed. 2d 985, 996 (1995); *ANR Coal Co., Inc. v. Cogentrix of North Carolina*, 173 F.3d 493, 496-97 (4th Cir.), *cert. denied*, 528 U.S. 877, 145 L. Ed. 2d 156 (1999).

[3] Turning to the merits of defendants' appeal, we must determine whether the trial court's error in applying the NCUAA was prejudicial. Therefore, we examine the trial court's order in light of the language of the FAA.

The FAA declares a liberal policy favoring arbitration. *See Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 74 L. Ed. 2d 765 (1983). Under the FAA, arbitration awards may be vacated only in limited situations:

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C.A. § 10(a) (1999). Under the FAA, "an arbitration award is presumed valid and the party seeking to vacate it must shoulder the burden of proving the grounds for attacking its validity." *Shrader*, 105 N.C. App. at 171, 412 S.E.2d at 120 (citations omitted). Further, "[o]nly *clear* evidence will justify vacating an award." *Id.* (citation omitted).

In their motion to vacate the arbitration award, plaintiffs alleged that the panel was hostile toward them, was partial toward defendants, and refused to hear or consider relevant evidence. After a hearing on the motion, and after considering "the arguments of counsel, the pleadings in this case, the entire transcript of arbitration proceedings conducted under the offices of the National Association of Securities Dealers Inc., as well as the briefs of the part[ies]," the trial court made a number of unexceptionable findings of fact tracking the history of the case, then made the following additional findings:

9. During the hearings before the Arbitration Panel, the panel members collectively harassed and badgered the Plaintiffs, their witnesses and their counsel.

10. Members of the Arbitration Panel repeatedly expressed negative opinions about the Plaintiffs' claim[s] throughout the arbitration proceedings.

11. Members of the Arbitration Panel expressed impatience with the Plaintiffs throughout the arbitration proceedings.

12. Members of the Arbitration Panel refused to hear evidence material to the Plaintiffs' claims and otherwise failed to consider relevant and appropriate evidence. Members of the Arbitration Panel throughout the proceeding exhibited partiality to the Defendants.

13. The conduct of the Arbitration Panel in this particular case rises to the level of prejudicial misconduct.

14. As a result of the prejudicial conduct on the part of the Arbitration Panel, the Plaintiffs were not given a[] full and fair hearing by the Arbitration Panel.

Although several of the quoted findings are denominated in the trial court's order as findings of fact, we are not bound by the label used by the trial court. *See Wachacha v. Wachacha*, 38 N.C. App. 504, 507, 248 S.E.2d. 375, 377 (1978). Finding 12 is at a minimum a mixture of finding of fact and conclusion of law "because it involves the application of a legal principle to a determination of facts." *Hall v. Hall*, 88 N.C. App. 297, 299, 363 S.E.2d 189, 191 (1987). Findings 13 and 14 are more aptly considered conclusions of law. As such, findings 12 through 14 are fully reviewable on appeal. *See id.*

Because the above-quoted findings lay the foundation for the trial court's conclusions of law, we examine each of the findings to determine if they are supported by competent evidence, and, in turn, whether they support vacatur of the arbitration award.

Findings 9-11

In their motion to vacate, plaintiffs alleged that the panel showed impatience with them, harassed and badgered them and their witnesses, and expressed negative opinions about plaintiffs' claims. Although there is some support in the record for the allegations that the panel occasionally expressed impatience with repetitive testimony, these instances are infrequent and do not rise to the level of misconduct. Plaintiffs' evidence was presented over six hearing days. The panel's comments to the parties are little different from the admonitions to "keep moving" that trial judges routinely give to litigators. "[A]n arbitrator's legitimate efforts to move the proceedings along expeditiously may be viewed as abrasive or disruptive to a

disappointed party. Nevertheless, such displeasure does not constitute grounds for vacating an arbitration award." *Fairchild & Co., Inc. v. Richmond, F. & P. R. Co.*, 516 F. Supp. 1305, 1313 (D.D.C. 1981). Similarly, an arbitrator is permitted to ask questions of witnesses, as is a judge at trial. Such questioning, which seeks to clarify testimony, is proper even if the questions are perceived as hostile so long as the examination does not prejudice either party. *See United States v. Parodi*, 703 F.2d 768 (4th Cir. 1983); *State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986). Finally, while comments and statements by the panel may indicate occasional frustration, we do not read these comments as evidence of bias on the panel's part or as being prejudicial to plaintiffs. The conduct of which plaintiffs complain never approached the level this Court found inappropriate in *Wildwoods of Lake Johnson Assoc. v. L.P. Cox Co.*, 88 N.C. App. 88, 362 S.E.2d 615 (1987) (interpreting the NCUAA). These findings, therefore, cannot support vacatur of the arbitration award.

Finding 12

Plaintiffs also contended that the panel refused to consider material evidence and exhibited partiality toward defendants. They sought to submit evidence of complaints and inquiries made to Pinnacle and Legg Mason about Brooks' handling of other customers' accounts. Plaintiffs' contention was that this evidence was relevant to show both that Brooks had a custom and practice of misrepresentation, and that Pinnacle and Legg Mason were on notice that Brooks required supervision. After considering arguments from attorneys for all parties, the arbitrators granted Legg Mason's motion *in limine* to exclude the evidence on relevance grounds.

A panel's refusal to hear material evidence is not by itself sufficient grounds to vacate an award. Under the FAA, vacatur is appropriate only if the panel's refusal to hear the evidence amounted to affirmative misconduct. *See Paperworkers v. Misco, Inc.*, 484 U.S. 29, 40, 98 L. Ed. 2d 286, 300 (1987). An evidentiary error by an arbitration panel "must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing." *Newark Stereotypers' U. No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3rd Cir. 1968). A showing of prejudice is a prerequisite to relief based on a panel's evidentiary ruling. *See Employers Ins. v. National Union Fire Ins.*, 933 F.2d 1481 (9th Cir. 1991).

Plaintiffs' claim that the evidence was admissible to show that Brooks had a custom and practice of misrepresentation is unavailing. Even had that evidence been offered in a court of law pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999), a trial court's ruling that the evidence was not relevant pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 (1999), *see State v. Morgan*, 315 N.C. 626, 632, 340 S.E.2d 84, 89 (1986), is reviewed under an abuse of discretion standard, *see State v. Parker*, 113 N.C. App. 216, 225, 438 S.E.2d 745, 751 (1994). Under the relaxed standard of review applicable to evidentiary rulings of arbitration panels, we hold that the panel did not commit misconduct in refusing to hear this evidence.

Plaintiffs' claim that the evidence was relevant to show that Pinnacle and Legg Mason were on notice that Brooks' behavior required careful monitoring is arguably a closer issue. However, plaintiffs' evidence indicated that Brooks misrepresented the current value of limited partnerships that plaintiffs purchased when Brooks was at Shearson in 1983. Any failure by Shearson to supervise Brooks, and any resulting financial loss to plaintiffs, cannot be attributed to Pinnacle or Legg Mason, his subsequent employers. When Brooks left Shearson for Pinnacle, and then left Pinnacle for Legg Mason, plaintiffs retained him as their broker. However, while Brooks was at Pinnacle, and later while he was at Legg Mason, both plaintiffs' securities accounts showed net gains. This evidence that Brooks successfully managed plaintiffs' accounts at Pinnacle and Legg Mason suggests that it was immaterial whether or not those firms were on notice to monitor Brooks with particular care. Moreover, assuming that the panel erred in failing to admit the evidence for this limited purpose, plaintiffs have not shown any resulting prejudice. The portion of plaintiffs' brief addressing prejudice discusses only the impact of this evidence in terms of trust between plaintiffs and Brooks. In the absence of a showing of prejudice, we cannot say the panel's ruling was misconduct justifying an order of vacatur.

Plaintiffs claimed that the panel also refused to hear evidence pertinent to their fraud claim, to the effect that Brooks guaranteed a particular return on certain investments. Carson made a proffer of evidence that she removed money from a certificate of deposit, that she provided the money to Brooks to invest in a municipal bond with a 10% rate of return, and that Brooks instead purchased stocks with those funds. Other proffered evidence included a tape recording of a conversation with Brooks and several documentary exhibits. However, our review of the record indicates that this proffered evi-

dence related to a custodial account opened by Carson for her son. Carson's claim as to this account was not subject to arbitration and was pending in a North Carolina superior court at the time of the arbitration. Because this claim was collateral to Carson's claim pertaining to trading in her own accounts, the trial court erred in finding that the panel's decision not to consider this evidence deprived plaintiffs of a fair hearing.

As to plaintiffs' claim of partiality by the panel, vacatur on this ground is permitted only where there is proof of "evident partiality," which "exists when an arbitrator's bias is 'direct, definite and capable of demonstration rather than remote, uncertain, or speculative.' " *Harter v. Iowa Grain Co.*, 211 F.3d 338, 347 (7th Cir. 2000) (citation omitted). There must exist " 'specific facts that indicate improper motives on the part of the arbitrator.' " *Consol. Coal v. Local 1643, United Mine Workers*, 48 F.3d 125, 129 (4th Cir. 1995) (citation omitted). Accordingly, "a disappointed party's perception of rudeness on the part of an arbitrator is not the sort of 'evident partiality' contemplated by the Act as grounds for vacating an award." *Fairchild*, 516 F. Supp. at 1313.

The record and transcript reveal an extended hearing during which the participants occasionally became argumentative and disputatious. However, any friction between the participants was within limits normal for a contested hearing or trial where attorneys seek zealously to represent clients with conflicting interests as the presiding official (or officials) maintains order while keeping the proceedings on track. Our review reveals that no specific facts indicating improper motives on the part of the arbitrators were established before the trial court. Consequently, we hold this finding was unsupported by the evidence and cannot support vacatur.

Findings 13, 14

We have studied the record on appeal, the transcripts, and appellate briefs, and have considered the appellate arguments of counsel. We have reviewed the previously-discussed, properly-denominated findings of fact. After completing this examination, we conclude that findings 13 and 14, which are more appropriately considered conclusions of law, are unsupported by the findings of fact. Additionally, even accepting the trial court's denomination of the findings, there is insufficient evidence to support the findings that the panel's conduct rose to the level of "prejudicial misconduct" or that plaintiffs were denied a full and fair hearing by the arbitration panel.

In conclusion, we hold the trial court erred in finding that the conduct of the panel rose to the level of misconduct and deprived plaintiffs a full and fair hearing. The vacatur of the trial court is reversed and the case remanded to the trial court for reinstatement of the arbitration panel's award.

Reversed and remanded.

Chief Judge EAGLES and Judge LEWIS concur.

PATRICIA ANNETTE BURCHETTE, AND SALLY BURCHETTE, PLAINTIFFS V. CHARLES WILLIAM LYNCH, DEFENDANT

No. COA99-604

(Filed 29 August 2000)

1. Trials— automobile collision—reference to insurance—failure to declare mistrial earlier

The trial court did not abuse its discretion in the first of three trials arising from an automobile collision by not declaring a mistrial earlier in the proceedings based upon an inadvertent reference to liability insurance. Defendant could not have been prejudiced regarding negligence because the jury deadlocked and did not decide that issue. As for resultant prejudice on contributory negligence, the court did not abuse its discretion by denying defendant's mistrial motion.

2. Appeal and Error— JNOV motions—mistrials and subsequent trials—ripeness for appeal

A defendant in a negligence action arising from an automobile collision was not prejudiced by the denial of his JNOV motion on negligence, given the mistrial and subsequent retrial on that issue, and his purported appeal of the denial of that motion was not considered. However, defendant's appeal from the denial of his motion for a directed verdict and JNOV on plaintiff's contributory negligence is now ripe for appellate review because it was decided at the first trial and, after two more trials, a final judgment has issued.

3. Motor Vehicles— automobile accident—contributory negligence—blinded by headlights

The trial court did not err by denying defendant's directed verdict and JNOV motions on contributory negligence in an automobile accident case where plaintiff was blinded by the headlights of an oncoming automobile but slowed and applied her brakes immediately upon seeing the lights of the approaching vehicle.

4. Appeal and Error— preservation of issues—jury deadlock—court's authority to submit other issues—no objection at trial

The defendant in an automobile accident case did not preserve for appellate review the issue of whether the trial court had the authority to enter judgment on the contributory negligence issue after the jury deadlocked on negligence where defendant did not object to submission of the contributory negligence issue to the jury and cites no authority for the proposition that it was improper for the court to enter judgment in light of defendant's assent to submission of the issue to the jury.

5. Appeal and Error— JNOV denied—mistrial as to those issues—appeal after subsequent trial

Defendant's attempted appeal of the denial of his JNOV motion in a negligence action was rejected where the trial was the second of three and ended in a mistrial as to the issues raised in the motion.

6. Appeal and Error— preservation of issues—jury instruction—no objection at trial

The defendant in a negligence action arising from an automobile collision did not object at trial to the intervening negligence instruction as omitting foreseeability and therefore did not preserve the issue for appellate review.

7. Negligence— subsequent trial—jury instruction—determination of prior trial

There was no prejudice to defendant in the third trial of an action arising from an automobile accident where the court instructed the jury that the court had ruled that plaintiff was not negligent rather than stating that plaintiff was determined not to be negligent in a prior proceeding. Defendant did not request an amendment to the instruction, the essence of the statement was

accurate, and the statement served to clarify that the intervening negligence at issue was not that of plaintiff.

8. Trials— negligence—jury arguments—not grossly improper

Plaintiff's jury arguments in an action arising from an automobile accident were not so grossly improper as to have likely influenced the jury's verdict.

9. Appeal and Error— JNOV motion in subsequent trial— argument concerning prior trial—issue abandoned

The defendant in an automobile accident case abandoned his argument on appeal regarding the denial of his JNOV motion where the appeal concerned the third trial and the argument in the brief concerned the second trial. Defendant was not bound on retrial by the evidence presented at the former trial and whether the evidence at the third trial would support the motion cannot be decided on the basis of the evidence presented at the former trial. Moreover, the court in this case properly denied the motion.

Appeal by defendant from judgment entered 28 August 1998 and order filed 13 October 1998 by Judge Robert H. Hobgood in Warren County Superior Court. Heard in the Court of Appeals 23 February 2000.

Douglas T. Simons for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Emerson M. Thompson, III, for defendant-appellant.

JOHN, Judge.

Defendant Charles William Lynch appeals judgment entered upon a jury verdict in favor of plaintiff Patricia Annette Burchette (plaintiff). We conclude the trial court did not err.

Pertinent facts and procedural history include the following: On 2 November 1991, plaintiff was operating her automobile on Rural Paved Highway 1229 in Warren County. Plaintiff Sally Burchette was a passenger therein. A farm tractor with grain drill attached, owned and operated by defendant, was parked partially on the shoulder of the road and partially in plaintiff's lane of travel. Plaintiff's vehicle collided with defendant's grain drill, resulting in injuries to plaintiff.

Plaintiff filed the instant complaint 18 October 1994, alleging defendant's negligence in parking the tractor and failing to warn

oncoming motorists thereof proximately caused plaintiff's injuries. Defendant answered 28 November 1994, generally denying negligence and asserting plaintiff's contributory negligence as a defense. Defendant also counterclaimed against plaintiff seeking a property damage recovery. Plaintiff replied, denying defendant's claim and asserting defendant was accorded the last clear chance to avoid the collision.

Trial of the case commenced 29 May 1996 (Trial I). Defendant's renewed motion for directed verdict at the close of all evidence was denied. *See* N.C.G.S. § 1A-1, Rule 50(a) (1999). The jury subsequently deadlocked on the issue of defendant's negligence, but unanimously absolved plaintiff of contributory negligence. The trial court ordered a mistrial on the negligence issue and entered judgment on the verdict against defendant regarding plaintiff's contributory negligence.

Defendant moved for judgment notwithstanding the verdict (JNOV) and for new trial, *see* N.C.G.S. § 1A-1, Rules 50(b), (c), which motions were denied 14 August 1996. Defendant subsequently appealed the judgment and denial of his motions, which appeal was dismissed as interlocutory. *See Burchette v. Lynch*, 128 N.C. App. 65, 493 S.E.2d 334 (1997).

A mistrial again occurred in February 1998 upon a second jury's failure to agree on the issue of defendant's negligence (Trial II). Plaintiff Sally Burchette subsequently dismissed her claims with prejudice 20 August 1998.

At a third trial commencing 24 August 1998 (Trial III), the jury determined plaintiff was injured by the negligence of defendant and awarded $120,000.00 in compensatory damages. A 28 August 1998 judgment was rendered reflecting the verdict. Defendant moved for JNOV as well as for relief from judgment under N.C.G.S. § 1A-1, Rule 60(b) (1999), which motions were denied by order dated 9 October 1998. Defendant timely appealed both the judgment and order, noting twenty-six assignments of error directed at all three trials. Only twelve assignments of error are addressed in defendant's brief to this Court; the remainder are therefore deemed abandoned. *See* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error not set out in the appellant's brief . . . will be taken as abandoned").

[1] Defendant first contends the trial court erred during Trial I by denying defendant's motions for mistrial as well as for directed verdict and JNOV on both the negligence and contributory negligence

issues. Although not raised by the parties, we must first determine the propriety of defendant's purported appeal in this regard. *See First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 246, 507 S.E.2d 56, 59 (1998) (although parties failed to raise issue, appellate court must *sua sponte* determine whether appeal is properly before the court).

Given that Trial I eventually terminated in a mistrial on the issue of defendant's negligence, his assertion the trial court erred by failing to declare a mistrial earlier in the proceedings is without merit.

Defendant's motion was directed at plaintiff's inadvertent reference to liability insurance in regard to property damage to her automobile. Defendant could not have been prejudiced regarding the negligence issue as that issue was not decided by the jury. *See Watson v. White*, 309 N.C. 498, 507, 308 S.E.2d 268, 273-74 (1983) (although defendant's argument to jury improperly suggested inability to pay verdict, error in allowing argument not prejudicial where jury found plaintiff contributorily negligent and thus did not reach issue of damages). To the extent defendant argues resultant prejudice concerning the issue of plaintiff's contributory negligence, we hold the trial court did not abuse its discretion in denying defendant's mistrial motion. *See State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996) (decision to grant mistrial motion "is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion").

[2] Further, defendant cannot have been prejudiced by denial of his JNOV motion on the issue of his negligence, given the mistrial and subsequent retrial of the case on that issue. When a trial court orders a new trial,

> the case remain[s] on the civil issue docket for trial *de novo*, unaffected by rulings made therein during the [original] trial . . . .

Goldston v. Wright, 257 N.C. 279, 280, 125 S.E.2d 462, 463 (1962).

Stated otherwise, a "mistrial results in nullification of a pending jury trial." 75B Am. Jur. 2d *Trial* § 1713 (1992); *see also People v. Thompson*, 379 N.W.2d 49, 56 (Mich. 1990) ("a hung jury mistrial . . . is essentially a nullity"), *cert. denied sub nom. Thompson v. Foltz*, 498 U.S. 971, 112 L. Ed. 2d 423 (1990). Accordingly, any error on the part of the trial court in denying defendant's motion regarding the

negligence issue would thus be harmless, as on retrial defendant would not be

> bound by the evidence presented at the former trial. Whether [his] evidence at the new trial will support [a motion for directed verdict] cannot now be decided.

Akzona, Inc. v. Southern Railway Co., 314 N.C. 488, 495, 334 S.E.2d 759, 763 (1985).

In short,

> [d]efendant, in respect to the denial of his motion for [JNOV], has nothing to appeal from, for the very simple reason that in this respect there is neither a final judgment nor any interlocutory order of the superior court affecting his rights.

Goldston, 257 N.C. at 280, 125 S.E.2d at 463. We therefore do not consider defendant's purported appeal of denial of his JNOV motion on the negligence issue proffered at Trial I which resulted in a mistrial on that issue.

[3] However, defendant also moved for a directed verdict and JNOV, *see Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993) (JNOV motion essentially renewal of earlier directed verdict motion and same standard of review therefore applicable), on the issue of plaintiff's contributory negligence. This issue was indeed decided at Trial I although appeal thereon at the conclusion of trial was premature in that

> the issues of whether defendant negligently injured plaintiff[] and what damages, if any, plaintiff[is] entitled to recover were not answered by the jury,

Burchette, 128 N.C. App. at 67, 493 S.E.2d at 335.

However, the question is now ripe for appellate review because a final judgment has been entered. *See Floyd and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51, 510 S.E.2d 156, 158 (1999) ("a party seeking to appeal from a nonappealable interlocutory order must wait until a final judgment is rendered and may then proceed as designated in" N.C.R. App. P. 3(d)); N.C.G.S. § 1-278 (1999) ("[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment").

Defendant argues plaintiff's testimony at Trial I established her contributory negligence as a matter of law, and that the trial court

therefore erred by denying his directed verdict and JNOV motions. We do not agree.

Defendant emphasizes plaintiff's testimony that she was blinded by the headlights of an oncoming automobile for two to three seconds prior to the collision, and relies upon our Supreme Court's decision in *McKinnon v. Motor Lines*, 228 N.C. 132, 44 S.E.2d 735 (1947). *McKinnon* held that a driver who "ran in a 'blinded area' for two or three seconds," but maintained his speed and then rear-ended another vehicle, was contributorily negligent as a matter of law. *Id.* at 136, 44 S.E.2d at 737.

However, defendant ignores plaintiff's further testimony that immediately upon seeing the headlights of the approaching auto, she "attempt[ed] to slow down," "hit [her] brakes," and did not take her eyes "away from the roadway." In *McKinnon*,

> the plaintiff[] continued to drive some distance after being "blinded" by the lights of another vehicle . . . without attempting to stop [his] vehicle[]. . . . The distinction in the case[] relied on by defendant[] and this case is that in the instant case plaintiff immediately acted upon seeing the danger, while in the case[] cited by defendant[] the plaintiff[] continued in the same course of action for some time and distance after being faced with apparent danger.

White v. Mote, 270 N.C. 544, 553, 155 S.E.2d 75, 81 (1967).

In the light most favorable to plaintiff, *see Abels*, 335 N.C. at 214-15, 436 S.E.2d at 825 (on JNOV motion, "trial court must examine all of the evidence in a light most favorable to the nonmoving party, [which] party must be given the benefit of all reasonable inferences that may be drawn from that evidence"), the evidence thus indicates plaintiff, unlike the plaintiff in *McKinnon*, slowed and applied her brakes immediately upon seeing the headlights of the approaching vehicle. We therefore cannot say her actions constituted contributory negligence as a matter of law, *see White*, 270 N.C. at 554, 155 S.E.2d at 82; *see also Nicholson v. American Safety Utility Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240 244 (1997) ("[i]ssues of contributory negligence . . . are ordinarily questions for the jury"), and the trial court did not err in denying defendant's directed verdict and JNOV motions asserting that argument.

[4] Alternatively, defendant claims the trial court "had no authority to enter judgment on the issues related to [plaintiff's] contributory

negligence." This argument has not been properly preserved for appellate review.

Following the jury's indication it was deadlocked regarding defendant's negligence, the trial court directed that the jury proceed to deliberate the issue of plaintiff's contributory negligence. In the absence of the jury, the court then inquired if either party objected to the jury's consideration of that issue. Although plaintiff objected, defendant's counsel responded:

> Your Honor, if the jury can come back with Issue 2 with yes or no, I believe this Court could use that as a basis to make rulings as a matter of law even if they deadlock on Issue 1, if they consider Issue 2 and I would request the Court to allow the jury to consider Issue 2 as you have so instructed.
>
> I would request that if the jury comes back and they indicate that their verdict is not unanimous then the Court inquire as to Issue 1 and Issue 2 separately to see if they have come back unanimously on Issue 2 and may still be deadlocked on Issue 1.

Defendant therefore did not object to submission of the contributory negligence issue to the jury, *see* N.C.R. App. P. 10(b)(1) (to preserve argument for appellate review, party must present to trial court timely objection), and cites no authority for the proposition that it was improper for the trial court to enter judgment thereon in light of defendant's assent to submission of the issue to the jury, *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").

[5] Defendant next attempts to appeal denial of his JNOV motion during Trial II

> on the grounds that the plaintiff's evidence as a matter of law failed to establish any negligence on the part of the defendant and in that the plaintiff's evidence as a matter of law established the intervening negligence of a third party as a matter of law.

However, Trial II ended in a mistrial as to the issues raised by defendant in his JNOV motion, leaving no order from which to appeal and resulting in no prejudice to defendant. *See Goldston*, 257 N.C. at 280, 125 S.E.2d at 463, and *Watson*, 309 N.C. at 507, 308 S.E.2d at 273-74. For the reasons set out in our discussion of defendant's attempted appeal of denial at Trial I of his JNOV motion on the issue of his neg-

ligence, therefore, we reject defendant's appeal of denial of his JNOV motion at Trial II.

[6] Defendant's final assignments of error concern Trial III and are generally reviewable on appeal. In the first, defendant maintains the trial court erred in instructing the jury on the issue of intervening negligence. We conclude the court did not err in this regard.

Defendant urged at trial that the intervening negligence of Alphonso Green (Green), operator of the oncoming automobile encountered by plaintiff immediately prior to the accident, should absolve defendant of liability. According to defendant, Green was negligent in that the headlights of his vehicle "were on high-beam and were never dimmed," thus temporarily blinding plaintiff.

The trial court's instruction addressing the matter of intervening negligence was as follows:

> Proximate cause is a cause which in a natural and continuous sequence produces a person's injuries and is a cause which a reasonable and prudent person could have foreseen would probably produce such injury or some similar injurious result.
>
> There may be more than one proximate cause of an injury. Therefore, the Plaintiff . . . need not prove that the Defendant's negligence was the sole proximate cause of the injuries.
>
> The Plaintiff must prove by the greater weight of the evidence only that the Defendant's negligence was a proximate cause; however, a natural and continuous sequence of causation may be interpreted [sic] or broken by the negligence of another operator of a vehicle. This occurs when another operator of a vehicle's negligence causes its own natural and continuous sequence which interrupts, breaks, displaces or supersedes the consequences of the first operator's negligence.
>
> *When I use the term "another operator" or "second operator" in connection with this law, I'm not referring to the Plaintiff . . . . The Court has ruled that [plaintiff] was not negligent.* Under such circumstances, if you so find, the negligence of another or second operator, Alphonso Green, if you so find, would be the sole proximate cause of an injury and the negligence of the first operator would not be a proximate cause of the injury.

(emphasis added).

Defendant insists the italicized portion of the charge reflected "the court's bias towards and favoritism of the plaintiff," and further asserts the charge as a whole "incorrectly stated the law . . . [and] was prejudicially edited, misleading and confusing."

In support of the latter argument, defendant points to *Barber v. Constien*, 130 N.C. App. 380, 502 S.E.2d 912, *disc. review denied*, 349 N.C. 227, 515 S.E.2d 699 (1998). In that case, this Court held an intervening negligence jury instruction that "fail[ed] to refer to the critical element of foreseeability" left the jury "without proper guidance," requiring a new trial. *Id.* at 386, 502 S.E.2d at 916.

However, during the charge conference *sub judice*, defendant did not object to any portion of the trial court's proposed intervening negligence instruction. Following the court's delivery of its jury charge and dismissal of the jury to the jury room, moreover, defendant reiterated his previous objections to other portions of the charge and objected to the intervening negligence instruction solely on grounds it "indicated [plaintiff] was not negligent." As defendant failed to object to the intervening negligence instruction as omitting reference to foreseeability, defendant has not preserved this issue for appellate review and we decline to discuss it further. *See* N.C.R. App. P. 10(b)(2) ("party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto . . . stating distinctly that to which he objects and the grounds of his objection"); *see also State v. Francis*, 341 N.C. 156, 160, 459 S.E.2d 269, 271 (1995) (as objections at trial "in no way supported" defendant's assignment of error on appeal, defendant did not preserve error for appellate review), and *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (where theory argued on appeal not raised in trial court, "the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]").

[7] Assuming *arguendo* error in the portion of the trial court's jury charge wherein it stated that "the [c]ourt has ruled that [plaintiff] was not negligent," moreover, such error was harmless. We first note defendant objected to this portion of the instruction at trial on grounds it "indicated [plaintiff] was not negligent." However, in his brief to this Court, defendant asserts the instruction "shows the court's bias towards" plaintiff. *See Francis*, 341 N.C. at 160, 459 S.E.2d at 271.

In any event, although it may have been preferable for the trial court to state "plaintiff was determined not to be negligent in a prior

proceeding" rather than "*the [c]ourt* has ruled [plaintiff] was not negligent," defendant requested no such amendment to the instruction. *See* N.C.R. App. P. 10(b)(2) and *Wall v. Stout*, 310 N.C. 184, 188-89, 311 S.E.2d 571, 574 (1984) (purpose of Rule 10(b)(2) is "to prevent unnecessary new trials caused by errors in instructions that the court could have corrected if brought to its attention at the proper time"). Further, the essence of the court's statement, *i.e.*, that plaintiff was not negligent, was accurate, given the jury's verdict in her favor on the contributory negligence issue at Trial I. Finally, rather than confusing the jury, we believe the court's statement served to clarify that the intervening negligence at issue was that of Green, not plaintiff.

[8] Defendant next claims the trial court erred by allowing improper jury argument. This contention is unavailing.

The trial court overruled defendant's objections to the following comments by plaintiff's counsel:

> Are you going to excuse [defendant] if it's your family in that car? Are you going to excuse [defendant] if it's your school children in that car? Are you going to excuse [defendant] if it's your sick and shut in aunt that you want to visit . . . .
>
> . . . .
>
> That's 25,000 pounds of equipment on the highway. Would [sic] do you want to say, do you want at least a warning? Do you want a chance? How many people in the Titanic wanted a chance but they didn't have enough lifeboats?

"[I]t is well established that counsel are accorded wide latitude in argument to the jury." *Fallis v. Watauga Medical Ctr., Inc.*, 132 N.C. App. 43, 53, 510 S.E.2d 199, 206, *disc. review denied*, 350 N.C. 308, — S.E.2d — (1999). The trial court, which "sees what is done, and hears what is said," is in a better position to judge "the latitude that ought to be allowed to counsel in the argument in any particular case." *State v. Bryan*, 89 N.C. 531, 534 (1883).

Accordingly,

> [i]t is left to the trial judge's sound discretion to determine whether counsel has abused [that] latitude accorded him in the argument of hotly contested cases. [The appellate courts] will not review the judge's exercise of discretion unless there exists such gross impropriety in the argument as would likely influence the jury's verdict.

State v. Hockett, 309 N.C. 794, 799, 309 S.E.2d 249, 252 (1983). Suffice it to state we do not conclude the challenged remarks *sub judice* were so grossly improper as to have "likely influence[d] the jury's verdict." *Id.*

[9] Lastly, defendant contends the trial court erred by denying his JNOV motion following the jury verdict at Trial III. Defendant's entire argument on this issue in his appellate brief reads as follows:

> Defendant procedurally appeals the court's rulings on the defendant's Rule 50 motions made during and after the third trial of this cause in an effort to protect the defendant's rights with respect to the entry of directed verdict relating to the first trial in accord with N.C.G.S. § 1A-1, Rule 50(b)(2). Defendant hereby incorporates its arguments from Issue IV [of the brief] as if fully set forth word for word.

However, defendant's arguments in Issue IV of his brief were directed to the trial court's denial of defendant's JNOV motion at Trial II, a separate and distinct proceeding. We note again that on retrial defendant

> [wa]s not bound by the evidence presented at the former trial. Whether [his] evidence at . . . [T]rial [III would] support [a motion for directed verdict] cannot . . . be decided,

Akzona, 314 N.C. at 495, 334 S.E.2d at 763, on the basis of the evidence presented at the previous trial.

As defendant has advanced no argument regarding the evidence presented at Trial III in relation to the JNOV motion made at *that* trial, defendant has abandoned this assignment of error. *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"). Notwithstanding, we have reviewed the record of Trial III and conclude the trial court properly denied defendant's JNOV motion advanced at the conclusion thereof. *See Abels*, 335 N.C. at 214-15, 436 S.E.2d at 825.

No error.

Judges LEWIS and EDMUNDS concur.

STATE OF NORTH CAROLINA v. NANCY FLUKER

No. COA99-504

(Filed 29 August 2000)

1. **Evidence— prior crime or act—similar act—detainment in department store for shoplifting—no prejudicial error**

Although the trial court erred in a misdemeanor larceny case by allowing the State to cross-examine defendant about her prior detainment in a department store for alleged shoplifting to show the absence of mistake by the State under N.C.G.S. § 8C-1, Rule 404(b), it was not prejudicial error because: (1) defendant did not request a limiting instruction to the jury either at the time the evidence was admitted nor during the jury charge; (2) defendant was caught leaving a department store with store items that had not been purchased and multiple eyewitnesses watched defendant take the store items; (3) defendant gave highly improbable explanations for her actions; and (4) the only evidence of the prior incident was defendant's testimony describing how she was physically and emotionally mistreated, which did not detract from her defense.

2. **Appeal and Error— appealability—issue not raised below—no assignment of error**

Although defendant contends the trial court erred in a misdemeanor larceny case by allowing the State to cross-examine defendant under N.C.G.S. § 8C-1, Rule 608(b) about her prior acquittal for shoplifting at another department store, this argument is not considered because: (1) it does not correspond to the assignment of error it references, nor to any other assignment of error in the record; and (2) the argument was not presented during trial.

3. **Larceny— misdemeanor—motion to dismiss—sufficiency of evidence**

The trial court did not err in a misdemeanor larceny case by denying defendant's motion to dismiss at the close of the State's evidence and at the close of all evidence, because the State presented substantial evidence that defendant entered a department store, obtained empty shopping bags from behind a sales desk, placed merchandise owned by the store into those bags, and carried the bags containing the merchandise out of the store without its consent.

Appeal by defendant from judgment entered 8 April 1998 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 21 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Linda Kimbell, for the State.

Laurence D. Colbert for defendant.

McGEE, Judge.

Defendant Nancy Fluker was charged with misdemeanor larceny of property belonging to J.C. Penney at South Square Mall in Durham, North Carolina on 1 February 1997. The evidence at trial tended to show that Catherine Cates (Cates), an employee of J.C. Penney for twenty-five years, saw defendant pulling a shopping bag from under Cates's counter at the J.C. Penney's store. When Cates asked if she could help defendant, defendant said she was just looking and walked away. Defendant was holding only a purse and the shopping bag from under the counter. Cates called to alert Malcolm Allen (Allen), a J.C. Penney's security person, about defendant's actions. Cates saw defendant looking at collectible Barbie dolls, each of which was boxed inside a cabinet in the gift registry area. She saw defendant take two dolls into the furniture department, where defendant sat down behind a desk and made a "motion with something between her legs." Cates testified she saw Renee Adkins (Adkins), another security person, also watching defendant as defendant walked out of the store.

Allen testified he saw defendant carrying a purse and flat, empty J.C. Penney's shopping bags draped over her forearm and held close to her stomach. In the baby section, Allen saw defendant picking up items and looking at them. Defendant went into a concealed corner near the stock room and placed baby clothing into a bag.

Allen and Adkins testified they observed defendant take two Barbie doll boxes out of the cabinet. Allen went downstairs to find Cates but received a message on his radio that defendant was about to leave the store. Allen testified that J.C. Penney's policy is to stop suspected shoplifters after they have exited the store. Allen ascended the stairwell in the mall common area adjacent to J.C. Penney and met defendant. Allen took defendant to the security office, and she cooperated. Allen said defendant stated that "she was only bringing some stuff back and the other stuff she was going to buy from the store," for she "was on her way to the bathroom and she was going to

return to the store." Allen testified that J.C. Penney has a bathroom for shoppers inside the store. According to defendant, she did not tell Allen she had left the store to find a bathroom.

Officer A. Z. Jaynes, a Durham police officer, testified defendant denied any wrongdoing and stated that her husband could verify her intent to exchange store items. Officer Jaynes spoke to defendant's husband on the telephone and defendant's husband said he did not see her leave the house and did not know if she had left with bags. Cates received a call instructing her to go to the security office where she identified the dolls in defendant's possession as the same dolls she saw defendant remove from the store.

Defendant testified that she bought "two little short sets, Barbie dolls and a book bag" at a mall in Virginia in the fall of 1996 and that she bought some baby clothes in Durham in October 1996. Defendant said she went to J.C. Penney to exchange the Barbie dolls and blue jean items, and to find something for her house. Defendant stated that she had bought the baby clothes for her neighbors' children, but on cross-examination she did not know the children's first names or the family's surname. Defendant testified that the neighbors moved away before she could give their children the baby clothes, and that defendant kept the baby clothes for months in case the neighbors returned to the house.

Defendant said because she did not have a receipt, when she arrived at J.C. Penney she found the "first person" she could find in the store to ask about exchanges without a receipt. She said she removed the goods from her bag and laid them on the counter. Defendant later identified the employee she talked to as Azuka Spicer (Spicer). Defendant said she noticed Cates watching her when she picked up her bags, so she stood in line at Cates's register. After a few minutes of waiting in line, defendant said she went to find Spicer, who could confirm that defendant owned the items in the bags. A computerized store time sheet showed that Spicer was not working when defendant said they spoke.

Jerry Kite, the manager of the Durham J.C. Penney store, testified that the results of an item inquiry showed that the articles in defendant's bags were not sold in the stores from which defendant claims to have purchased them during the times defendant said she bought them. The items were, however, currently listed in the J.C. Penney inventory. Defendant was convicted of misdemeanor larceny on 6

April 1998 and sentenced to a 45-day suspended sentence with twelve months of supervised probation. Defendant appeals.

[1] Defendant argues the trial court erred by allowing the State to cross-examine her about a prior detainment in a Hecht's department store pursuant to Rule 404(b) of the North Carolina Rules of Evidence. Defendant filed a motion *in limine* on 30 March 1998 requesting that the trial court exclude any reference to a "larceny and unlawful concealment at Hecht's in March, 1995, when in fact the Defendant was found not guilty[.]" The trial court acknowledged the request and told the State before trial "[i]f you do have evidence that might be of a 404 nature, I'm not going to allow you to proceed with that evidence in the presence of the jury." The court continued that "if there is evidence of that nature, you need to notify the Court during the course of the trial . . . and we'll send the jury out. The Court will then rule on whether or not it is admissible."

The trial court later stated just prior to cross-examination of defendant, "Mr. D.A., before we start cross examination, I understand that at least [at] one point in time [] there had been an incident at Hecht's and you wanted the Court to hear you on any inquiry you might make of [defendant] on cross examination in regards to that." The State responded affirmatively and explained:

> Certainly it's not a conviction, but it goes to show intent, preparation, plan. Especially in this case, absence of mistake. This isn't just a mistake. [The defendant] was aware something like this could happen if you don't have a receipt or you're exchanging items. So it's not just a big misunderstanding. It might be a big misunderstanding if it happens the first time. But if you're put on notice this could happen, it's less likely the second time this is going to become a big misunderstanding again.

The trial court ruled that defendant "has testified to the extent that this was at least a mistake or a misunderstanding and that for cross-examination purposes, the Court is going to allow inquiry into the incident at [Hecht's] previously, to show absence of mistake." The trial court continued, however:

> [S]ince there was a prior adjudication of these charges, Mr. D.A., I'm going to tell you that you will not be able to ask [defendant] about whether or not she was charged with these offenses or what the disposition, if any, was. I will allow you to inquire cautiously about whether or not there was an incident at [Hecht's] on

> this date in which [defendant] was stopped with merchandise and questions of that nature, and detained, questioned, and whether or not that—if you desire, whether or not that did not leave an impression on [defendant] to some extent about such activities.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999) provides:

> *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

The State commenced its cross-examination of defendant by asking whether "th[e] whole occurrence [at J.C. Penney] ha[d] been a big misunderstanding," to which defendant maintained that her testimony during direct examination regarding the incident at J.C. Penney had been truthful. Later defendant was asked, "Did you not have an incident on March 21, 1995 at Hecht's Department Store when you were stopped with merchandise there?" Defendant replied, "I plead the [F]ifth." When the trial court ordered defendant to respond, she provided a detailed explanation of how she was treated unjustly during and subsequent to her detainment at Hecht's.

The trial court had determined "that under [Rule] 404, for cross-examination purposes, [] this would be an appropriate inquiry." It added that "under [Rule] 402 [] this is relevant information and [] it's not precluded or excluded by Rule 403." N.C. Gen. Stat. § 8C-1, Rule 403 (1999) provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

First, each of the purposes for which character evidence may be admitted under Rule 404(b) refers to the accused, or the person whose character is in issue. Just as the considerations of "motive, opportunity, intent, preparation, plan, knowledge, [and] identity," in Rule 404(b) pertain to the accused, the same is true for "absence of mistake, entrapment or accident." Thus, the State may attempt to introduce evidence of other crimes, wrongs, or acts to demonstrate that defendant did not make a mistake. However, defendant does not claim she made any mistake in this case. Instead, she claims she

owned the items found in her shopping bag and was detained during an attempt to exchange them.

By contrast, the State characterizes her defense as a claim that the entire incident was a "mistake," which properly stated would be a mistake on the part of the State. Using this characterization, the State attempts to introduce evidence of other crimes, wrongs or acts to prove an "absence of mistake." Rule 404(b) may not be applied in this way. The reason is that the question of whether the State was mistaken in prosecuting a certain defendant hinges on whether that defendant is in fact guilty. Proving guilt or a likelihood of guilt through evidence of other crimes, wrongs or acts is precisely what Rule 404(b) forbids—the use of such evidence "to prove the character of a person in order to show that he acted in conformity therewith." Moreover, if "absence of mistake" were to apply to a mistake in prosecuting, virtually every criminal defendant claiming innocence could implicitly contend that the State was somehow mistaken in prosecuting that defendant.

The United States Court of Appeals for the Sixth Circuit has made the same observations:

> [A]bsence of mistake "on behalf of the government" is not a legitimate basis to admit other acts evidence under Rule 404(b). Rather, it is a restatement of the primary reason for which the evidence is *not* admissible; that is, to suggest that the defendant is guilty (the government is not mistaken) because he committed the same or other crimes before.

United States v. Merriweather, 78 F.3d 1070, 1077 (6th Cir. 1996) (emphasis in original). Similarly in *United States v. Robinson*, 20 M.J. 752, 753 (1985), the U.S. Navy-Marine Corps Court of Military Review stated:

> We feel much more comfortable, however, with the position taken by the defense at trial and on appeal that the "absence of mistake" mentioned in M.R.E. 404(b) refers only to a mistake on the part of the accused. Such a position seems the only logical one when the litany of exceptions obviously relate to acts of the accused or other person whose character is in issue.

We also acknowledge the State implicitly argues defendant made a mistake to which she does not admit. The State's argument in essence is that defendant, by shopping in J.C. Penney carrying items she owned in a store bag without a receipt, made a mistake simply in

creating a situation where she might again be suspected of larceny. The State contends the evidence from Hecht's was properly admitted "to determine if that experience had not left an impression on the Defendant about such activities." This argument is premised on an overbroad theory of what may constitute a mistake on the part of defendant, and the State is not permitted to offer evidence of other crimes, wrongs or acts for character evidence in such circumstances. Thus, the trial court erred by admitting evidence of a prior detainment at Hecht's to show the absence of mistake by the State pursuant to Rule 404(b), as opposed to any absence of mistake that defendant might claim she made. *See, e.g., State v. Pierce*, 346 N.C. 471, 488 S.E.2d 576 (1997) (evidence that defendant shook and threw his girlfriend's son admissible to show he did not mistakenly inflict fatal injuries to his niece while trying to revive her); *State v. Crawford*, 329 N.C. 466, 406 S.E.2d 579 (1991) (testimony of prior instances of inappropriate child discipline admissible to show absence of mistake by defendant regarding the prudence of coercing child to consume large quantities of water, which caused death); *State v. Freeman*, 79 N.C. App. 177, 339 S.E.2d 56, *cert. denied*, 317 N.C. 338, 346 S.E.2d 144 (1986) (testimony that defendant had previously passed bad checks admissible to rebut his claim that he was mistaken about the legitimacy of later checks and of a sham janitorial service in whose name the checks were written), *overruled on other grounds by State v. Rogers*, 346 N.C. 262, 485 S.E.2d 619 (1997).

Additionally, defendant was judicially acquitted of the crime for which she was charged in the Hecht's incident. In *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992), our Supreme Court held "evidence that defendant committed a prior alleged offense for which he has been tried and acquitted may not be admitted in a subsequent trial for a different offense when its probative value depends, as it did here, upon the proposition that defendant in fact committed the prior crime." *Scott*, 331 N.C. at 42, 413 S.E.2d at 788. The Court in *Scott* explained that "[a] person acquitted of a charge should not be required again to defend himself against that charge in subsequent criminal proceedings in which he may become involved." *Id.* at 44, 413 S.E.2d at 789. Therefore,

> [t]he North Carolina Rules of Evidence must be interpreted and applied in light of this proposition: an acquittal and the undefeated presumption of innocence it signifies means that, in law, defendant did not commit the crime charged. When the probative value of evidence of this other conduct depends upon the propo-

> sition that defendant committed the prior crime, his earlier acquittal of that crime so erodes the probative value of the evidence that its potential for prejudice, which is great, must perforce outweigh its probative value under Rule 403.

Id. at 44, 413 S.E.2d at 790. *Compare State v. Robertson*, 115 N.C. App. 249, 444 S.E.2d 643 (1994) (testimony that defendant told victim he would hurt her like he had hurt someone else, referring to a crime for which he was later acquitted, was admissible to show victim's fear and did not depend on proposition that defendant committed prior crime); *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990) (testimony that defendant possessed marijuana, despite earlier acquittal of the possession charge, was admissible where that conduct was part of the same "chain of circumstances" which included the charged offense for which defendant was on trial).

As previously stated, the trial court allowed evidence of the prior incident to show lack of a mistake, which equates to proving the likelihood of her guilt. The probative value of the prior detainment necessarily depends upon the proposition that defendant committed the prior crime at Hecht's. Thus in the present case, as

> the probative value of evidence of this other conduct [at Hecht's] depends upon the proposition that defendant committed the prior crime, [her] earlier acquittal of that crime so erodes the probative value of the evidence that its potential for prejudice, which is great, must perforce outweigh its probative value under Rule 403."

Scott, 331 N.C. at 44, 413 S.E.2d at 790. Following *Scott*, we conclude the trial court in this case erred in admitting evidence of the detainment incident at Hecht's on cross-examination. We also note the trial court was not requested to and did not give a limiting instruction to the jury either at the time the evidence was admitted nor during the jury charge. *See generally* T. M. Ringer, Jr., *A Six Step Analysis of "Other Purposes" Evidence Pursuant to Rule 404(B) of the North Carolina Rules of Evidence*, 21 N.C. CENT. L.J. 1 (1995).

In *Scott*, our Supreme Court concluded that the trial court's error was prejudicial and entitled the defendant to a new trial. *See id.* at 46, 413 S.E.2d at 791. "The test for prejudicial error is whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *Id.* The *Scott* Court stated that "[g]iven the similarity of the circumstances" between the

prior accusations and the offense for which the defendant was being tried, "we conclude there is at least a reasonable possibility that had the error in admitting [the 404(b)] testimony not been committed and this evidence excluded a different result would have [been] obtained at trial." *Id.*

In the present case, however, there is not a reasonable possibility that, had the error not been committed, a different result would have been reached at trial. In *State v. Robinson*, 115 N.C. App. 358, 444 S.E.2d 475, *disc. review denied*, 337 N.C. 697, 448 S.E.2d 538 (1994), our Court held that the error under *Scott* in admitting through Rule 404(b) evidence of a prior acquittal was not prejudicial because of the circumstances under which the defendant was caught in a private office, "his self-contradictory and highly improbable explanations for his presence there," and the similarity between the improperly admitted evidence and other evidence to which the defendant did not object. *Id.* at 362, 444 S.E.2d at 477. The circumstances in this case similarly militate a finding of culpability where defendant was caught leaving J.C. Penney with store items that had not been purchased and multiple eyewitnesses watched defendant take the store items.

We also note the "highly improbable explanations" by defendant in this case, such as the claim that defendant intended to bring gifts to children whom she could not name, or the claim that she was walking out of the store to visit a bathroom before exchanging the items when the J.C. Penney store provided a bathroom inside. Moreover, the State presented extrinsic evidence that undermines the defense theory, and thus the jury was not faced with a simple case of witness credibility. For instance, the articles found in defendant's bag were not sold in the store where she claims to have purchased them, and the woman whom defendant said she consulted about exchanging the items was not working when defendant said they spoke. Following *Robinson*, the error in admitting the Hecht's evidence was a non-prejudicial error. Indeed, the only evidence of the Hecht's incident was defendant's testimony, and her testimony only described how she was physically and emotionally mistreated during that prior detainment; it did not greatly detract from her defense.

[2] Defendant also argues the trial court erred by allowing the State to cross-examine her about the Hecht's acquittal pursuant to Rule 608(b) of the North Carolina Rules of Evidence. This argument, however, neither corresponds to the assignments of error it references nor to any other assignment of error in the record. Additionally, the

argument was not presented during trial for the trial court to consider and determine. Our "scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal[,]" and therefore we do not review this argument. N.C.R. App. P. Rule 10(a); *Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991).

[3] Furthermore, defendant argues the trial court erred by denying her motion to dismiss at the close of the State's evidence and at the close of all the evidence. "A motion to dismiss should be denied if there is substantial evidence of each essential element of the charged offense and substantial evidence that the defendant is the individual who committed it." *State v. Foreman*, 133 N.C. App. 292, 298, 515 S.E.2d 488, 493 (1999), *aff'd as modified*, 351 N.C. 627, 527 S.E.2d 921 (2000) (citation omitted). Larceny is the taking by trespass and carrying away of the goods or personal property of another, without the owner's consent and with the intent permanently to deprive the owner of the property and to convert it to the taker's own use. *State v. Boykin*, 78 N.C. App. 572, 576, 337 S.E.2d 678, 681 (1985). The elements of proof are the same for misdemeanor and felony larceny, the only difference being the value or nature of the property stolen. *Id.* The State presented evidence that defendant entered a department store, obtained empty shopping bags from behind a sales desk, placed merchandise owned by the store into those bags, and carried the bags containing the merchandise out of the store without its consent. This is substantial evidence defendant committed larceny and the trial court did not err in denying defendant's motions to dismiss for insufficient evidence.

We have reviewed defendant's remaining arguments that the trial court erred and find them to be without merit. The defendant received a fair trial free of prejudicial error.

No prejudicial error.

Chief Judge EAGLES and Judge HORTON concur.

GEORGE L. GAUNT, BARBARA G. FIELDS, CENTER FOR REPRODUCTIVE MEDICINE, P.A., DONALD S. HORNER, AND DONALD S. HORNER, P.A., PLAINTIFFS-APPELLANTS V. DONALD E. PITTAWAY, NANCY O. TEAFF, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR, SHELLEY J. MOORE, KEVIN C. MOORE, AND THE NALLE CLINIC, DEFENDANTS-APPELLEES

No. COA98-823

(Filed 29 August 2000)

1. Appeal and Error— orders omitted from notice of appeal— considered under N.C.G.S. § 1-278

Trial court orders dismissing an action for unfair and deceptive trade practices and granting a partial summary judgment on a defamation claim were reviewed despite their absence from the notice of appeal where the requirements for applying N.C.G.S. § 1-278 were satisfied. The first requirement was met under N.C.G.S. § 1A-1, Rule 46 when plaintiffs indicated their objection to the action of the court in their motions opposing defendants' motions to dismiss even though they did not timely object at the motions hearing. The second requirement was met in that the trial court orders did not dispose of the entire case and are interlocutory, with no exception applicable to allow an interlocutory appeal. Finally, the third requirement was met in that the order dismissing the unfair practices claim deprived plaintiffs of one of their claims and affected the judgment.

2. Unfair Trade Practices— statements by infertility specialists—medical professionals excluded from statute

The trial court did not err by granting summary judgment for defendants on an unfair and deceptive practices claim arising from a newspaper story about in vitro fertilization. Plaintiffs have no claim against defendants under N.C.G.S. § 75-1.1 because medical professionals are expressly excluded from the scope of the statute and it clearly does not follow that a statement by a medical professional, criminal or otherwise, is governed by this statute.

3. Libel and Slander— limited purpose public figure—summary judgment

The trial court did not err in a defamation action by granting defendants' motion for partial summary judgment on the issue of whether plaintiff Gaunt was a public figure. Under North Carolina

law, an individual may become a limited purpose public figure by his purposeful activity amounting to a thrusting of his personality into the vortex of an important public controversy.

Appeal by plaintiffs from orders and judgments entered 24 June 1997 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 30 March 1999.

Wood & Francis, PLLC, by John S. Austin; Wyrick, Robbins, Yates & Ponton, LLP, by Gary V. Mauney; for plaintiffs-appellants.

Jones, Hewson & Wollard, by Lawrence J. Goldman, for defendants-appellees Jack L. Crain, Daniel B. Whitesides, Richard L. Wing, and The Nalle Clinic.

Koy E. Dawkins, P.A., by Koy E. Dawkins, for defendant-appellee Carolyn B. Coulam.

Dean & Gibson, L.L.P., by Michael G. Gibson and John W. Ong, for defendant-appellee Donald E. Pittaway.

F. Kevin Mauney for defendants-appellees Morgan D. Gainor and Charles J. Gainor.

McGEE, Judge.

This case arose from a newspaper story entitled " 'Miracle Baby' Attempts Raise Questions" (the story), which was published in *The Charlotte Observer* on 15 September 1991. The story was about infertility treatment, with special emphasis on *in vitro* fertilization and the type of medical training expected of physicians performing that procedure. The story focused on plaintiffs George L. Gaunt (Gaunt) and the Center for Reproductive Medicine, P.A. (the Center). Defendants Jack L. Crain, Richard L. Wing and Daniel B. Whitesides, all of whom were shareholders and employees of defendant The Nalle Clinic, are infertility specialists and were interviewed for the newspaper story as to their opinions of Gaunt's expertise as an infertility specialist and his work at the Center. Plaintiffs allege that several of the statements made by defendants Crain, Wing, and Whitesides in the story, and the interviews leading up to its publication, were defamatory and constituted unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1.

Defendant Donald E. Pittaway, Director of Reproductive Endocrinology at Bowman Gray School of Medicine, was similarly

interviewed for the story and made several statements regarding his opinion of Gaunt's training and expertise in the field of *in vitro* fertilization. Pittaway also made statements to the effect that, in his opinion, Gaunt made a practice of ordering tests that were unnecessary or excessive. Plaintiffs filed this action alleging these statements were defamatory and constituted an unfair and deceptive practice.

Defendants moved to dismiss plaintiffs' claims for unfair and deceptive practices pursuant to N.C.R. Civ. P. 12(c), and the trial court granted the motion on 10 May 1994. Defendants then moved for partial summary judgment pursuant to N.C.R. Civ. P. 56(c) on the issue of whether plaintiffs were public figures for purposes of the newspaper story. Plaintiffs moved to strike certain exhibits defendants offered supporting their motion for partial summary judgment. Plaintiffs' motion to strike was denied and the trial court granted defendants' motion for partial summary judgment determining plaintiffs were public figures for purposes of the story in orders entered 25 July 1995. Defendants then moved for summary judgment on plaintiffs' defamation claims. These motions were subsequently granted in orders and judgments entered on 24 June 1997.

Plaintiffs timely filed a notice of appeal of the 24 June 1997 orders and judgments on plaintiffs' defamation claims. An opinion of this Court, affirming the judgment of the trial court, was filed on 2 November 1999. Plaintiffs' petition for rehearing was filed 7 December 1999. The petition was granted, in part, on 21 December 1999 for review of the applicability of Rule 46(b) of the N.C. Rules of Civil Procedure to the appeal. The petition was heard after the filing of additional briefs without oral argument. This opinion supersedes the previous opinion of our Court relating only to the issue for which the order for rehearing was granted. Our question is whether the orders entered prior to the 24 June 1997 order are reviewable. These prior orders are (1) the 10 May 1994 order of the trial court dismissing plaintiffs' action for unfair and deceptive acts or practices for failure to state a claim, and (2) the orders of the trial court entered 25 July 1995 granting defendants' motions for partial summary judgment on the public figure issue.

I.

[1] We first consider whether plaintiffs' assignments of error were preserved for appeal and are therefore reviewable by our Court. N.C.R. App. P. Rule 3(d) requires that the notice of appeal "designate

the judgment or order from which appeal is taken [.]" The substituted notice of appeal in the amended record on appeal stated:

> Plaintiffs George L. Gaunt and Center for Reproductive Medicine, P.A. hereby give notice of appeal to the North Carolina Court of Appeals from those Orders and Judgments by the Honorable Marvin K. Gray signed and filed in this action on June 24, 1997, granting all the defendants' motions for summary judgment, dismissing plaintiffs' actions with prejudice, and taxing costs against plaintiffs.

This notice of appeal does not designate appeal from the orders entered by the trial court prior to 24 June 1997, but only from the "Orders and Judgments" entered on 24 June 1997. Our Court has stated that a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424 (1990). However, the notice of appeal in this case does not give rise to any inference of an intent to appeal orders issued other than the 24 June 1997 orders and judgments.

The question before us then is whether the orders entered prior to 24 June 1997, both the 10 May 1994 unfair and deceptive practices claim and the 25 July 1995 public figure partial summary judgment, which are not designated in the notice of appeal, are nevertheless reviewable. N.C. Gen. Stat. § 1-278 (1996) provides that: "Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." In *Floyd and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51-52, 510 S.E.2d 156, 158-59, *disc. review denied*, 350 N.C. 830, — S.E.2d — (1999), our Supreme Court set out the conditions under which an interlocutory order may be reviewed under N.C.G.S. § 1-278: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.

Regarding the first requirement under *Floyd*, although plaintiffs did not timely object at the motion hearing to the trial court's granting defendants' motions to dismiss plaintiffs' claim for unfair and deceptive acts or practices, Rule 46 of the North Carolina Rules of Civil Procedure provides that "[w]ith respect to rulings and orders of

the court not directed to the admissiblity of evidence, formal objections and exceptions are unnecessary." N.C. Gen. Stat. § 1A-1, Rule 46(b) (1999). Rather, a party may preserve an objection by "mak[ing] known to the court his objection to the action of the court" or "mak[ing] known the action which he desires the court to take and his ground therefor[.]" *Id.* Plaintiffs indicated such objection in their motions opposing defendants' motions to dismiss, and our Court recently held this satisfies the first procedural requirement in *Floyd*. Our Court stated in *Inman v. Inman*, 136 N.C. App. 707, 711-12, 525 S.E.2d 820, 823, *cert. denied*, 351 N.C. 641, —— S.E.2d —— (2000), that

> Under G.S. 1A-1, Rule 46(b), with respect to rulings and orders of the trial court not directed to admissibility of evidence, no formal objections or exceptions are necessary, it being sufficient to preserve an exception that the party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court or makes known the action which he desires the court to take and his ground therefor.

Id.

The second requirement of *Floyd* is that the orders being reviewed must be interlocutory and not immediately appealable. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazy v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Because the trial court's orders of 10 May 1994 and 25 July 1995 did not dispose of the entire case, they are interlocutory. Generally, there is no right of immediate appeal from an interlocutory order. N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990); *see also Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Although there are exceptions to this rule, none apply in the case before us, and therefore the interlocutory orders are not immediately appealable. *See* N.C. Gen. Stat. §§ 1-277(a) (1996), 7A-27(d) (1995).

As to the third requirement, plaintiffs argue the order dismissing their unfair and deceptive practices claim involved the merits and necessarily affected the judgment by "depriv[ing] plaintiffs of one of their claims," borrowing the language in *Floyd*. *See Floyd*, 350 N.C. at 51, 510 S.E.2d at 159. However, defendants insist that plaintiffs' unfair and deceptive practices claim "did not, in any way, involve the merits of the remaining defamation claims." Defendants emphasize that the

word "merits" rather than "facts" appears in N.C.G.S. § 1-278 and argue that "merits" refers to the "strict legal rights of the parties" which for unfair or deceptive practices are distinct from the legal rights involved in plaintiffs' remaining claims. Regardless, our Supreme Court in *Floyd* used a different analysis of whether an order involves the merits and necessarily affects the judgment when it stated, "[b]ecause the election of remedies order deprived plaintiffs of one of their claims, it involved the merits and affected the judgment." *Floyd*, 350 N.C. at 51, 510 S.E.2d at 159. The Court did not discuss whether the prior order must involve the same strict legal rights of the parties as those adjudged in the judgment, as defendants argue, but did state that an order depriving plaintiffs of one of their claims will qualify as involving the merits and affecting the judgment.

Therefore in this case, we agree with plaintiffs that because the order dismissing their claims for unfair and deceptive practices deprived them of one of their claims, the order involved the merits and affected the judgment. We also believe the order granting defendants' motions for partial summary judgment on the public figure issue involved the merits and necessarily affected the judgment, as defendants conceded in their motion arguing against our review of the prior orders. *Cf. Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468, *cert. denied*, 350 N.C. 599, — S.E.2d — (1999) (grant of a counterclaim for specific performance of separation agreement reviewable on appeal even though wife's notice of appeal did not reference it, as it involved the merits and necessarily affected the final judgment); *In re Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 364 S.E.2d 723, *cert. denied*, 322 N.C. 480, 370 S.E.2d 222 (1988) (order withdrawing an upset bid and directing a resale of foreclosed property reviewable even where appellants did not timely appeal from it because order involved the merits and necessarily affected the judgment). As *Floyd*'s requirements for applying N.C. Gen. Stat. § 1-278 are satisfied, we will review the orders entered prior to 24 June 1997 which are absent from the notice of appeal.

II.

[2] Plaintiffs contend the trial court erred in dismissing their claims of unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1 (1994). Subsection (a) of the statute provides that "[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.G.S. § 75-1.1(a). Subsection (b) defines "commerce" to include "all business activities, however denominated, but does not include

professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b). Our Court has made clear that unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a). *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 446, 293 S.E.2d 901, 920, *cert. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982); *see also Cohn v. Wilkes Gen. Hosp.*, 767 F. Supp. 111, 114 (W.D.N.C.), *aff'd*, 953 F.2d 154 (4th Cir. 1991), *cert. denied*, 505 U.S. 1230, 120 L. Ed. 2d 922 (1992) ("[M]edical professionals are not contemplated by North Carolina's prohibition of unfair trade practices.").

Nonetheless, plaintiffs argue that defendants' statements are crimes and as such "cannot be a legal medical service" under the statute authorizing revocation of medical licenses. According to plaintiffs, "therefore, it follows that such actions cannot be 'exempt' from the coverage of Chapter 75." In support of their argument, plaintiffs cite a law review article entitled "The Learned Professional Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line." Plaintiffs' argument fails for the simple reason that medical professionals are expressly excluded from the scope of N.C.G.S. § 75-1.1(a) and thus it clearly does not follow that a statement by a medical professional, criminal or otherwise, is governed by this particular statute. Plaintiffs have no claim against defendants under N.C.G.S. § 75-1.1 for unfair or deceptive acts or practices. The trial court did not err in granting summary judgment in favor of the defendants on this issue.

III.

[3] Plaintiffs argue that the trial court erred by granting defendants' motions for partial summary judgment entered 25 July 1995, thereby establishing plaintiffs' status as limited purpose public figures and granting defendants' motions for summary judgment on plaintiffs' defamation claims. Our Court's standard of review on appeal from summary judgment requires a two-part analysis. Summary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c); *see also Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish

a *prima facie* case at trial. *Id.* at 394, 499 S.E.2d at 775; *see also Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964), the United States Supreme Court held the First and Fourteenth Amendments prohibit "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice[.]' " *Id.* at 279-80, 11 L. Ed. 2d at 706. Three years later, the Court extended the application of the *New York Times* "actual malice" standard to speech about "public figures," but provided little guidance as to which plaintiffs fell into that category. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 18 L. Ed. 2d 1094 (1967). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789 (1974), the Supreme Court elaborated on the types of defamation plaintiffs, whereby private individuals were distinguished from both public officials and public figures, the latter of whom were then divided into three categories. The *Gertz* Court described involuntary public figures, all purpose public figures, and limited purpose public figures. *Id.* at 345, 41 L. Ed. 2d at 808. Following *Gertz*, a defamation plaintiff who is a public official or public figure "may recover injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth," which is the *New York Times* "actual malice" standard. *Id.* at 342, 41 L. Ed. 2d at 807.

In the orders entered 25 July 1995, the trial court granted defendants' motions for partial summary judgment on the issue of whether plaintiffs were limited purpose public figures. The Court in *Gertz* stated that a limited purpose public figure is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351, 41 L. Ed. 2d at 812. In the course of deciding three other cases, the Supreme Court developed a two-part inquiry for determining whether a defamation plaintiff is a limited purpose public figure: (1) was there a particular "public controversy" that gave rise to the alleged defamation and (2) was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify "public figure" status? *See Time, Inc. v. Firestone*, 424 U.S. 448, 47 L. Ed. 2d 154 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111, 61 L. Ed. 2d 411 (1979); *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 61 L. Ed. 2d 450 (1979). By contrast, the United States Court of Appeals for the Fourth Circuit has set forth five requirements,

which need not be identified herein, that a defamation plaintiff must prove before a court can properly treat the plaintiff as a public figure for the limited purpose of comment on a particular public controversy. *See Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024, 75 L. Ed. 2d 497 (1983); *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir.) (en banc), *cert. denied*, 501 U.S. 1212, 115 L. Ed. 2d 986 (1991). Under North Carolina law, an individual may become a limited purpose public figure "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy[.]" *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 435-36, 291 S.E.2d 852, 857 (1982), *disc. review denied*, 307 N.C. 459, 298 S.E.2d 385 (1983) (adopting language of the United States Supreme Court in *Curtis Publishing Co.*).

We believe plaintiffs satisfied both the federal and state definitions of limited purpose public figures. First, there was an important public controversy surrounding *in vitro* fertilization at the time of *The Charlotte Observer* news article. One controversial question, for example, was whether a doctor performing *in vitro* fertilization should have special training in reproductive endocrinology. Several major news sources published articles on the debate, including *Time*, *Newsweek*, *Life*, *Forbes*, *People*, *Business Week*, *U.S. News & World Report*, *The Wall Street Journal* and the *Los Angeles Times*. Moreover, during this time the United States Congress and the North Carolina General Assembly debated the consumer protection issues involving *in vitro* fertilization clinics. *See Wolston*, 443 U.S. at 167, 61 L. Ed. 2d at 459 (suggesting in dicta there can be no "public controversy" unless the issues involved were truly divisive, or subject to debate—a requirement criticized by lower courts and commentators). Even Gaunt's agent, Bill Ballenger, repeatedly acknowledged there was a national controversy about infertility treatment. When questioned about the popularity of the subject, he stated "Yes, there certainly was a hot public debate, no doubt."

Furthermore, it is clear that Gaunt thrust himself into the vortex of the controversy. Gaunt, referring to the infertility treatment controversy, admitted that he had "spent every spare moment trying to stop this lunacy[.]" He also wrote to several politicians, hired a personal lobbyist, and procured the services of a public relations agent to enhance his public image. Gaunt also provided *The Charlotte Observer* with his side of the debate, for example in quotations such as: "As long as you have the background, understand how to interpret

the tests, have a medical license and are able to deal with the patient, then you have the potential of being an infertility specialist." We agree with the trial court that Gaunt is a limited purpose public figure for purposes of this action. The trial court did not err in granting defendants' motion for partial summary judgment on the public figure issue, in that there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law.

We hold that the trial court did not err in dismissing plaintiffs' claims of unfair and deceptive practices under N.C.G.S. § 75-1.1. The trial court also did not err in granting partial summary judgment finding Gaunt to be a public figure for purposes of defamation in this case. Plaintiffs' arguments concerning the trial court's granting summary judgment to defendants on plaintiffs' defamation claims were determined in the prior opinion of this Court.

Affirmed.

Judges GREENE and MARTIN concur.

STATE OF NORTH CAROLINA v. OLLIE JUNIOR ALSTON, DEFENDANT

No. COA99-317

(Filed 29 August 2000)

Probation and Parole— condition of probation—sex offender treatment program—Alford plea

The trial court did not abuse its discretion in its determination that defendant violated the probationary condition that he actively participate in and successfully complete a sex offender treatment program, because: (1) defendant presented no competent evidence of his inability to comply, and the evidence of his failure to pursue the program was sufficient within itself to sustain the trial court's finding that defendant's failure to comply was without lawful excuse; and (2) defendant's reliance upon his Alford plea as a lawful excuse for non-compliance with the program condition requiring defendant to acknowledge having committed the charged offenses before inclusion in the program was unfounded.

Appeal by defendant from judgments entered 26 October 1998 by Judge Frank R. Brown in Nash County Superior Court. Heard in the Court of Appeals 27 January 2000.

Michael F. Easley, Attorney General, by J. Bruce McKinney, Assistant Attorney General, for the State.

Etheridge, Sykes & Britt, L.L.P., by Raymond M. Sykes, Jr., for defendant-appellant.

JOHN, Judge.

Defendant Ollie Junior Alston appeals judgments activating previously-suspended probationary sentences. We affirm the trial court.

Examination of the record reveals the following: On 1 June 1998, defendant entered into a plea bargain arrangement (plea bargain) under which he pleaded guilty to each of four counts of taking indecent liberties with a child. Defendant's pleas were tendered pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970) (hereinafter "Alford plea"), and the transcript of plea form (plea transcript) reflected his understanding "that upon [his] 'Alford Plea' [he] w[ould] be treated as being guilty whether or not [he] admit[ted] that [he was] in fact guilty." Under defendant's plea bargain, four consecutive sentences of not less than sixteen nor more than twenty months imprisonment were suspended during a sixty-month term of supervised probation. In return, defendant agreed to comply with certain specified conditions of probation, including "active[] participat[ion] in and successful[] complet[ion] [of] a sexual offender treatment program" (the program condition). Further, defendant's "[f]ailure to fully participate and successfully complete" such program was stipulated to "constitute immediate grounds for revocation" of his probation.

On 15 September 1998, a probation violation report was filed in each case, alleging defendant had "failed to complete the sex offender program [(the program)] at the Edgecombe-Nash Mental Health Center" (the Center). During a violation hearing conducted 26 October 1998, Robert Bissette (Bissette), defendant's supervising probation officer, testified defendant had enrolled in the program at the Center, but that he "could not complete the program because he wouldn't admit to what he had done." The court also received into evidence a 13 August 1998 letter to the Adult Probation/Parole Department from Ted Simpson (Simpson), a licensed psychologist at

the Center, stating that "the minimum entrance criterion for the [program wa]s that the offender accept some level of guilt and responsibility for his abuse." Simpson related that defendant had "steadfastly and consistently maintained his innocence," and therefore "[wa]s not appropriate for inclusion" in the program. Defendant did not testify at the hearing, and his presentation was limited to tendering a copy of his plea transcript and arguing that, in light of his "Alford plea," he was not required to admit guilt during the program.

Following the hearing and

> [a]fter considering the record . . . together with the evidence presented by the parties and the statements made on behalf of the State and the defendant,

the trial court rendered the following factual findings in each case:

> 1. The defendant is charged with having violated specific conditions of [his] probation as alleged in:
>
> X a. the Violation Report(s) on file herein, which is incorporated by reference.
>
> . . . .
>
> 3. The condition(s) violated and the facts of each violation are as set forth . . .
>
> X a. in paragraph(s) 5 in the Violation Report or Notice dated 09-15-98 .
>
> . . . .
>
> 5. Each of the conditions violated as set forth above is valid; the defendant violated each condition willfully and without valid excuse; and each violation occurred at a time prior to the expiration or termination of the period of the defendant's probation.
>
> X Each violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.

The court thereupon ordered defendant's probation revoked and his suspended sentence activated. Defendant appeals.

In seeking to revoke a probationary sentence, the State must show that the defendant, without lawful excuse, willfully violated a

condition of probation, *State v. Seagraves*, 266 N.C. 112, 113, 145 S.E.2d 327, 329 (1965) (per curiam); when this burden is met, the defendant must then "present competent evidence of his inability to comply" with such terms, *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985). However, if the defendant fails to offer evidence of inability to comply,

> then the evidence which establishes that defendant has failed to . . . [comply with] the terms of the judgment is sufficient within itself to justify a finding by the [trial court] that defendant's failure to comply was without lawful excuse.

State v. Williamson, 61 N.C. App. 531, 534, 301 S.E.2d 423, 426 (1983) (citation omitted).

On appeal,

> " '[t]he findings of the [trial court], and [its] judgment upon them, are not reviewable . . . unless there [wa]s a manifest abuse of . . . discretion.' "

State v. Green, 29 N.C. App. 574, 576, 225 S.E.2d 170, 172 (1976) (citations omitted).

Defendant asserts that acceptance of his "Alford plea" by the trial court "necessarily contemplate[d]" that he would be allowed to maintain factual innocence, even while fulfilling probationary conditions imposed by the court. Specifically, defendant contends that

> maintaining his innocence . . . pursuant to his Alford plea[] should be considered a lawful excuse for not having completed the program.

Furthermore, defendant argues:

> To now hold that [he] has violated his probation because of his refusal to acknowledge his guilt is unjust and inequitable, and robs him of the benefit of the bargain he struck with the State by entering into the plea bargain arrangement.

Defendant's argument that his "Alford plea" excuses his failure to participate in the program raises an issue of first impression in this jurisdiction. We therefore examine the principles espoused in *Alford* and the decisions of other courts that have addressed the issue.

Preliminarily, however, we address briefly defendant's contention that the plea bargain between himself and the State was somehow

compromised by inclusion in the program the requirement that he acknowledge having committed the charged offenses. Because the hearing transcript reveals defendant failed to raise this argument in the trial court, the question is not properly before us. *See* N.C. R. App. P. 9(a) (appellate "review is solely upon the record on appeal and the verbatim transcript of proceedings"), and *State v. Hall*, 134 N.C. App. 417, 424, 517 S.E.2d 907, 912 (1999) (citations omitted) ("where theory argued on appeal not raised in trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]' ").

Even if the issue were preserved for appellate review, moreover, we note the plea transcript indicates defendant's acquiescence in the program condition.

> If [defendant] had wished to challenge that condition as inconsistent with his plea agreement, he could have moved to withdraw his plea prior to the imposition of sentence.

People v. Birdsong, 958 P.2d 1124, 1129 (Colo. 1998) (citations omitted).

Further, the record reveals no motion for appropriate relief by defendant

> seeking to vacate his plea on the basis that he mistakenly and detrimentally relied upon plea agreement that differed from the terms and conditions of probation.

Id. Nor does the record reflect defendant sought to withdraw his plea at the probation revocation hearing. *See id.*

Prior to leaving this issue, moreover, we observe that defendant's claim of a plea bargain violation by implication also includes the argument his plea may have been rendered involuntary by virtue of the sentencing court's failure to advise him he might be required to admit guilt in order to satisfy the program condition. However, the question of the voluntariness of defendant's plea likewise was not raised in the trial court nor has it been argued before this Court. *See* N.C. R. App. P. 9(a), and *Hall*, 134 N.C. App. at 424, 517 S.E.2d at 912. We therefore do not address the adequacy of the initial plea colloquy *sub judice*.

At the outset, it must be noted that, in view of defendant's failure to present evidence of inability to comply, *see Crouch*, 74 N.C. App. at 567, 328 S.E.2d at 835, the State's evidence at the hearing provided a

sufficient basis upon which the trial court could reasonably have determined defendant willfully violated, without lawful excuse, the condition that he fully complete a sex offender program, *see Williamson*, 61 N.C. App. at 534, 310 S.E.2d at 425; *see also State v. Hoggard*, 180 N.C. 678, 679, 103 S.E. 891, 891 (1920) (" 'When judgment is suspended in a criminal action upon good behavior, or other conditions, the proceedings to ascertain whether the terms have been complied with are addressed to the reasonable discretion of the judge of the court. . . . The findings of the judge, and his judgment upon them, are not reviewable upon appeal unless there is a manifest abuse of such discretion.' ").

Notwithstanding, we consider defendant's assertion that "maintaining his innocence . . . pursuant to his Alford plea[] should be considered a lawful excuse" for failure to comply with the program condition. *Alford* established that a defendant may enter a guilty plea while continuing to maintain his or her innocence. 400 U.S. at 37, 27 L. Ed. 2d at 171.

In the words of our Supreme Court,

> while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Id. Commentators have noted that a defendant may choose to enter an Alford plea for reasons other than admitting guilt; for example, a defendant may wish to "plea bargain for a predictable, and often shorter, sentence or to protect others from the rigors, expense, or publicity of a trial." Alice J. Hinshaw, Comment, *State v. Cameron: Making the Alford Plea an Effective Tool in Sex Offense Cases*, 55 Mont. L. Rev. 281, 281 (1994).

Nonetheless, an "Alford plea" constitutes "a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea." *State ex rel. Warren v. Schwarz*, 579 N.W.2d 698, 706 (Wis. 1998); *see Alford*, 400 U.S. at 37, 27 L. Ed. 2d at 171 (no "material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence"); *Birdsong*, 958 P.2d at 1130 ("An Alford plea is to be treated as a guilty plea and a sentence may be imposed accordingly.").

As a consequence, in accepting an "Alford plea" as

> a concession to [a] defendant, [the trial court accords that defendant] no implications or assurances as to future revocation proceedings.

Birdsong, 958 P.2d at 1129. In other words, an "Alford plea" is in no way "infused with any special promises," *Warren*, 579 N.W.2d at 711, nor does acceptance thereof constitute "a promise that a defendant will never have to admit his guilt," *id.*

As the Wisconsin Supreme Court stated in *Warren*:

> [a] defendant's protestations of innocence under an Alford plea extend only to the plea itself.
>
> . . . .
>
> . . . "*There is nothing inherent in the nature of an* Alford *plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction.*"
>
> . . . Put simply, an *Alford* plea is not the saving grace for defendants who wish to maintain their complete innocence. Rather, it is a device that defendants may call upon to avoid the expense, stress and embarrassment of trial and to limit one's exposure to punishment [and it is] not the saving grace for defendants who wish to maintain their complete innocence.

Id. at 707 (citations omitted) (emphasis added); *see generally Smith v. Com.*, 499 S.E.2d 11, 13 (Va. Ct. App. 1998) (quoting *State v. Howry*, 896 P.2d 1002, 1004 (Idaho Ct. App. 1995)) (" '[A]lthough an *Alford* plea allows a defendant to plead guilty amid assertions of innocence, it does not require a court to accept those assertions . . . [but the court may] consider all relevant information regarding the crime, including [the] defendant's lack of remorse.' ").

Under the plea bargain *sub judice*, defendant expressly acknowledged his understanding that he would be, and that he agreed to be, "treated as . . . guilty" whether or not he admitted guilt. Further, defendant's plea bargain set forth specified probationary conditions, which he agreed to perform, including "active" participation and "successful[]" completion of "a sexual offender treatment program," as well as defendant's stipulation that his"[f]ailure to fully participate and successfully complete" such program would "constitute immedi-

ate grounds for revocation" of his probation. Defendant not only agreed to such terms during the oral plea colloquy with the court, but personally, along with his counsel, signed the plea transcript incorporating the terms of the plea bargain.

Upon defendant's assent to the foregoing terms and conditions, the trial court accepted the plea bargain, including defendant's "Alford plea," and sentenced defendant accordingly. In doing so, however, the trial court conveyed "no implications or assurances as to future revocation proceedings." *Birdsong*, 958 P.2d at 1129. Notwithstanding the absence of any assurances as to future proceedings and his specific acceptance of participation and successful completion of the program, defendant reiterates that "[m]aintaining his innocence . . . pursuant to his Alford plea, should be considered a lawful excuse for not having completed the program." We disagree.

It is well established that "probation or suspension of sentence is an act of grace" and not a right. *State v. Baines*, 40 N.C. App. 545, 550, 253 S.E.2d 300, 303 (1979). Further, under the authorities discussed above, including *Alford* itself, defendant's protestations of innocence under his "Alford plea" did not extend to future proceedings. *See Birdsong*, 958 P.2d at 1129. Rather, his claim of innocence was applicable only to the plea itself, a plea of guilty, *see Warren*, 579 N.W.2d at 706, *Birdsong*, 958 P.2d at 1130, and *Alford*, 400 U.S. at 37, 27 L. Ed. 2d at 171, which bestowed upon defendant no rights, promises, or limitations with respect to the punishment imposed save as set out in the plea bargain and authorized the trial court to treat defendant as any other convicted sexual offender, *see Warren*, 579 N.W.2d at 707; *see also generally State v. Goff*, 509 S.E.2d 557, 565-66 (W. Va. 1998) (Workman, J., concurring) (" 'The primary goal for managing sex offenders should be to protect society [especially children] from new sexual assaults . . . [and] one of the best methods for accomplishing th[is] goal . . . includes providing treatment for the sex offender.' ").

To summarize, the trial court's determination that defendant had violated the probationary condition that he "actively participate" in and "successfully complete" a sexual offender treatment program in no way reflected a "manifest abuse of discretion." *Green*, 29 N.C. App. at 576, 225 S.E.2d at 172. First, defendant presented no competent "evidence of his inability to comply," *Crouch*, 74 N.C. App. at 567, 328 S.E.2d at 835, and the evidence of his failure to pursue the program was thereby in any event "sufficient within itself," *Williamson*, 61

N.C. App. at 534, 310 S.E.2d at 425, to sustain the court's finding "that defendant's failure to comply was without lawful excuse," *id.* Second, as discussed above, defendant's reliance upon his "Alford plea" as lawful excuse for non-compliance with the program condition was unfounded.

Affirmed.

Judges McGEE and HUNTER concur.

GEORGE E. GROVES, PLAINTIFF-APPELLANT v. THE TRAVELERS INSURANCE COMPANY, CHRISTINE DE SIMONE, ANDY GREEN, AND PORCELANITE, INC., F/K/A P&M TILE, INC., F/K/A MANNINGTON CERAMIC TILE, INC., DEFENDANT-APPELLEES

No. COA99-831

(Filed 29 August 2000)

1. **Workers' Compensation— exclusive jurisdiction—bad faith—unfair and deceptive trade practices—civil conspiracy**

The trial court did not err by granting judgment on the pleadings as to plaintiff's claims for bad faith, unfair and deceptive trade practices, and civil conspiracy arising out of a refusal to pay a claim which arose from a workers' compensation claim involving an allegedly inaccurate videotape, because all of plaintiff's claims were within the exclusive jurisdiction of the Industrial Commission.

2. **Workers' Compensation— no exclusive jurisdiction—intentional infliction of emotional distress**

The trial court erred by granting judgment on the pleadings as to plaintiff's claim for intentional infliction of emotional distress arising out of a refusal to pay a claim which arose from a workers' compensation claim involving an allegedly inaccurate videotape, because: (1) an intentional infliction of emotional distress claim lies outside the exclusivity provisions of the Workers' Compensation Act; and (2) plaintiff has pled the elements of the tort.

Judge McGEE concurring in part and dissenting in part.

Appeal by plaintiff from order entered 28 April 1999 by Judge Julius A. Rousseau, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 18 April 2000.

Donaldson & Black, P.A., by Jay A. Gervasi, Jr., and Rachel Scott Decker, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, PLLC, by Richard T. Rice and Garth A. Gersten, for defendant-appellees.

EDMUNDS, Judge.

Plaintiff George E. Groves appeals the trial court's order granting judgment on the pleadings in favor of defendants. We affirm in part and reverse in part.

In 1994, plaintiff was employed as the production manager by defendant Porcelanite, Inc. (Porcelanite). During plaintiff's employment, defendant The Travelers Insurance Company (Travelers) provided workers' compensation insurance to Porcelanite.

On 12 August 1994, plaintiff became disabled as the result of a shoulder injury. He alleged that the injury was compensable because it resulted from repetitive motion required by his job. Plaintiff sought treatment from Dr. Robert V. Sypher, Jr., who diagnosed plaintiff as suffering from impingement and a probable rotator cuff tear. Based on plaintiff's description of his job duties, Dr. Sypher was of the opinion that the injury likely was related to plaintiff's employment. Accordingly, plaintiff submitted a workers' compensation claim to Travelers, which, through its agent defendant Christine De Simone, denied liability.

Sometime prior to 28 March 1995, defendants prepared a video tape purporting to demonstrate the functions of plaintiff's job. The video failed to show all aspects of plaintiff's job and allegedly omitted some of the job functions plaintiff contended were the cause of his injury. Defendants forwarded the video to Dr. Sypher, who reviewed the tape and changed his opinion that plaintiff's condition was job-related. Dr. Sypher then wrote a letter to defendants informing them that it was his opinion that plaintiff's condition was a result of age-related degeneration.

After a hearing on plaintiff's workers' compensation claim, plaintiff, Porcelanite, and Travelers entered into an Agreement of Final

Settlement and Release (Agreement). Pursuant to the Agreement, plaintiff agreed to dismiss his workers' compensation claim against Porcelanite and Travelers in return for a lump-sum payment of $13,000 plus payment of medical bills related to his injury.

Thereafter, on 30 March 1998, plaintiff brought suit against Travelers, De Simone, and Porcelanite alleging (1) intentional infliction of emotional distress, (2) bad faith, (3) unfair or deceptive trade practices, and (4) civil conspiracy. Defendants answered on 10 June 1998 and asserted as affirmative defenses the Agreement and the statute of limitations. Defendants filed a Motion for Judgment on the Pleadings on 2 July 1998. This motion was denied, but on 15 March 1999, defendants filed a Motion for Reconsideration of Judgment on the Pleadings, citing *Johnson v. First Union Corp.*, 131 N.C. App. 142, 504 S.E.2d 808 (1998), *disc. review allowed*, 349 N.C. 529, 526 S.E.2d 175, *review dismissed as improvidently granted*, 351 N.C. 339, 525 S.E.2d 171 (2000). On 28 April 1999, the trial court granted defendants' motion and entered judgment in favor of defendants. Plaintiff appeals.

[1] Plaintiff contends that his claims were outside of the exclusivity provision of the North Carolina Workers' Compensation Act and that the trial court accordingly erred in granting defendants' motion. Section 97-10.1 of the Act states:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

N.C. Gen. Stat. § 97-10.1 (1999). Plaintiff contends that "[i]n the case currently before this Court, the actions of the defendants as alleged do not fall within the exclusive jurisdiction of the Industrial Commission because the acts did not occur within the course and scope of employment." We disagree. All of plaintiff's claims except for his claim for intentional infliction of emotional distress are precluded by our holding in *Johnson*.

In *Johnson*, where the facts were virtually identical to those at bar, the plaintiffs allegedly suffered on-the-job injuries and filed

claims with the Industrial Commission seeking workers' compensation benefits. Both plaintiffs initially were diagnosed as suffering from job-related repetitive motion disorders. Defendants then prepared a videotape portraying the physical requirements of the plaintiffs' jobs. After viewing the tape, the physician withdrew diagnoses that the plaintiffs' injuries were job-related. When the plaintiffs' claims were rejected by the Industrial Commission, they filed suit alleging fraud, bad faith, unfair and deceptive trade practices, intentional infliction of emotional distress, and civil conspiracy, contending that the videotape was inaccurate and made with the intent of deceiving plaintiff's physician. The trial court dismissed the complaint for failure to state a claim for which relief could be granted. The plaintiffs appealed, and the defendants cross-appealed, arguing that while the trial court was correct in dismissing the suit, the dismissal should have been based upon lack of subject matter jurisdiction. We agreed with the defendants that all of the plaintiffs' claims were within the exclusive jurisdiction of the Industrial Commission and affirmed the trial court's dismissal. *See Johnson*, 131 N.C. App. at 145, 504 S.E.2d at 810.

[2] Plaintiff in the case at bar also alleged intentional infliction of emotional distress. This Court has long held that such a claim lies outside the exclusivity provision of the Workers' Compensation Act. *See Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116 (1986) (allowing plaintiff's claim for intentional infliction of emotional distress). The issue was one of first impression before the *Hogan* Court, which addressed the question directly and discussed at length the policy considerations behind its holding. *Hogan* has since been followed by this Court. *See Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989). Accordingly, despite the suggestion in *Johnson* that such a claim is precluded, we address plaintiff's claim as to this issue.

To establish such a claim, plaintiff must have shown that defendants engaged in extreme and outrageous conduct that was intended to cause severe emotional distress, or were recklessly indifferent to the likelihood that such distress would result, and that severe distress did result from defendants' conduct. *See Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). In his complaint, plaintiff alleged:

> 29. The defendants created the videotape and sent it to Dr. Sypher intentionally, which conduct was extreme and outra-

geous, with the intent to cause emotional distress to Groves, and said actions did, in fact, cause emotional distress to Groves.

30. As a result of said conduct, Groves suffered frustration and severe emotional distress, for which he is entitled to compensatory and punitive damages, in an amount to be determined at trial.

Although the level of proof required for such a claim is high, *see Waddle v. Sparks*, 331 N.C. 73, 84, 414 S.E.2d 22, 27-28 (1992), plaintiff has pled the elements of the tort. Under principles of notice pleading, a complaint is adequate if it gives a defendant sufficient notice of the nature and basis of the plaintiff's claim and allows the defendant to answer and prepare for trial. *See Gilchrist, District Attorney v. Hurley*, 48 N.C. App. 433, 269 S.E.2d 646 (1980). Therefore, the trial court erred in granting judgment on the pleadings as to plaintiff's claim for intentional infliction of emotional distress. The case is remanded to the trial court for further proceedings in accordance with this opinion.

Affirmed in part, reversed in part.

Judge GREENE concurs.

Judge McGEE concurs in part and dissents in part.

Judge McGEE concurring in part and dissenting in part.

I agree with the majority that plaintiff's claims for bad faith, unfair or deceptive trade practices, and civil conspiracy fall within the exclusive jurisdiction of the Industrial Commission. I respectfully disagree that the trial court erred in granting judgment on the pleadings as to plaintiff's claim for intentional infliction of emotional distress under the facts alleged by plaintiff.

To properly state a claim for intentional infliction of emotional distress, a plaintiff must allege that (1) the defendant engaged in extreme and outrageous conduct and (2) such conduct was intended to cause, and in fact did cause, severe emotional distress. *See Dickens v. Puryear*, 302 N.C. 437, 447, 276 S.E.2d 325, 332 (1981). Plaintiff has alleged a claim of intentional infliction of emotional distress specifically asserting that defendants "created the videotape and sent it to

Dr. Sypher intentionally, which conduct was extreme and outrageous, with the intent to cause emotional distress to [plaintiff]."

"The determination of whether the conduct alleged" is sufficiently "extreme and outrageous enough to support such an action is a question of law for the trial judge." *Lenins v. K-Mart Corp.*, 98 N.C. App. 590, 599, 391 S.E.2d 843, 848 (1990) (citation omitted). Conduct is extreme and outrageous when it is " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, 327 S.E.2d 308, 311 (1985) (quoting Restatement (Second) of Torts, § 46 cmt. d (1965)).

In this case, plaintiff essentially alleges that defendants prepared a videotape purporting to demonstrate the functions of plaintiff's job which failed to show all aspects of his job and allegedly omitted some of the job functions plaintiff contended were the cause of his injury. Defendants sent the videotape to plaintiff's physician, who reviewed the tape and changed his opinion that plaintiff's condition was job-related. While such alleged conduct might well be most objectionable, defendants' actions "may not be reasonably regarded as exceeding all bounds usually tolerated by a decent society so as to satisfy the first element of the tort, requiring a showing of extreme and outrageous conduct." *Shreve v. Duke Power Co.*, 85 N.C. App. 253, 257, 354 S.E.2d 357, 360 (1987) (citing *Hogan v. Forsyth Country Club Co.*, 79 N.C. 483, 340 S.E.2d 116 (1986)).

Plaintiff's claim for intentional infliction of emotional distress should be dismissed because the conduct alleged under this cause of action, even if true, does not rise to the level of behavior our courts previously have required. Assuming the allegations in plaintiff's claim to be true, these actions do not exceed all bounds usually tolerated by decent society. Our courts have appropriately held that allegations of actions by a defendant that rose to the level of "extreme and outrageous" conduct are actionable. *See, e.g., Hogan*, 79 N.C. App. at 494, 340 S.E.2d at 123 (sexual advances and harassment and threats of bodily injury sufficient to maintain claim for intentional infliction of emotional distress). However, in other employment actions, our courts have been reluctant to find intentional infliction of emotional distress claims actionable. *See, e.g., Haburjak v. Prudential Bache Securities, Inc.*, 759 F. Supp. 293 (W.D.N.C. 1991); *Mullis v. The Pantry, Inc.*, 93 N.C. App. 591, 378 S.E.2d 578 (1989); *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C. App. 451, 358 S.E.2d 107

(1987). *But see Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989). The tort of intentional infliction of emotional distress is reserved for conduct that is " 'utterly intolerable in a civilized community.' " *Hogan*, 79 N.C. App. at 493-94, 340 S.E.2d at 123 (citation omitted). Our Court in *Hogan* dismissed one plaintiff's claim for intentional infliction of emotional distress despite the fact that she alleged her manager refused her request for pregnancy leave, directed her to carry heavy objects weighing more than ten pounds, cursed at her, and refused her request to leave work to visit a hospital. *See id.* at 494, 340 S.E.2d at 123 (characterizing such alleged conduct as "unjustified under the circumstances" but not " 'extreme and outrageous' as to give rise to a claim for intentional infliction of emotional distress").

Like other cases in which our courts have found the alleged conduct fell short of establishing the tort, defendants' alleged actions do not rise to the level of conduct required to establish a claim of intentional infliction of emotional distress and as a matter of law, are insufficient to state such a cause of action. *See, e.g., Buser v. Southern Food Service, Inc.*, 73 F. Supp. 2d 556 (M.D.N.C. 1999) (termination of employee who refused to return to work from leave under Family and Medical Leave Act not "extreme and outrageous" conduct); *Pardasani v. Rack Room Shoes Inc.*, 912 F. Supp. 187 (M.D.N.C. 1996) (conduct not "extreme and outrageous" when the plaintiff alleged that he was given poor performance evaluations, denied promotions available to others, excluded from training, and finally terminated from his employment); *Dickens*, 302 N.C. 437, 276 S.E.2d 325 (physical abuse not sufficient); *Lorbacher v. Housing Authority of the City of Raleigh*, 127 N.C. App. 663, 493 S.E.2d 74 (1997) (alleged discharge for the purposes of deflecting responsibility for certain deaths and for retaliation of First Amendment rights not "extreme and outrageous" conduct); *Poston v. Poston*, 112 N.C. App. 849, 436 S.E.2d 854 (1993) (adultery not extreme and outrageous conduct); *Wilson v. Bellamy*, 105 N.C. App. 446, 414 S.E.2d 347 (1992) (some evidence of sexual battery, standing alone, not "atrocious"). The totality of defendants' actions simply is not comparable to cases in which our courts have imposed liability for intentional infliction of emotional distress. For example, defendants' actions did not involve physical abuse as in *Dickens*, sexual harassment as in *Hogan* and *Brown*, or threats, obscene gestures, and cursing as in *Wilson*. The conduct that sustained claims in those cases far exceeds in outrageousness the conduct experienced by plaintiff in this case. Accordingly, to the extent that plaintiff's complaint does not identify conduct that can be con-

sidered extreme and outrageous, he has not alleged a claim for intentional infliction of emotional distress; therefore, the trial court did not err in entering judgment in favor of defendants.

I respectfully disagree and dissent in part.

ANNIE LOWERY FRIDAY, WIDOW OF CLARK FRIDAY, DECEASED EMPLOYEE, PLAINTIFF v. CAROLINA STEEL CORP., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA99-1043

(Filed 29 August 2000)

Workers' Compensation— death benefits—reapportionment

The Industrial Commission did not err as a matter of law in concluding that plaintiff-widow was not entitled to a reapportionment of death benefits upon her daughter's eighteenth birthday during the initial 400-week period for payment of death benefits under N.C.G.S. § 97-38 for dependents of an employee whose death proximately results from compensable injury or occupational disease, because: (1) each recipient's share is fixed at the date of decedent's death for the initial period of 400 weeks; and (2) there was no decrease in the payor's obligation before the full 400 weeks payment to the dependent child was complete.

Judge EAGLES concurring.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 17 March 1999. Heard in the Court of Appeals 15 May 2000.

Robert Winfrey for the plaintiff-appellant.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by G. Thompson Miller, for the defendant-appellees.

LEWIS, Judge.

Plaintiff Annie Lowery Friday appeals from an opinion and award of the North Carolina Industrial Commission denying her request for a reapportionment of death benefits. Plaintiff's husband, Clark Friday ("decedent"), died on 2 March 1989 as a result of a compensable

injury. On 16 August 1989, the parties filed a Form 30 in which they stipulated that Annie Friday and Versie Friday, the spouse and daughter of the decedent, were dependents entitled to receive death benefit payments from the defendants. The parties stipulated to death benefit payments for both dependents in the amount of $328.21 per month for a period of 400 weeks. The Industrial Commission approved the agreement.

N.C. Gen. Stat. § 97-38, which provides for payment of death benefits for dependents of an employee whose death proximately results from compensable injury or occupational disease, provides in pertinent part:

> If death results proximately from a compensable injury . . . the employer shall pay . . . to the person or persons entitled thereto as follows:
>
> (1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the *entire* compensation payable share and share alike to the exclusion of all other persons . . .
>
> * * *
>
> Compensation payments due on account of death *shall be paid for a period of 400 weeks* from the date of the death of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, . . . compensation payments due a dependent child *shall be continued* until such child reaches the age of 18.

(Emphasis added.)

At the time of the decedent's death Versie Friday was seventeen years old; however, she turned eighteen during the 400-week period. Defendants nonetheless continued to issue Versie death benefits for the entire 400 weeks. Annie Friday, who is blind, has continued to receive benefits beyond the 400-week period as required under G.S. 97-38 for a widow with a physical disability. On 6 October 1997, after the 400 weeks expired, Annie Friday filed a Motion to Set Aside the Form 30. In that motion, she first alleged defendants were required to stop payment of death benefits to Versie as of her eighteenth birthday and reapportion Annie's benefits such that she would

receive the defendants' entire payment obligation for the duration of her entitlement. Plaintiff also alleged that because defendant Liberty Mutual's insurance adjuster told plaintiff it was not necessary to hire an attorney in this matter, the Form 30 was entered as a result of fraud, misrepresentation or mutual mistake.

Plaintiff's motion was set for hearing on 22 January 1998. Prior to the hearing, however, the parties agreed to have the issue in dispute decided by the Deputy Commissioner based upon the stipulations set forth in the parties' pre-trial agreement, prior orders of the Industrial Commission and all affidavits filed with plaintiff's motion. On 17 March 1998, Deputy Commissioner John A. Hedrick entered an order concluding plaintiff was not entitled to a reapportionment of benefits as of her daughter's eighteenth birthday, citing G.S. 97-38, *Deese v. Southern Lawn and Tree Expert Co.* and *Allen v. Piedmont Transport Services, Inc.* (citations omitted), and that the Form 30 was not entered as a result of fraud, misrepresentation, undue influence or mutual mistake.

On 23 March 1998, plaintiff filed notice of appeal to the Full Commission. On 17 March 1999, the Full Commission entered an Opinion and Award denying plaintiff's claim, also citing *Deese* and *Allen* as supporting authority. Plaintiff appeals from the Opinion and Award of the Full Commission.

On appeal from an order of the Industrial Commission, our jurisdiction is limited to questions of law, namely, whether there was competent evidence before the commission to support its findings of fact and whether those findings justify the legal conclusions and ultimate decision of the commission. *Allen*, 116 N.C. App. 234, 236, 447 S.E.2d 835, 836 (1994). On appeal, plaintiff has only assigned error as to the commission's conclusions of law, and we review them accordingly.

Plaintiff first contends the Commission erred as a matter of law in concluding she was not entitled to a reapportionment of death benefits upon her daughter's eighteenth birthday. Specifically, plaintiff contends that when Versie turned eighteen, the pool of dependent beneficiaries decreased during the 400-week period, entitling plaintiff to a reapportionment of death benefits under *Deese*. We disagree.

Addressing this contention necessarily involves our determination of whether defendants properly paid Versie after her eighteenth birthday for the full 400 weeks, or whether they were required to stop payment upon her eighteenth birthday and issue benefits for less than

400 weeks. For this analysis, we turn first to G.S. 97-38. This Court has noted "the General Assembly intended to fix each recipient's share at the date of the decedent's death," *Chinault v. Pike Electrical Contractors*, 53 N.C. App. 604, 606, 281 S.E.2d 460, 462 (1981), *aff'd*, 306 N.C. 286, 293 S.E.2d 147 (1982), and indeed, the express language of G.S. 97-38 supports this interpretation. The statute provides that a dependent beneficiary has a vested right to payment of death benefits "for a period of 400 weeks" upon the decedent's death. N.C. Gen. Stat. § 97-38. Although G.S. 97-38 specifically addresses the situation where payments will be extended *beyond* 400 weeks, the express language does not indicate any situation in which the vested right to a 400-week payment period may be shortened. Absent such language in the statute, it is clear that Versie was entitled to payment for a full 400 weeks and defendants were not required to stop payment upon her eighteenth birthday.

Plaintiff, however, contends that *Deese*, 306 N.C. 275, 293 S.E.2d 140 (1982), and *Allen*, 116 N.C. App. 234, 447 S.E.2d 835 (1994), support the alternate conclusion that the beneficiary pool did in fact decrease when Versie turned eighteen, thus entitling plaintiff to a reapportionment of benefits.

Indeed, *Deese* contains the following language: "[I]f there is a decrease in the dependent beneficiary pool *during* the 400 weeks following the employee's death, there must be a corresponding reapportionment of the full award payable for that set period among the remaining eligible members of the pool." *Deese*, 306 N.C. at 279-80, 293 S.E.2d at 144. We have already concluded that Versie was entitled to a full 400 weeks' payment under the statute, and thus, the pool of dependent beneficiaries did not decrease. Furthermore, unlike this case, *Deese* dealt with the specific issue of whether G.S. 97-38 permits a reapportionment of benefits among eligible dependents *after* the initial 400 weeks. *Id.* at 277, 293 S.E.2d at 142. The beneficiary pool in *Deese* consisted of the decedent's wife and three minor children. *Id.* The issue for review was whether G.S. 97-38 required a reapportionment of the entire amount of payable death benefits among the remaining dependent children in equal shares as each child reached the age of eighteen, *after* the expiration of the initial 400 weeks. *Id.* The remaining minor beneficiaries argued that each time a child turned eighteen during the post-400 week period and was no longer entitled to receive benefits, his share must be put back into the "compensation pot" and the entire award redistributed equally to the remaining eligible beneficiaries. *Id.* at 279, 293 S.E.2d at 144.

The court held "G.S. 97-38 does not permit a reapportionment of the entire compensation award among eligible dependents *after* 400 weeks have elapsed," noting that were such a reapportionment allowed the payor's obligation beyond the 400 weeks would be effectively increased. *Id.* at 281, 293 S.E.2d at 145. In explanation, the court made the following distinction:

> [I]f there is a decrease in the dependent beneficiary pool *during* the 400 weeks following the employee's death, there must be a corresponding reapportionment of the full award payable for that set period among the remaining eligible members of the pool. That, we hold, is the only situation in which there will be an increase in the amount of the individual shares paid to the dependents still partaking of the compensation fund.

Id. at 279-80, 293 S.E.2d at 144 (citations omitted.) The court noted its concern that the payor of death benefits would be able to avoid its obligation for less than 400 weeks, in abrogation of G.S. 97-38:

> [T]he underlying logic of the statute evinces no reason for *decreasing* the [payor's] *400 week obligation* based merely upon a decrease in the number of persons to whom such payments must be made . . . [since] the rights and liabilities arising under G.S. 97-38 attach in a final sense at the time of the employee's death so that the award then determined is not thereafter extinguished *on the payor's end* until it has been paid in full.

Id. at 280, 293 S.E.2d at 144.

The facts of this case neither violate the specific holding in *Deese* nor the concerns mentioned in conjunction with that holding. Under G.S. 97-38, there was no *decrease* in the payor's obligation before the full 400 weeks payment to Versie was complete. *See also* Commissioner J. Randolph Ward, *Primary Issues in Compensation Litigation*, 17 Campbell L. Rev. 443, 480 (1995) ("Despite dicta to the contrary in [*Deese*], it appears to be settled that the class of beneficiaries becomes fixed according to their status 'at the time of the accident' or at the date of the decedent-employee's death. All qualifying beneficiaries obtain a vested right to the death benefit, or their share of it, for a period of four hundred weeks following the death . . . .") Having completed their obligation, defendants were not then required to effectively *increase* their obligation beyond the 400-week period—which would be the result were plaintiff's argument in this respect followed.

Here, Versie was properly paid benefits for the entire 400 weeks under G.S. 97-38 and as such, the pool of dependent beneficiaries did not decrease and no corresponding reapportionment of benefits was required under *Deese*. Accordingly, the Commission did not err as a matter of law in concluding plaintiff was not entitled to a reapportionment of benefits.

In addition, we note the holding in *Allen*, 116 N.C. App. at 239, 447 S.E.2d at 838, no more compels the conclusion that defendants were required to stop payment to Versie on her eighteenth birthday and reapportion plaintiff's benefits than the court's specific holding in *Deese* itself. In *Allen*, the decedent died with two children, a fourteen-year-old son and a twenty-five-year-old daughter. *Id.* at 235, 447 S.E.2d at 836. The son was declared the sole dependent beneficiary entitled to receive death benefits but turned eighteen *during* the 400-week period. *Id.* Citing *Deese*, the daughter claimed when her brother turned eighteen the beneficiary pool decreased from one to zero entitling her to share in the benefits. *Id.* at 239, 447 S.E.2d at 838. The *Allen* Court concluded the son was entitled to receive the *entire* compensation payable under G.S. 97-38(1), and thus, the dependent beneficiary pool did not decrease and the daughter was not entitled to share in the benefits. *Id.*

Because we find no error as to the Commission's first conclusion of law, we find it unnecessary to address plaintiff's contention regarding the presence of fraud, misrepresentation and mutual mistake in entering the Form 30.

Affirmed.

Judge EDMUNDS concurs.

Chief Judge EAGLES concurs with separate opinion.

Judge EAGLES concurring.

I concur. I agree with the majority that the pool of beneficiaries did not decrease on Versie Friday's (Versie) 18th birthday. I write separately to emphasize my separate basis for that conclusion. The majority reasons that Versie was entitled to the full 400 weeks of benefits because G.S. § 97-38 does not denote any situation where the vested right to a 400 week payment may be shortened. I agree that the

act does not speak of shortening benefits. However, the answer to this question lies in a separate part of Chapter 97.

> Under G.S. § 97-38,
>
> [i]f death results proximately from a compensable injury . . . the employer shall pay . . . to the person or persons entitled thereto as follows:
>
> (1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons.

G.S. § 97-39 (1999) states "[t]he widow, or widower and all children of deceased employees shall be conclusively presumed to be dependents of deceased and shall be entitled **to receive the benefits of this Article for the full periods specified herein.**"(Emphasis added). These statutes make clear that a child of a deceased employee is a dependent who shares benefits with other dependents for the full 400 weeks. Therefore, since Versie remained a "child" under Chapter 97, she was entitled to the full 400 weeks of benefits.

Under G.S. § 97-2(12) (1999), a " '[c]hild' . . . include[s] only persons **who at the time of the death of the deceased employee** are under 18 years of age." (Emphasis added). Therefore, if an individual is under 18 at the time of the employee's death then that individual is a "child" under the act. The implication from this definition is that an individual remains a "child" for purposes of Chapter 97 even if that individual turns 18 before the 400 weeks has elapsed. The end result is that the "child's" interest vested at the time of the employee's death. Though arguably dicta, this Court has implied that a child does not lose his or her right to payment by turning 18 during the 400 weeks. "Scott will continue receiving payments after he reaches age 18 because he will turn 18 before the 400-week period expires." *Allen v. Piedmont Transport Services*, 116 N.C. App. 234, 237, 447 S.E.2d 835, 837 (1994).

All parties acknowledge that Versie was a "child" under § 97-2 at the date of death. Therefore, Versie did not and could not exit the class of beneficiaries by simply turning 18 during the 400 weeks. Accordingly, she was entitled to payment for the full 400 weeks and defendants were not required to cease payments. Since the beneficiary class did not decrease, plaintiff was not entitled to any reapportionment of benefits.

KEITH PAGE, PLAINTIFF v. GRADY BOYLES, DEFENDANT

No. COA99-986

(Filed 29 August 2000)

Trials— motion for new trial on damages—no finding of passion or prejudice

The trial court erred in an action arising from a boating accident by granting plaintiff's motion for a new trial on the issue of personal injury damages under N.C.G.S. § 1A-1, Rule 59(a)(6) where the court did not make the necessary finding that the damages had been awarded under the influence of passion or prejudice and found that defendant had not offered evidence to refute the causal connection between the accident and the injury even though the burden was on plaintiff. Finally, there is no indication here that the order was entered in the court's discretion, so that the deference traditionally paid to discretionary rulings does not apply.

Judge HUNTER dissenting.

Appeal by defendant from order entered 20 January 1999 by Judge G. K. Butterfield in Wilson County Superior Court. Heard in the Court of Appeals 6 June 2000.

Anderson Law Firm, by Michael J. Anderson, for plaintiff appellee.

Baker, Jenkins, Jones & Daly, P.A., by Roger A. Askew and Kevin N. Lewis, for defendant appellant.

HORTON, Judge.

Keith Page (plaintiff) brought this action to recover for personal injuries and property damage he sustained in a collision between his boat and a boat operated by the defendant, Grady Boyles. A jury found that defendant was negligent, plaintiff was contributorily negligent, and found that defendant had the last clear chance to avoid the accident. The jury awarded $1,650.00 to plaintiff for personal injury, $350.00 for property damage, and found in answer to a separate issue that plaintiff was not entitled to any recovery for permanent injury. Plaintiff moved for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(6), contending that the damages awarded were "calculated under the influence of passion or prejudice and [were] clearly inade-

quate." Plaintiff alleged that he had presented evidence of medical specials in the amount of about $4,500.00, lost wages of about $2,000.00, as well as past and future pain and suffering. Plaintiff further alleged that he presented evidence at trial of property damage in the amount of $6,907.00.

After hearing the motion for a new trial, the trial court entered the following order:

> Plaintiff's Motion for a new trial on damages for personal injury having been heard and the Court having found that, among other things, Plaintiff introduced evidence of significant special and general damages, and, that, Defendant did not offer sufficient evidence to refute the causal connection between the accident and injury sustained and, that, the jury returned an Award of significantly less than the amount of special damages; the Court finds that said amount is inadequate to compensate Plaintiff ~~and appears to have been awarded under passion or prejudice~~ and, therefore;
>
> Plaintiff's Motion for a New Trial on personal injury damages is hereby ALLOWED.
>
> The Court having found damages for property damage were not inadequate, Plaintiff's Motion for a New Trial pertaining to property damage is DENIED.

The trial court struck the portion of the proposed order which read "and appears to have been awarded under passion or prejudice," initialed the amendment, then dated and signed the order.

Defendant contends that the trial court erred in awarding plaintiff a new trial on the issue of damages for personal injury, and we agree. Rule 59 of our Rules of Civil Procedure provides in pertinent part that "[a] new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds: . . . (6) Excessive or inadequate damages *appearing to have been given under the influence of passion or prejudice*[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) (1999) (emphasis added). Although the trial court made the necessary finding that the damages awarded were inadequate, it failed to make the necessary additional finding that damages were awarded "under the influence of passion or prejudice," and specifically deleted that finding from its order.

The trial court also found that the *defendant* did not offer evidence to "refute the causal connection between the accident and the

injury sustained[.]" The burden is, however, on *plaintiff* to prove, if he can, the connection between the boating accident, his alleged injuries, and his special damages. Here, the trial court properly charged the jury that

> the plaintiff may also be entitled to recover actual damages. On this issue *the burden of proof is on the plaintiff.* This means *he* must prove by the greater weight of the evidence the amount of actual damages proximately caused by the negligence of the defendant.

(Emphases added.) Thus, the *jury* must decide whether plaintiff has met his burden as to damages and is not required to accept all of plaintiff's allegations as to the nature and extent of his injuries. Otherwise, the issue of special or actual damages would be a matter of law for the court and there would be no need to submit the issue to the jury. We also note that the jury in this case specifically rejected plaintiff's claim that he suffered permanent injury in the boating accident. Further, although plaintiff alleged that he sustained property damage of more than $6,900.00, the trial court declined to set aside the jury verdict of only $350.00 for property damage, and found that the damages awarded by the jury for property damage were not inadequate.

We are aware of the deference traditionally paid to the discretionary rulings of our trial courts. In *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982), relied upon in the dissent, our Supreme Court made it clear that the enactment of the Rules of Civil Procedure "did not diminish the inherent and traditional authority of the trial judges of our state to set aside the verdict whenever in their sound discretion they believe it necessary to attain justice . . . ." *Id.* at 482, 290 S.E.2d at 602. Following a jury verdict, the defendant in *Worthington* moved for a new trial pursuant to the provisions of sections 5, 6, and 7 of Rule 59 of our Rules of Civil Procedure. The trial court allowed the defendant's motion in *Worthington* and entered a written order which provided in part that:

> It being made to appear to the Court and the Court in *its considered discretion* being of the opinion that the Motion filed by the defendant in each case under Rule 59 of the North Carolina Rules of Civil Procedure should be allowed and granted[.]

Id. at 480, 290 S.E.2d at 601. In affirming the trial court's order in *Worthington*, our Supreme Court emphasized that the trial court's

order "after *reciting* defendant's grounds for the motion, stated that the court was awarding a new trial as a matter of 'its considered discretion' (and thus not as a matter of law). This fact is significant for it controls the scope of our review of [the trial court's] action." *Id.* at 481, 290 S.E.2d at 602. Here, there is no indication that the trial court's order was entered in its discretion. Thus, the reasoning of *Worthington* does not apply in the case now before us, nor does it control our decision.

In light of our decision to reverse the order of the trial court, we do not reach the difficult question whether the trial court erred in awarding a new trial only on the damages issue, rather than on all issues. See *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974) (where the liability and damages issues were "inextricably interwoven," the trial court erred in awarding a new trial on damages alone as a new trial on all issues was necessary).

As it appears from this record that the trial court erred in awarding a new trial on the issue of plaintiff's damages for personal injury, this order of the trial court is reversed, and this case is remanded to the Superior Court of Wilson County for entry of a judgment based on the verdict rendered by the jury.

Reversed and remanded.

Judge GREENE concurs.

Judge HUNTER dissents.

Judge HUNTER dissenting.

I respectfully dissent from the majority opinion.

It is well established that a ruling in the discretion of the trial judge raises no question of law. *Britt v. Allen*, 291 N.C. 630, 231 S.E.2d 607 (1977). The order of the trial court to grant a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure is a discretionary order.

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the

judge. *Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E.2d 676, 680 (1967); *see e.g.*, *Bryant v. Russell*, 266 N.C. 629, 146 S.E.2d 813 (1966); *Robinson v. Taylor*, 257 N.C. 668, 127 S.E.2d 243 (1962); *Dixon v. Young*, 255 N.C. 578, 122 S.E.2d 202 (1961); *Caulder v. Gresham*, 224 N.C. 402, 30 S.E.2d 312 (1944). The legislative enactment of the Rules of Civil Procedure in 1967 did not diminish the inherent and traditional authority of the trial judges of our state to set aside the verdict whenever in their sound discretion they believe it necessary to attain justice for all concerned, and the adoption of those Rules did not enlarge the scope of appellate review of a trial judge's exercise of that power. *Britt v. Allen*, 291 N.C. 630, 634-35, 231 S.E.2d 607, 611-12 (1977), *see also Insurance Co. v. Chantos*, 298 N.C. 246, 253, 258 S.E.2d 334, 338-39 (1979) (Huskins, J., dissenting). . . .

Worthington v. Bynum and Cogdell v. Bynum, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E.2d at 605. My review does not indicate that the trial court in the present case abused its discretion, resulting in a substantial miscarriage of justice. Thus, I would affirm the order of the trial court wherein it granted plaintiff a new trial.

Rule 59 of the North Carolina Rules of Civil Procedure provides in pertinent part:

> (a) *Grounds.*—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> (1) Any irregularity by which any party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
>
> (5) Manifest disregard by the jury of the instructions of the court;

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion, or

(9) Any other reason heretofore recognized as grounds for new trial.

N.C. Gen. Stat. § 1A-1, Rule 59 (1999). A plain reading of the subject order indicates that although plaintiff based his motion on Rule 59(6), inadequate damages, the trial court granted a new trial under Rule 59(7), insufficiency of evidence to justify the verdict.

Plaintiff in the present case had pled and therefore had the burden of proving his personal injury damages, which must be proved to a reasonable certainty. While absolute certainty is not required, evidence of damages must be adequately specific and complete to permit the jury to arrive at a reasonable conclusion. *Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 234 S.E.2d 605 (1977). The order of the trial court in the present case provides, in pertinent part:

> Plaintiff introduced evidence of significant special and general damages, and, that, Defendant did not offer sufficient evidence to refute the causal connection between the accident and the injury sustained and, that, the jury returned an Award of significantly less than the amount of special damages; the Court finds that said amount is inadequate to compensate Plaintiff ~~and appears to have been awarded under passion or prejudice~~ . . . .

Thus, it is clear that the trial court reasoned that plaintiff had proven special damages to a reasonable certainty, and that because defendant's evidence was insufficient to rebut plaintiff's proof, the evidence did not justify the verdict rendered as to plaintiff's special damages. While the trial court did not specifically state that its reasons for granting a new trial fell under Rule 59(7), its reasoning clearly falls under the ambit of this rule. Accordingly, the deletion of the words "and appears to have been awarded under passion or prejudice" in the order had no effect since the trial court did not grant a new trial under Rule 59(6).

The majority opinion correctly points out that the jury is not required to accept all of plaintiff's allegations as to the nature and

extent of his injuries; however, in its discretion, the trial court in the case at bar found that plaintiff had proven special damages to a reasonable certainty and defendant's evidence was insufficient to rebut that proof. Unlike the majority, I do not believe that the jury's verdict that plaintiff's property damages were significantly less than those pled by plaintiff indicates that his special damages were less than those pled and proven at trial. Property damages and special damages are distinct and separate from each other, and may be dissimilar in degree and severity.

I note that absent a specific request by the opposing party, the trial court is not required to either state the reasons for its decision to grant a new trial, or make findings of fact showing those reasons. *Strickland v. Jacobs*, 88 N.C. App. 397, 363 S.E.2d 229 (1988); *Edge v. Metropolitan Life Ins. Co.*, 78 N.C. App. 624, 337 S.E.2d 672 (1985). Since the record does not reveal that defendant made a request in the present case, the trial court was not required to give any reason for granting the new trial. As previously stated, a ruling in the discretion of the trial judge raises no question of law. *Britt*, 291 N.C. 630, 231 S.E.2d 607. Furthermore, our Supreme Court has recognized the trial court's superior position in making discretionary rulings regarding the grant of a new trial:

> [T]he trial judges of this state have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings. We believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity of a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case. Because of this, we find much wisdom in the remark made many years ago by Justice Livingston of the United States Supreme Court that "there would be more danger of injury in revising matters of this kind than what might result now and then from an arbitrary or improper exercise of this discretion." *Insurance Co. v. Hodgson*, 10 U.S. (6 Cranch) 206, 218 (1810). . . .

Worthington, 305 N.C. at 487, 290 S.E.2d at 605. Based on the foregoing, it is my opinion that the trial court in the present case, while not

required to state its reasons, did not abuse its discretion in granting a new trial for the reasons articulated. My review of the record does not indicate that the trial court's action resulted in a miscarriage of justice. Accordingly, I would affirm the order of the trial court.

AUBREY REDDING, JR., PLAINTIFF v. SHELTON'S HARLEY DAVIDSON, INC., AND SHELTON DAVIS, DEFENDANTS

No. COA99-996

(Filed 29 August 2000)

1. Assault— civil—shopkeeper's privilege—instruction

The trial court correctly instructed the jury on the applicability of N.C.G.S. § 14-72.1(c), the "shopkeeper's privilege," in an action for civil assault resulting from plaintiff's attempt to leave a store after being accused of shoplifting and the detention of plaintiff by force until the police arrived. Although plaintiff contended that the privilege created by the statute is not a defense to assault and battery, the alleged assault and battery in this case cannot be separated from the detention and the two torts must be treated as a whole.

2. Assault— civil—detention of shoplifter—shopkeeper's privilege—burden of proof

In a civil assault action arising from the detention by force of a suspected shoplifter, the trial court erred by instructing the jury that plaintiff had the burden of proving that defendants failed to act in a reasonable manner. Reasonableness is an element of the affirmative defense provided by N.C.G.S. § 14-72.1(c) and the courts have consistently placed on defendants the burden of proving that an affirmative defense exists to a claim of assault and battery. The portion of *Hawkins v. Hawkins*, 101 N.C. App. 529, relied upon by defendants is dictum.

Appeal by plaintiff from judgment entered 26 April 1999 and orders entered 13 May 1999 by Judge Donald W. Stephens in Johnston County Superior Court. Heard in the Court of Appeals 18 May 2000.

Mast, Schulz, Mast, Mills & Stem, P.A., by David F. Mills, for plaintiff-appellant.

Smith, Helms, Mulliss & Moore, L.L.P., by Matthew W. Sawchak, Clayton D. Somers, and Wendy I. Sexton, for defendants-appellees.

SMITH, Judge.

Plaintiff Aubrey Redding Jr. appeals from a jury trial resulting in a verdict and entry of judgment thereon in favor of defendants Shelton's Harley Davidson, Inc. (Shelton's Harley) and Shelton Davis (Davis). We order a new trial.

On 16 September 1997, plaintiff entered Shelton's Harley in Goldsboro, North Carolina. A store employee, suspecting plaintiff was stealing a vest, confronted plaintiff and then yelled out to other employees to call the police. Plaintiff tried to leave the store; however, John Martindale (Martindale), a store employee, blocked plaintiff's exit and, along with Davis, the store owner, attempted to detain him until the police arrived. Plaintiff alleges he was injured when "all three men fell onto the asphalt and concrete outside of the store." According to plaintiff, Davis and Martindale held plaintiff on the ground for "approximately 15 minutes while waiting for the police to arrive."

Plaintiff filed suit against defendants 11 February 1998, alleging a claim of assault and battery and seeking both compensatory and punitive damages. Defendants answered 9 April 1998, generally denying plaintiff's allegations and asserting in defense, *inter alia*, that Davis' actions against plaintiff were privileged.

Trial began 17 March 1999. The jury returned a verdict absolving defendants of liability, and the trial court entered judgment in accordance with the verdict. Plaintiff subsequently filed motions for new trial and for judgment notwithstanding the verdict, which motions were denied by the trial court. Plaintiff timely appealed both the judgment and the orders denying his motions.

[1] Plaintiff first argues the trial court should not have "instructed the jury on the principle of the shopkeeper's privilege." Pursuant to N.C.G.S. § 14-72.1(c) (1999),

> [a] merchant, or the merchant's agent or employee, . . . who detains or causes the arrest of any person shall not be held civilly

> liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, where such detention . . . is in a reasonable manner for a reasonable length of time, and, if in detaining or in causing the arrest of such person, the merchant, or the merchant's agent or employee, . . . had at the time of the detention or arrest probable cause to believe that the person committed the offense [of concealment of merchandise].

Plaintiff argues that the privilege created by this statute is not a defense to assault and battery, citing *Burwell v. Giant Genie Corp.*, 115 N.C. App. 680, 446 S.E.2d 126 (1994) as controlling authority.

In *Burwell*, this Court examined whether G.S. § 14-72.1(c) protected a police officer from liability for "conducting a 'pat down' search of plaintiff before determining whether to arrest plaintiff." *Id.* at 685, 446 S.E.2d at 129. The plaintiff in that case filed suit against the officer alleging assault and battery. After noting that the statute specifically exempts merchants and police officers from liability for "detention, malicious prosecution, false imprisonment, [and] false arrest," G.S. § 14-72.1(c), we stated that

> [a]ctions for assault and battery are conspicuously omitted from the statute. We do not read G.S. [§] 14-72.1(c) as giving police officers or merchants the right to conduct "pat down" searches of customers without their consent.

Burwell, 115 N.C. App. at 685, 446 S.E.2d at 129.

The facts recited in *Burwell* indicate that plaintiff therein, after paying for his groceries and while attempting to leave the store, was accused of stealing cigarettes by the store manager. *Id.* at 681-82, 446 S.E.2d at 127. The manager then "grabbed plaintiff's arm and pulled plaintiff about two aisles down toward the store office." *Id.* at 682, 446 S.E.2d at 127. An off-duty police officer approached plaintiff, showed plaintiff his badge, and, along with the store manager, conducted a "pat down" search of plaintiff. *Id.* at 682, 684, 446 S.E.2d at 127, 128.

In *Burwell*, the plaintiff's assault and battery claim was predicated upon the "pat down" search, which was a separate act from the detention of the plaintiff. As the *Burwell* Court noted, the assault and battery occurred "*during [plaintiff's] detention.*" *Id.* at 686, 446 S.E.2d at 130 (emphasis added). The search was not conducted in order to detain plaintiff, but was instead conducted while plaintiff

was detained. As the search was an assault and battery not necessary to plaintiff's detention, defendants were not entitled to the protection of G.S. § 14-72.1(c).

In the instant case, however, the alleged assault and battery cannot be separated from plaintiff's detention. The plaintiff in the case at bar attempted to leave the store once accused of shoplifting, and was detained by force by Davis and Martindale. The force used to detain plaintiff resulted in the three men falling to the ground, at which point plaintiff was injured. Thus, the alleged assault and battery in this case is the detention. *See Kmart Corp. v. Perdue*, 708 So.2d 106, 110 (Ala. 1997) (in state with nearly identical privilege statute, court held that where merchant uses only force minimally necessary to ensure detention of suspected shoplifter, statute protecting merchant against unlawful detention claim must also shield merchant from assault and battery claim). The two torts were not separate acts and must be treated as a whole.

G.S. § 14-72.1(c) protects merchants from civil actions for detention if its terms are complied with. The issues presented by this case are thus (1) whether defendants had probable cause to believe plaintiff had concealed merchandise and (2) whether the detention was "in a reasonable manner for a reasonable length of time." G.S. § 14-72.1(c). If probable cause was lacking or the detention was not reasonable, G.S. § 14-72.1(c) would not apply and defendants would be liable for assault and battery. *Cf. Kmart*, 708 So.2d at 110 (when there is no evidence merchant "used any more force than was necessary to ensure that [plaintiffs] were detained," merchant entitled to directed verdict on assault and battery claim); *State v. Ataei-Kachuei*, 68 N.C. App. 209, 213-14, 314 S.E.2d 751, 754 (indicating that firing three shots at victim, one of which hit and killed victim, could be reasonable manner of detaining victim), *disc. review denied*, 311 N.C. 763, 321 S.E.2d 146 (1984).

In sum, the trial court correctly instructed the jury on the applicability of G.S. § 14-72.1(c). We thus overrule this assignment of error.

[2] Plaintiff next alleges the trial court incorrectly placed the burden of proof on him to show that defendants failed to act in a reasonable manner to detain plaintiff. Plaintiff argues the privilege created under G.S. § 14-72.1(c) should be regarded as an affirmative defense upon which defendants have the burden of proof. We agree.

Plaintiff objects to the following instruction given by the trial court:

> The first question is issue number one, did the defendants fail to act in a reasonable manner to detain the plaintiff at their store on September 16, 1997. The plaintiff has the burden of proof to prove to you that defendants did fail to act in a reasonable manner in detaining him. If he's satisfied you by the greater weight of the evidence that the defendant did fail to so act in a reasonable manner, then you would answer that issue yes . . . .

Defendants argue the instruction was correct as given, in that this Court has stated that "lack of privilege" is one of the elements of battery, *see Hawkins v. Hawkins*, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475 (1991), *aff'd*, 331 N.C. 743, 417 S.E.2d 447 (1992), that plaintiff must prove in order to prevail.

The issue before this Court in *Hawkins* was "whether the lack of an award of at least nominal damages precludes an award of punitive damages" in a case based on claims of assault and battery. *Hawkins*, 101 N.C. App. at 532, 400 S.E.2d at 474. In the course of discussing the punitive damages issue, we noted that

> [t]he elements of battery are intent, harmful or offensive contact, causation, and lack of privilege.

Id. at 533, 400 S.E.2d at 475, citing 1 W. Haynes, *North Carolina Tort Law* § 4-2 (1989) (hereinafter Haynes) for that proposition. We first note that *Hawkins* merely listed the "elements" without discussing which party had the burden of proof as to each.

In addition, neither party to that case disputed that plaintiff therein had established his claim for battery; the sole issue before the court was whether punitive damages were allowable. *See Hawkins*, 101 N.C. App. at 533, 400 S.E.2d at 475. Thus, the portion of our opinion setting forth the elements of battery "was unnecessary to the court's holding and therefore dictum." *Donovan v. Fiumara*, 114 N.C. App. 524, 533, 442 S.E.2d 572, 578 (1994). Cases that have since cited *Hawkins'* formulation of the elements of battery as including "lack of privilege" have also done so in dictum. *See Holloway v. Wachovia Bank and Tr. Co.*, 109 N.C. App. 403, 415, 428 S.E.2d 453, 460 (1993) (court's decision based on intent and lack of consent), *rev'd in part, aff'd in part*, 339 N.C. 338, 452 S.E.2d 233 (1994); *Wilson v. Bellamy*, 105 N.C. App. 446, 465, 414 S.E.2d 347, 357-58 (issue was whether

plaintiff consented to contact), *disc. review denied*, 331 N.C. 558, 418 S.E.2d 669 (1992).

Further, the treatise relied on by *Hawkins* for the proposition that "lack of privilege" is an element of battery also notes that "privilege" is a defense to battery, *see* Haynes at § 4-3, and that "the *essential* elements of the tort [are] intent, a harmful or offensive touching, and causation," *id.* at § 4-6 (emphasis added). This formulation of the "essential elements" of battery is consistent with prior caselaw, *see Dickens v. Puryear*, 302 N.C. 437, 445, 276 S.E.2d 325, 330 (1981) ("[t]he interest protected by the action for battery is freedom from intentional and unpermitted contact with one's person"); *Ormond v. Crampton*, 16 N.C. App. 88, 94, 191 S.E.2d 405, 410 ("[a] battery is made out when the person of the plaintiff is offensively touched against his will"), *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972), and traditional formulations of the elements of battery, *see* 6 Am. Jur. 2d *Assault & Battery* § 3 (1999) ("[a] battery is a wrongful or offensive physical contact with another through the intentional contact by the tortfeasor and without the consent of the victim").

Finally, Haynes notes that

> [a]fter the plaintiff has introduced sufficient evidence to support his cause of action for battery, the burden of proof shifts to the defendant to put forth such defenses as are possible in mitigation or justification. For example, the defendant could set forth the defenses of provocation, privilege, [and] self-defense . . . .

Haynes at § 4-7. Our courts have consistently placed the burden of proof on defendants to prove an affirmative defense exists to a plaintiff's claim of assault and battery. *See Roberson v. Stokes*, 181 N.C. 59, 64, 106 S.E. 151, 154 (1921) (where defendant admits making the assault, burden is on him to prove justification for such conduct); *Young v. Warren*, 95 N.C. App. 585, 588, 383 S.E.2d 381, 383 (1989) (self-defense and defense of family are affirmative defenses to assault upon which defendant has the burden of proof); *see also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 16 (5th ed. 1984) (it would be "manifestly unsound and impractical to require a plaintiff to negative at the outset all possible excuses or justifications"; thus, defendant must "plead and prove" such justifications); 6 Am. Jur. 2d *Assault & Battery* § 165 (1999) (defendant has burden of proving justification).

"[O]n an affirmative defense, the burden of proof lies with the defendant." *Price v. Conley*, 21 N.C. App. 326, 328, 204 S.E.2d 178, 180 (1974). The privilege created by G.S. § 14-72.1(c) is an affirmative defense, as it "rais[es] new facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all allegations in the complaint are true." Black's Law Dictionary 430 (7th ed. 1999); *compare Young*, 95 N.C. App. at 588, 383 S.E.2d at 383 (defense which results in avoidance of liability is affirmative defense), *and Carlson v. State*, 524 S.E.2d 283, 286 (Ga. Ct. App. 1999) ("[a]ffirmative defenses are those in which the defendant admits doing the act charged but seeks to justify, excuse, or mitigate his conduct"), *with State v. Miller*, 339 N.C. 663, 676, 455 S.E.2d 137, 144 (evidence regarding defendant's mental state at time of crime, which may rebut State's proof of premeditation and deliberation, is not affirmative defense for which defendant bears burden of proof), *cert. denied*, *Miller v. North Carolina*, 516 U.S. 893, 133 L. Ed. 2d 169 (1995).

The trial court therefore erred in instructing the jury that plaintiff had the burden of proof to establish that defendants failed to act in a reasonable manner in detaining plaintiff, as reasonableness is an element of the affirmative defense provided by G.S. § 14-72.1(c). We thus vacate the judgment of the trial court and remand this case for a new trial. In light of our disposition herein, we decline to address plaintiff's remaining assignments of error.

New trial.

Judges WALKER and TIMMONS-GOODSON concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF/APPELLEE v. DOUGLAS S. HARRIS, ATTORNEY, DEFENDANT

No. COA99-580

(Filed 29 August 2000)

Evidence— work product rule—investigator—waiver to the extent materials used on direct examination

An attorney who was disbarred by the State Bar was entitled to a new hearing where his due process rights were violated by the Hearing Committees's failure to compel production of the

State Bar investigator's notes, reports, or memoranda relating to matters about which the investigator testified. By allowing the investigator to testify, the State Bar waived any protection under the work product rule for those materials used on direct examination.

Appeal by defendant from order of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar entered 6 November 1998. Originally heard in the Court of Appeals 24 February 2000. An opinion was filed by this Court 4 April 2000. Defendant's Petition for Rehearing, filed 9 May 2000, was granted 7 June 2000 and heard without additional briefs or oral argument. The present opinion supersedes the 4 April 2000 opinion.

Fern Gunn Simeon for the North Carolina State Bar.

Douglas S. Harris, Pro Se.

WYNN, Judge.

The North Carolina State Bar brought this action before the Hearing Committee of the Disciplinary Hearing Commission of the State Bar by a complaint alleging that the defendant, a licensed attorney, violated various Disciplinary Rules of the Code of Professional Responsibility while representing a client in a personal injury action.

Before the disciplinary hearing, the defendant requested that the State Bar produce all memoranda and notes of its investigator's interviews with various parties. The State Bar responded by objecting to his request and declining to produce the requested material. As a result, the defendant moved to compel discovery and continue the hearing.

The Hearing Committee ordered the State Bar to produce notes from its investigator's interview with the defendant. But the Hearing Committee did not order the State Bar to produce notes or memoranda concerning other witnesses or potential witnesses because it determined that those notes and memoranda were protected from discovery under the attorney-work product rule.

At the disciplinary hearing held on 8 and 9 October and 6 November 1998, the State Bar called its investigator to testify as a witness. The investigator testified concerning conversations and other matters which were allegedly addressed in his reports, notes and

memoranda. Again, the defendant sought to have the investigator's materials provided. But again, the Hearing Committee denied his request.

Following the disciplinary hearing, the Hearing Committee entered an order disbarring the defendant from the practice of law. From this order, he appealed.

On appeal, the defendant argues that his due process rights were violated because the Hearing Committee erroneously denied his motion to compel discovery of the State Bar investigator's witness interview notes and memoranda. He asserts that the Hearing Committee, prior to the disciplinary hearings, should have granted his motion to compel discovery of the investigator's notes and memoranda since this evidence was not protected under the attorney-work product rule. Additionally, he asserts that the Hearing Committee should have allowed him access to the investigator's notes and memoranda in light of the investigator's testimony at the disciplinary hearings.

In our initial opinion, *N.C. State Bar v. Harris*, 137 N. C. App. 207, 527 S.E.2d 728 (2000), we relied on *Hickman v. Taylor*, 329 U.S. 495, 91 L. Ed. 2d 451 (1947), to address the defendant's first claim, and held that the aforementioned evidence was protected under the attorney-work product rule. *Id.* We stand by that opinion to the extent that it upheld the Hearing Committee's denial of defendant's motion to compel that was made prior to the disciplinary hearings. However, upon reconsidering our earlier opinion in light of *United States v. Nobles*, 422 U.S. 225, 45 L. Ed. 2d 141 (1975), we now conclude that, by allowing the investigator to testify, the State Bar waived any immunity under the attorney-work product doctrine as to matters testified to by the investigator that were contained in his notes. Accordingly, we hold that defendant's due process rights were violated by the Hearing Committee's failure to compel production of the State Bar investigator's witness interview notes and memoranda to defense counsel, insofar as they related to matters to which the investigator testified.

In *Hickman, supra,* the United States Supreme Court held that oral and written statements of witnesses obtained or prepared by an adverse party's counsel in the course of preparation for possible litigation are not discoverable without a showing of necessity. In effect, the *Hickman* Court recognized the attorney-work product rule,

which is "a qualified privilege for witness statements prepared at the request of the attorney and an almost absolute privilege for attorney notes taken during a witness interview." *In re PCB*, 708 A.2d 568 (Vt. 1998); *see also Hickman*, 329 U.S. at 495, 91 L. Ed. 2d at 451. Also, under the attorney-work product rule, the mental impressions, conclusions, opinions and legal theories of an attorney are absolutely protected from discovery regardless of any showing of need. *See Hickman*, 329 U.S. at 495, 91 L. Ed. 2d at 451.

Indeed, North Carolina recognizes the attorney-work product rule under N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (1990). Under that statute, attorney-work product is defined in relevant part to include, among other things, materials "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's . . . agent . . . ." *Id.* Such evidence may be obtained by a party "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.*

Our courts have previously considered the *attorney-client privilege*, and held that it may be waived by the client when he or she offers testimony concerning the substance of the privileged communication. *See State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978) (holding that the defendant by eliciting testimony regarding a letter written to him by his attorney, waived the attorney-client privilege with respect to the entire content of the letter); *Hayes v. Ricard*, 244 N.C. 313, 93 S.E.2d 540 (1956) (holding that when plaintiffs elected to examine the decedent's former attorney, plaintiffs waived their right to keep privileged the communications between that attorney and the decedent); *State v. Artis*, 227 N.C. 371, 42 S.E.2d 409 (1947) (holding that the State could cross-examine as to an alleged privileged communication between the defendant and his attorney where the defendant first brought out testimony on the subject). However, we have not previously considered whether attorney-work product immunity may be similarly waived at trial where testimony is offered concerning the substance of the privileged work product. We hold now that it may.

Twenty-eight years following the *Hickman* decision, in *Nobles*, *supra*, 45 L. Ed. 2d at 141, the United States Supreme Court extended the work-product doctrine from the pre-trial context to trial, reasoning that "the concerns reflected in the work-product doctrine do not

disappear once trial has begun." *Nobles*, 422 U.S. at 239, 45 L. Ed. 2d at 154. The Supreme Court recognized that the protection afforded by "the work product doctrine is not absolute. Like other qualified privileges, it may be waived." *Id.* The Supreme Court held that the qualified privilege derived from the attorney-work product rule was waived with respect to those matters covered in an investigator's testimony and as a result, the rule was not available to prevent disclosure of the relevant portions of the investigator's report. In reaching this holding, the Supreme Court stated that "[r]espondent, by electing to present the investigator as a witness, waived the privilege *with respect to matters covered in his testimony*." *Id.* (emphasis added). The Court further noted by analogy that:

> Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.

Id. at 239-40, 45 L. Ed. 2d at 154.

In the instant case, the State Bar's investigator was identified as a witness in the Plaintiff's Answers to Defendant's First Set of Interrogatories. Also, the investigator was listed as a witness in the Pre-trial Order filed 8 October 1998. At the disciplinary hearings, the investigator was called by the State Bar as a witness, testifying concerning certain matters covered in his notes and memoranda, which otherwise were protected attorney-work product. At that time the defendant again sought to have the investigator's materials provided, arguing that defense counsel "ought . . . to have the opportunity . . . to be able to review whatever notes were there . . . relative to what the substance of his testimony is." We agree.

By allowing the investigator to so testify, the State Bar waived any protection that otherwise would have been afforded by the attorney-work product rule to those materials of which the State Bar made testimonial use on direct examination. Thus, the defendant should have been given access to any of the investigator's notes, reports or memoranda relating to the subject matter of the testimony elicited from him by the State Bar. Upon request, "a copy of the report, inspected and edited in camera, . . . [should have been] submitted to . . . [opposing] counsel at the completion of the investigator's . . .

testimony." *Id.* at 229, 45 L. Ed. 2d at 148. In sum, the failure to provide such access denied the defendant a fair hearing, thereby violating his due process rights under both the federal and state constitutions. *See* U.S.C.S. Const. Amends, § 5, 14; N.C. Const. Art. I § 19; *In re Murchison*, 349 U.S. 133, 99 L. Ed. 942 (1955); *North Carolina State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

We conclude that the defendant is entitled to a new hearing. On remand, the Hearing Committee should grant the defendant access to the State Bar investigator's witness interview report, notes and memoranda insofar as they relate to matters contained in the investigator's testimony.

Having reached this conclusion, we need not address the defendant's remaining assignments of error on appeal.

The order appealed from is reversed and remanded, and the defendant is entitled to a

New Hearing.

Judges MARTIN and HUNTER concur.

MALLIE HARRIS, PLAINTIFF v. RAY JOHNSON CONSTRUCTION CO., INC., AND MARSHALL AVON McNEILL, DEFENDANTS

No. COA99-1049

(Filed 29 August 2000)

1. Attorneys— attorney-client relationship—settlement agreement—actual authority

The trial court did not err by concluding that plaintiff's attorney had actual authority to enter into a settlement agreement on his client's behalf for $2000 for injuries arising out of an automobile accident, because the attorney reasonably believed at the time of negotiation that he could settle the case for this gross amount, and only in hindsight did it become clear that the attorney and his client had not reached a clear agreement as to the proper amount based on a difference between the net and gross amount.

2. Compromise and Settlement— oral acceptance by plaintiff's attorney—binding on all parties

The trial court did not err by concluding that plaintiff was bound by her attorney's oral acceptance of a settlement agreement for injuries arising out of an automobile accident and that a binding agreement was reached as to all parties, because plaintiff's claim was premised on joint and several liability seeking to recover for a single indivisible injury, which necessarily operated to terminate the controversy as to both defendants.

Appeal by plaintiff from order entered 14 May 1999 by Judge Henry V. Barnette in Harnett County Superior Court. Heard in the Court of Appeals 15 May 2000.

Brenton D. Adams for the plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by H. Lee Evans and F. Marshall Wall, for the defendant-appellee Ray Johnson Construction Co., Inc.

LEWIS, Judge.

On 2 March 1998, plaintiff filed a lawsuit seeking to hold defendants jointly and severally liable for injuries arising out of an automobile accident in which defendant Marshall Avon McNeill was the named negligent driver. Defendant McNeill was an employee of defendant Ray Johnson Construction Co. Inc. ("Construction Company").

On 6 November 1998, Brenton Adams, plaintiff's counsel, and defendant Construction Company's insurance carrier entered into negotiations regarding a settlement of plaintiff's claim. The insurance carrier offered to settle plaintiff's claim for $2000, which Mr. Adams accepted on behalf of his client. Defendants believed this transaction created an oral agreement to settle plaintiff's claim. However, in a letter to the insurance carrier dated 2 December 1998, Mr. Adams attempted to repudiate the purported settlement agreement. The insurance carrier received the letter on 28 December 1998. At this time, counsel for defendant Construction Company and its insurance carrier responded to Mr. Adams, asserting that a binding oral agreement had been reached on 16 November 1998. Having received no response from Mr. Adams, on 15 March 1999 defendants filed a Motion to Enforce Settlement in superior court. On 14 May 1999, after reviewing the evidence submitted by both parties, the

judge entered an order enforcing the 16 November 1998 oral settlement agreement between plaintiff and defendants. Plaintiff appeals from this order.

Plaintiff's arguments on appeal question the validity of the purported agreement. A compromise and settlement agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts. *Casualty Co. v. Teer Co.*, 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959). Here, the issue is a matter of contract interpretation, and hence, a question of law. *Davison v. Duke University*, 282 N.C. 676, 712, 194 S.E.2d 761, 783 (1973). Our standard of review here is *de novo*. *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999).

[1] Plaintiff first contends her attorney, Mr. Adams, had no actual authority to enter into this settlement agreement on her behalf so that she was not bound by the agreement entered on 16 November 1998. Although plaintiff concedes she expressly authorized Mr. Adams to negotiate a settlement on her behalf, she contends there was a misunderstanding as to the amount of that settlement. Specifically, plaintiff claims she intended to *net* $2000 from the settlement, while her attorney settled for a *gross* amount of $2000, contemplating that medical bills and attorney's fees would be deducted from that amount, resulting in a *net* settlement amount less than $2000 for his client.

We recognize that there is a presumption in North Carolina in favor of an attorney's authority to act for the client he professes to represent. *Gillikin v. Pearce*, 98 N.C. App. 484, 488, 391 S.E.2d 198, 200, *disc. review denied*, 327 N.C. 427, 395 S.E.2d 677 (1990). This presumption applies to both procedural and substantive aspects of a case. *Greenhill v. Crabtree*, 45 N.C. App. 49, 51, 262 S.E.2d 315, 317, *aff'd per curiam*, 301 N.C. 520, 271 S.E.2d 908 (1980). Special authorization from the client is required before an attorney may enter into an agreement discharging or terminating a cause of action on the client's behalf. *Greenhill*, 45 N.C. App. at 52, 262 S.E.2d at 317. "Where special authorization is necessary in order to make a dismissal or other termination of an action by an attorney binding on the client . . . it [is also] presumed . . . that the attorney acted under and pursuant to such authorization." *Id.* One who challenges the actions of an attorney as being unauthorized has the burden of rebutting this presumption and proving lack of authority to the satisfaction of the court. *Chemical Co. v. Bass*, 175 N.C. 453, 456, 95 S.E. 766, 767-78 (1918).

The attorney-client relationship is based upon principles of agency. *Dunkley v. Shoemate*, 350 N.C. 573, 577, 515 S.E.2d 442, 444 (1999). A principal is liable on a contract duly made when the agent acts within the scope of his actual authority. *Foote & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 595, 324 S.E.2d 889, 892 (1985). Actual authority is that authority which the agent reasonably thinks he possesses, conferred either intentionally or by want of ordinary care by the principal. *Heath v. Craighill, Rendleman, Ingle & Blythe*, 97 N.C. App. 236, 241, 388 S.E.2d 178, 181 (1990); 3 Am Jur. 2d *Agency* § 73 (1976). Actual authority may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question. 3 Am Jur. 2d *Agency* § 75 (1976).

Plaintiff's evidence here establishes Mr. Adams had actual authority to settle her claim for an amount of $2000. Plaintiff retained Mr. Adams as her counsel in this matter and expressly authorized him to settle the claim for an amount in which plaintiff and her counsel thought they had agreed on at the time. According to plaintiff's evidence, plaintiff and her attorney had previously discussed the difference between the net and gross amount, and at the time of the 16 November 1998 negotiation, Mr. Adams "understood" that he was to settle the claim for $2000. Only in hindsight did it become clear that Mr. Adams and his client had not reached a clear agreement as to the proper amount. From this evidence we conclude that Mr. Adams reasonably believed at the time of negotiation that he could settle the case for $2000. Thus, he possessed actual authority to settle in that amount, though it was unfortunately conferred by want of ordinary care. Plaintiff has failed to meet her burden of proving Mr. Adams lacked authority and she is bound by his acceptance of defendant's settlement offer on 16 November 1998.

[2] Plaintiff next contends even if plaintiff was bound by Mr. Adams' acceptance of the settlement agreement, all essential terms were not established before plaintiff's initial acceptance and thus, no binding agreement was reached upon Mr. Adams' acceptance. Specifically, plaintiff argues that the general release of claims form, releasing "all other persons," was not negotiated as part of the offer of settlement. Plaintiff contends that at best, settlement could have been enforced only with respect to defendant Ray Johnson Construction Co., Inc., and not as to defendant Marshall Avon McNeill. Although we agree 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), our

review indicates the oral agreement made between the parties in this case was not incomplete.

The evidence here establishes the 16 November 1998 offer was made to settle plaintiff's *entire* case. Plaintiff's counsel accepted the offer to settle the *entire* pending claim on plaintiff's behalf. This acceptance necessarily contained the implied promise to execute some instrument terminating the controversy as to that settling defendant, namely, the stipulation to dismiss the case with prejudice and release of claims form. Because plaintiff's claim was premised on joint and several liability seeking to recover for a single indivisible injury, this implied promise necessarily operated to terminate the controversy as to both defendants. Consequently, after the initial offer and acceptance, there remained nothing to negotiate in terms of the forms necessary to effectuate the settlement.

Affirmed.

Chief Judge EAGLES and Judge EDMUNDS concur.

SHELIA JONES HAYES, PLAINTIFF v. JIMMIE LEE HAYES, DEFENDANT

No. COA99-950

(Filed 29 August 2000)

Appeal and Error— appealability—interlocutory order—dismissal of ex parte domestic violence order

Plaintiff's appeal from the dismissal of a temporary ex parte domestic violence protective order is dismissed since it is an interlocutory order that does not affect a substantial right and plaintiff's rights will be adequately protected by an appeal timely taken from the final judgment.

Appeal by plaintiff from orders entered 28 April 1999 by Judge J. Larry Senter and 4 May 1999 by Judge Robert R. Blackwell in Warren County District Court. Heard in the Court of Appeals 14 August 2000.

Wyrick Robbins Yates & Ponton, LLP, by Joseph H. Nanney, Jr., for plaintiff-appellant.

No brief filed for defendant-appellee.

EAGLES, Chief Judge.

This case presents the question of whether the dismissal of an *ex parte* domestic violence order is immediately appealable.

On 18 February 1999, plaintiff Shelia Hayes instituted this action by filing a motion for a domestic violence protective order (DVPO). In her motion, plaintiff alleged that her husband defendant Jimmie Lee Hayes "balled up his fists and advanced on [her] in an angry manner." On the same day, Judge Senter granted the plaintiff an *ex parte* DVPO effective until 24 February 1999. On 24 February, Judge Charles Wilkinson extended the *ex parte* order until 18 March 1999. During the interim on 9 March, plaintiff filed an amended complaint seeking (1) divorce from bed and board; (2) custody of the couple's children; (3) child support; (4) equitable distribution; and (5) postseparation support. Defendant moved to dismiss the amended complaint and motion two days later.

The district court considered the motion again on 22 April 1999. In an order dated 22 April but entered on 28 April, Judge Senter dismissed the *ex parte* order he entered on 18 February 1999. The order states:

> [I]t appearing to the Court that the said Ex Parte Domestic Violence Protective Order was issued in violation of N.C.G.S. § 50B-2(c) in that the pleadings or nothing presented showed that it clearly appeared that there was a danger of acts of Domestic Violence against an aggrieved party, therefore the Temporary Ex Parte Domestic Violence Protective Order should not have been issued and the same is hereby dismissed.

Judge Senter set a hearing for 28 April 1999 to determine whether the plaintiff was entitled to emergency relief under N.C.G.S. § 50B-2(b) (1999). In an order dated 28 April 1999 but entered on 4 May 1999, Judge Robert Blackwell considered this issue. In his order, Judge Blackwell concluded that the 22 April dismissal applied to any emergency relief that the court could order. Accordingly, Judge Blackwell dismissed the motion for emergency relief. Following the dismissal, defendant answered the plaintiff's complaint and motion. Addition-

ally, he alleged several counterclaims against her. Plaintiff appeals from the 28 April and 4 May orders.

Plaintiff is appealing from the vacation of a temporary *ex parte* order and the refusal to grant temporary relief. Because we conclude that plaintiff's appeal is interlocutory we decline to address the merits. An interlocutory order is one that fails to determine all issues and does not fully dispose of the case. *Smart v. Smart*, 59 N.C. App. 533, 535, 297 S.E.2d 135, 137 (1982). Instead, the order here requires further action from the trial court to ultimately determine the controversy. *Hunter v. Hunter*, 126 N.C. App. 705, 707, 486 S.E.2d 244, 245 (1997). Our Courts discourage interlocutory appeals to prevent "fragmentary, premature and unnecessary appeals." *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985).

Here, the trial court's order does not determine any of the issues and only deals with the vacation of a "temporary" order. This Court has noted that an appeal from a temporary domestic violence protective order is interlocutory. *See Smart*, 59 N.C. App. at 535, 297 S.E.2d at 137. Indeed, this Court has consistently looked unfavorably on an appeal from this type of "interim" order in the domestic context. *See e.g. Hunter*, 126 N.C. App. at 707, 486 S.E.2d at 245; *Dixon v. Dixon*, 62 N.C. App. 744, 303 S.E.2d 606 (1983). The trial court's vacation of its order did not involve a dismissal of either party's action. All claims filed by both parties still remain intact and undecided. Therefore, this appeal is interlocutory.

We note that plaintiff has not addressed the appealability of this order. As this Court has previously recognized

> [i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Hunter, 126 N.C. App. at 707, 486 S.E.2d at 245 (quoting *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). This case is best left until the trial court deals with the issues in controversy. In order to maintain the policy of discouraging fragmentary appeals, we conclude that the present appeal does not

affect a substantial right and that "plaintiff's rights will be adequately protected by an appeal timely taken from the final . . . judgment." *Hunter*, 126 N.C. App. at 708, 486 S.E.2d at 246.

Finally, we want to make clear that our holding here is not a ratification of Judge Blackwell's order or his actions in considering this case. Our decision is limited simply to the procedural aspects of this case. Any other issues may and should be addressed after entry of a final judgment.

Appeal dismissed.

Judges MARTIN and HORTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 29 AUGUST 2000

CARMIN v. SPRINKLE No. 99-853	Forsyth (98CVS8928)	Reversed as to summary judgment; appeal dismissed as to entry of default.
HANKINS v. MERCY HOSP. No. 99-1074	Ind. Comm. (301332)	Affirmed in part; reversed and remanded in part
KIKENDALL v. JONES No. 99-610	Wake (97CVS06825)	New Trial
LATTIMORE v. REGENCY PARK CORP. No. 99-945	Wake (97CVS10644)	Dismissed in part; Affirmed in part
LOWERY v. C&J TRANSP., INC. No. 99-890	Ind. Comm. (859350)	Affirmed
STATE v. JACKSON No. 99-985	Guilford (97CRS81185) (97CRS81186)	Affirmed
STATE v. MAY No. 99-990	Pitt (96CRS22070) (96CRS23912) (96CRS23914)	No Error
STATE v. MCNEILL No. 99-773	Scotland (93CRS7704) (93CRS7705) (93CRS7706)	No prejudicial error
STATE v. STRICKLAND No. 99-665	Forsyth (98CRS33626) (98CRS33627) (98CRS46696)	No Error
STEEVES v. SCOTLAND COUNTY BD. OF HEALTH No. 99-1126	Scotland (98CVS796)	Reversed and remanded

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

Appealability—temporary custody order—review in one year—no unresolved issues—An appeal was not interlocutory where the trial court issued a child custody order on 2 July 1999, noted that the order was "temporary," and decreed that it would review the order in "the summer of the year 2000." A year is too long a period to be considered "reasonably brief" in a case where there are no unresolved issues. **Brewer v. Brewer, 222.**

Cross-assignment of error—issues not providing alternate basis for judgment—not considered—A workers' compensation plaintiff's cross-assignments of error concerning a Kentucky insurance policy which did not provide North Carolina coverage and the failure to assess a late payment penalty were not preserved for appeal where they would not have provided an alternative basis in law for upholding the order and award of the Industrial Commission. Plaintiff should have filed a cross-appeal. **Harrison v. Tobacco Transp., Inc., 561.**

JNOV denied—mistrial as to those issues—appeal after subsequent trial—Defendant's attempted appeal of the denial of his JNOV motion in a negligence action was rejected where the trial was the second of three and ended in a mistrial as to the issues raised in the motion. **Burchette v. Lynch, 756.**

JNOV motion in subsequent trial—argument concerning prior trial—issue abandoned—The defendant in an automobile accident case abandoned his argument on appeal regarding the denial of his JNOV motion where the appeal concerned the third trial and the argument in the brief concerned the second trial. Defendant was not bound on retrial by the evidence presented at the former trial and whether the evidence at the third trial would support the motion cannot be decided on the basis of the evidence presented at the former trial. Moreover, the court in this case properly denied the motion. **Burchette v. Lynch, 756.**

JNOV motions—mistrials and subsequent trials—ripeness for appeal—A defendant in a negligence action arising from an automobile collision was not prejudiced by the denial of his JNOV motion on negligence, given the mistrial and subsequent retrial on that issue, and his purported appeal of the denial of that motion was not considered. However, defendant's appeal from the denial of his motion for a directed verdict and JNOV on plaintiff's contributory negligence is now ripe for appellate review because it was decided at the first trial and, after two more trials, a final judgment has issued. **Burchette v. Lynch, 756.**

Mootness—underlying conviction vacated—Although defendant argues he was subjected to double jeopardy by being convicted of attempted first-degree rape and assault with a deadly weapon inflicting serious injury, this issue is moot because the Court of Appeals vacated the attempted first-degree rape conviction. **State v. Walker, 512.**

Motion to amend record—reasons not given—A Motion to Amend the Record on Appeal was denied where one of the defendants wanted to add to the record portions of depositions included in the record on a prior appeal but provided no explanation of why they are necessary or why they were not included in the first record. **Robinson, Bradshaw and Hinson, P.A. v. Smith, 1.**

Orders omitted from notice of appeal—considered under N.C.G.S. § 1-278—Trial court orders dismissing an action for unfair and deceptive trade practices and granting a partial summary judgment on a defamation claim were

APPEAL AND ERROR—Continued

reviewed despite their absence from the notice of appeal where the requirements for applying N.C.G.S. § 1-278 were satisfied. **Gaunt v. Pittaway, 778.**

Partial summary judgment—possibility of inconsistent verdicts—The appeal of a partial summary judgment was addressed on its merits where it was reasonably foreseeable that inconsistent verdicts could result if the appeal was dismissed. **State ex rel. Easley v. Rich Food Servs., Inc., 691.**

Preservation of issues—claim not asserted prior to appeal—In a negligence action arising from a prescription, Wal-Mart did not preserve for appellate review the issue of whether the trial court should have granted its motions for directed verdict and JNOV on the grounds that its pharmacist had filled the prescription as directed by a physician where Wal-Mart did not assert that claim prior to appeal. **Brooks v. Wal-Mart Stores, 637.**

Preservation of issues—expert testimony—Defendant Wal-Mart's contention in a negligence action arising from a prescription that testimony by a pharmacist was erroneously based upon a national standard was not properly before the Court of Appeals in light of Wal-Mart's failure to move to strike the standard of care testimony, its presentation on cross-examination of essentially the same testimony, and its further failure to object to the tender of the witness as an expert or to request a voir dire to explore the basis for his opinion. **Brooks v. Wal-Mart Stores, 637.**

Preservation of issues—failure to assign error or challenge in brief—The question of whether the trial court erred by crediting an amount paid by a tortfeasor solely to Harleysville rather than sharing the credit upon the multiple UIM carriers was not preserved for appellate review where appellant (USAA) did not assign error to nor challenge in its brief the court's characterization of the Harleysville policy as primary and the USAA policy as excess. It is well established that the primary provider of UIM coverage is entitled to the credit for the liability coverage. **Dutch v. Harleysville Mut. Ins. Co., 602.**

Preservation of issues—failure to cite authority—Although defendant contends the trial court erred by allowing the State to show the effect of the first-degree burglary upon a young child residing in the house as an aggravating factor when the State did not list the child as an occupant of the house in the indictment, defendant has abandoned this argument since he failed to cite any authority. **State v. Hutchinson, 132.**

Preservation of issues—failure to cite authority—Although petitioner contends the trial court erred in affirming respondent-Agency's decision to uphold a fine against petitioner for $5,000 based on an alleged failure to hold an adequate evidentiary hearing and failure to prepare an adequate record for judicial review, petitioner has abandoned this assignment of error since it offered no legal authority to substantiate these contentions. **Pisgah Oil Co. v. Western N.C. Reg'l Air Pollution Control Agency, 402.**

Preservation of issues—failure to cite authority—Although defendant contends the trial court erred by refusing to instruct the jury on disorderly conduct, this argument is deemed abandoned based on defendant's failure to cite any reason or authority as required by N.C. R. App. P. 28(b)(5). **State v. Smith, 209.**

APPEAL AND ERROR—Continued

Preservation of issues—failure to object—Although defendant contends the trial court erred by failing to instruct the jury concerning which incidents involving one of the minor sex abuse victims were the basis of the charges against defendant versus which ones were admitted under N.C.G.S. § 8C-1, Rule 404(b), defendant did not preserve this issue. **State v. Bowen, 18.**

Preservation of issues—failure to obtain a ruling—The trial court did not abuse its discretion in a first-degree murder case by refusing to conduct an inquiry into an alleged incident of possible juror misconduct based on a juror informing the clerk during trial that he recognized two potential witnesses in the audience. **State v. Aldridge, 706.**

Preservation of issues—failure to refer to order in notice of appeal—issue preserved under § 1-278—An issue concerning the dismissal of Wal-Mart's codefendants in an action arising from a prescription greater than the intended dose was properly before the Court of Appeals pursuant to N.C.G.S. § 1-278 despite Wal-Mart's failure to refer to the order in its notice of appeal. **Brooks v. Wal-Mart Stores, 637.**

Preservation of issues—jury deadlock—court's authority to submit other issues—no objection at trial—The defendant in an automobile accident case did not preserve for appellate review the issue of whether the trial court had the authority to enter judgment on the contributory negligence issue after the jury deadlocked on negligence where defendant did not object to submission of the contributory negligence issue to the jury and cites no authority for the proposition that it was improper for the court to enter judgment in light of defendant's assent to submission of the issue to the jury. **Burchette v. Lynch, 756.**

Preservation of issues—jury instruction—no objection at trial—The defendant in a negligence action arising from an automobile collision did not object at trial to the intervening negligence instruction as omitting foreseeability and therefore did not preserve the issue for appellate review. **Burchette v. Lynch, 756.**

Preservation of issues—objection at trial—different grounds on appeal—Defendant Wal-Mart did not preserve for appellate review its contention regarding the court's instruction in a negligence action arising from a prescription where Wal-Mart objected at trial, but the grounds asserted before the trial court were markedly different from those raised on appeal. **Brooks v. Wal-mart Stores, 637.**

Ripeness—prior decision—The issue of whether the present value of a settlement was a proper method of calculating attorneys' fees under a contingency contract for an equitable distribution action became ripe for appeal only in this appeal, following a remand, as the trial court's original calculation did not disclose that a present value calculation was used to determine the fee and the trial court has since made the requisite findings. The Court of Appeals disagreed with the contention that this issue was previously decided in that the same assignment of error was raised relating to the present value issue, the issue was not discussed, and the previous opinion (129 N.C. App. 305) stated that the Court of Appeals had reviewed any remaining assignments of error and found them to be without merit. **Robinson, Bradshaw and Hinson, P.A. v. Smith, 1.**

CRIMINAL LAW—Continued

EVIDENCE—Continued

Police officer testimony—victim's statement consistent—The trial court did not commit plain error by allowing a police witness to testify that the victim's statement to him about the attack was consistent with statements she gave to other officers and with her trial testimony, without requiring that the officer also testify about the contents of the statement. **State v. Walker, 512.**

Prior crime or act—propensity to commit crime—Although the trial court erred in a first-degree murder case by admitting testimony of defendant's two former wives concerning his behavior towards them during their marriages, the error was not prejudicial. **State v. Aldridge, 706.**

Prior crime or act—similar act—detainment in department store for shoplifting—no prejudicial error—Although the trial court erred in a misdemeanor larceny case by allowing the State to cross-examine defendant about her prior detainment in a department store for alleged shoplifting to show the absence of mistake by the State under N.C.G.S. § 8C-1, Rule 404(b), it was not prejudicial error. **State v. Fluker, 768.**

Rape shield statute—medical DSS records—sexual act involved in offense—accusations—There was no prejudicial error in a prosecution for first-degree statutory rape, indecent liberties, and other offenses where the trial court erroneously invoked the rape shield statute to prevent defendant from introducing the victim's medical records, which indicated that defendant's "partner" had been treated for gonorrhea, and to prevent defendant from questioning whether the victim's DSS records included any accusations of people other than defendant or false accusations. **State v. Thompson, 299.**

Recross examination denied—reading previously admitted evidence—The trial court did not err in a prosecution for first-degree statutory rape, indecent liberties, and other offenses by not permitting defendant to cross-examine the victim a second time after she read on redirect a story she had written for her therapist about her abuse where the story had been admitted during the initial direct examination and defense counsel had cross-examined her about the story. Simply having her read the evidence on re-direct did not elicit new matter. **State v. Thompson, 299.**

Subsequent crime or act—intent and motive—The trial court did not abuse its discretion in a first-degree burglary case by admitting evidence of defendant's subsequent offenses of shoplifting, breaking and entering and larceny, and car theft, and evidence that defendant used the proceeds from these offenses to purchase drugs. **State v. Hutchinson, 132.**

Work product rule—investigator—waiver to the extent materials used on direct examination—An attorney who was disbarred by the State Bar was entitled to a new hearing where his due process rights were violated by the Hearing Committees's failure to compel production of the State Bar investigator's notes, reports, or memoranda relating to matters about which the investigator testified. By allowing the investigator to testify, the State Bar waived any protection under the work product rule for those materials used on direct examination. **N.C. State Bar v. Harris, 822.**

INSURANCE—Continued

Automobile—UIM coverage—person under parked car at time of collision—person insured—The trial court did not err by concluding that the decedent (Dutch) was insured under the UIM provisions of a USAA policy where the vehicle Dutch was driving (the Bullock vehicle, insured by Harleyville) skidded into a ditch; Dutch solicited help from a nearby residence and Clark drove his vehicle (insured by USAA) to the scene, where he parked on the road while Dutch hooked a chain to the vehicle he was driving and crawled under the Clark vehicle to attach the other end of the chain; and a vehicle driven by Fairley collided with both the Bullock and Clark vehicles and ran over Dutch, causing his death. **Dutch v. Harleysville Mut. Ins. Co., 602.**

Automobile—UIM coverage—statutory limit—per-person or per-accident—The applicable UIM coverage limit under N.C.G.S. § 20-279.21(b)(4) will depend on the number of claimants seeking coverage under the UIM policy and whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap. **N.C. Farm Bureau Mut. Ins. Co. v. Gurley, 178.**

Automobile—UIM coverage—subrogation—workers' compensation lien—The trial court erred by concluding intervenor-employer did not have a lien on plaintiff-employee's settlement with the employer's underinsured motorist (UIM) carrier in an action where plaintiff-employee was injured in an automobile accident in the course of his employment while driving a company vehicle. **Levasseur v. Lowery, 235.**

Reserves—filed rate doctrine—The trial court did not err by granting a Rule 12(b)(6) dismissal of plaintiffs' class actions alleging that defendant medical service corporation maintained excessive reserves on the ground that the filed rate doctrine precluded the actions. The filed rate doctrine holds that a plaintiff may not claim damages on the ground that a rate approved by a regulator as reasonable is excessive and that rates set by a regulator may not be collaterally attacked. **Lupton v. BCBS of N.C., 421.**

INTEREST

Prejudgment—breach of implied warranty of habitability—date action instituted—The trial court did not err by awarding plaintiffs prejudgment interest from the date the action was instituted, as opposed to the date of defendant's breach of the implied warranty of habitability concerning synthetic stucco. **Medlin v. FYCO, Inc., 534.**

JUDGMENTS

Default—failure to challenge finding—law of case—The trial court erred by denying defendant-administratrix's motion for summary judgment in an action where an insurance company sought a declaratory judgment in its effort to deny coverage of claims and to set forth defenses involving a single-car accident after entry of default judgment against the insured's estate based on the issue of whether the car accident occurred within the policy term. **Naddeo v. Allstate Ins. Co., 311.**

SENTENCING—Continued

habitual felon and imposing sentence and the sentences imposed upon the underlying convictions of felonious breaking and entering and felonious larceny were vacated and remanded for resentencing where the trial court imposed the habitual felon sentence in a separate judgment and directed that the principal felony sentence run at the expiration of the habitual felon sentence. Being an habitual felon is not a crime but a status and the status only will not support a criminal sentence. Upon conviction as an habitual felon, the court must sentence defendant for the underlying felony as a Class C felon; here, defendant was improperly sentenced with a Prior Record Level of I on the Class H felonies. **State v. Wilson, 544.**

Prior record level—The trial court did not err during a sentencing proceeding by determining that defendant's prior record level is level IV under N.C.G.S. § 15-1340.14(c)(4). **State v. Smith, 209.**

Second-degree murder—aggravating factor—creating a great risk of death to more than one person—The trial court did not err in a second-degree murder case by finding as an aggravating factor that defendant created a great risk of death to more than one person. **State v. Baldwin, 65.**

Second-degree murder—aggravating factor—failing to render aid to victim—essence of the crime—The trial court erred in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant failed to render aid to the victim, and the case must be remanded for a new sentencing hearing. **State v. Baldwin, 65.**

Second-degree murder—aggravating factor—murder committed in course of robbery—motivated by pecuniary gain—The trial court did not err by finding as an aggravating factor that the murder was committed in the course of a robbery and was motivated by pecuniary gain. **State v. Baldwin, 65.**

SEXUAL OFFENSES

Conviction for offense not charged—plain error—The trial court committed plain error by instructing the jury on statutory sexual offense instead of first-degree sexual offense as charged in the indictment because a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment. **State v. Bowen, 18.**

Indictment—child victim—date of offenses—notice—Even though defendant was not served with the bills of indictment in a first-degree sexual offense and taking indecent liberties with a minor case and defendant also alleges the State destroyed his alibi defense by offering evidence that the offenses occurred on dates different from those in the arrest warrants, defendant's due process rights were not violated. **State v. Hutchings, 184.**

Indictment—child victim—language of statute used—notice—double jeopardy—Although defendant contends the indictments for two counts of first-degree sexual offense under N.C.G.S. § 14-27.4 and three counts of taking indecent liberties with a minor under N.C.G.S. § 14-202.1 do not sufficiently identify the offenses so as to protect him from multiple prosecutions and multiple punishments for the same offenses, the trial court did not commit plain error by accepting the verdicts and entering judgment upon them where each of the

UNFAIR TRADE PRACTICES—Continued

company where the finance companies had purchased retail installment sales contracts from the food company. **State ex rel. Easley v. Rich Food Servs., Inc., 691.**

Statements by infertility specialists—medical professionals excluded from statute—The trial court did not err by granting summary judgment for defendants on an unfair and deceptive practices claim arising from a newspaper story about in vitro fertilization. Plaintiffs have no claim against defendants under N.C.G.S. § 75-1.1 because medical professionals are expressly excluded from the scope of the statute and it clearly does not follow that a statement by a medical professional, criminal or otherwise, is governed by this statute. **Gaunt v. Pittaway, 778.**

WARRANTIES

Implied warranty of habitability—synthetic stucco—jury instruction—workmanlike construction—Although defendant contends the trial court erred by failing to require that the jury find before awarding damages that such damages were proximately caused by defendant's failure to meet the industry standards of workmanlike construction in an action for breach of implied warranty of habitability concerning synthetic stucco, the trial court gave the substance of this instruction. **Medlin v. FYCO, Inc., 534.**

Implied warranty of habitability—synthetic stucco—motion for directed verdict—judgment notwithstanding the verdict—The trial court did not err by denying defendant's motions for directed verdict and judgment notwithstanding the verdict in an action for breach of implied warranty of habitability concerning synthetic stucco. **Medlin v. FYCO, Inc., 534.**

WILLS

Right of dissent—subject matter jurisdiction—declaratory judgment action improper—Although plaintiffs contend they have standing to contest defendant-wife's right of dissent from her deceased husband's will in this action, the trial court did not err by granting summary judgment in favor of defendant in a declaratory judgment action because the trial court did not have subject matter jurisdiction over the issues involved. **Ripley v. Day, 630.**

WITNESSES

Cross-examination—pending charges—Although defendant contends the trial court erred in a first-degree murder case by denying defendant the opportunity to cross-examine a State's witness about any charges pending at the time the witness spoke with police about the crime in this case, defendant was allowed to inquire as to any pending charges and did so. **State v. McRae, 387.**

Cross-examination—pending charges—no details—Although defendant contends the trial court erred in a first-degree murder case by denying defendant the opportunity to cross-examine a State's witness about the witness's pending charges, a review of the voir dire hearing reveals that the trial court only prohibited defendant from asking about details surrounding the two concealed weapons charges, and not about the charges themselves. **State v. McRae, 387.**

WORKERS' COMPENSATION

Additional compensation—claim not timely—The Industrial Commission did not err in a workers' compensation action by finding and concluding that plaintiff's claim for additional compensation for a change of condition was not timely where plaintiff received a lump sum payment intended to be the last payment in March of 1993, the Commission did not approve the agreement for a lump sum payment until 20 April 1994, and plaintiff filed a claim on 3 April 1996 for additional compensation for a change in condition. The plain language of N.C.G.S. § 97-47 establishes that the limitations period begins to run on the date of the last payment of compensation and the date that triggers the running of the statute of limitations is the date the last payment is received, not the date the Commission approves the award. **Hunter v. Perquimans County Bd. of Educ., 352.**

Additional compensation—claim not timely—no bad faith inducement of delay—Defendants in a workers' compensation claim were not equitably estopped from raising the limitation period defense to a claim for additional compensation for a change of condition where the Commission explicitly concluded that there was no evidence that plaintiff's delay in filing her claim was induced by defendants and no evidence that defendants acted in bad faith. **Hunter v. Perquimans County Bd. of Educ., 352.**

Additional compensation—time limitations defense—not estopped—Defendants in a workers' compensation action were not estopped from raising the limitations period as an affirmative defense to a claim for additional compensation for a change of condition where they never filed Form 28B with plaintiff or the Commission. Although defendants should have filed the form, the plain language of N.C.G.S. § 97-18(h) provides a remedy only to the Commission, not to the plaintiff. **Hunter v. Perquimans County Bd. of Educ., 352.**

Ankle ulcer—result of injury—The Industrial Commission did not err in a workers' compensation action by finding that bleeding from an ulcer on plaintiff's ankle in 1995 was the direct and natural result of her 1994 injury where the Commission relied upon the testimony of plaintiff's primary care physician, Dr. Thompson, that plaintiff's three ankle injuries aggravated her pre-existing condition and were significant contributing factors in her continuing problems with her ulcer. Although there was conflicting medical testimony, the Commission was entitled to give greater weight to Dr. Thompson's testimony. **Royce v. Rushco Food Stores, Inc., 322.**

Attorney fees—appeal of order—not a collateral attack on earlier order—An appeal of an order by an Industrial Commissioner awarding attorney fees was not an improper collateral attack on an order of the Full Commission which had earlier awarded attorney fees. **Pearson v. C.P. Buckner Steel Erection, 394.**

Attorney fees—care provider—Medicaid accepted—provider's fees not a benefit to employee—The Industrial Commission correctly concluded that intervenor was not entitled to attorney fees in a workers' compensation action where intervenor was a nursing home which had accepted payment from Medicaid. In so doing, intervenor gave up its right to hold the injured employee liable for any costs associated with the care aside from the standard deductible, coinsurance or copayments, and the plain language of N.C.G.S. § 97-88 only authorizes payments to the injured employee for his costs. Intervenor cannot now argue that payment of its attorney fees is either payment of the injured employ-

WORKERS' COMPENSATION—Continued

WORKERS' COMPENSATION—Continued

sion found that plaintiff has fibromyalgia and that it was caused or aggravated by her employment but that there was no medical evidence that plaintiff's employment placed her at an increased risk of contracting or developing fibromyalgia. **Norris v. Drexel Heritage Furniture, Inc., 620.**

Form 21 agreement—subsequent Form 26 agreement—burden of establishing total disability—The Industrial Commission erred by concluding that defendants had the burden of presenting evidence to rebut a presumption of continued total disability raised by a Form 21 agreement where the parties subsequently signed a Form 26 supplemental agreement under which the employer agreed to pay plaintiff for a temporary partial disability at a reduced rate for a two-week period. **Dancy v. Abbott Labs., 533.**

Inability to find alternative employment—insufficient evidence—The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff did not meet her burden of proving that it would be futile for her to seek other employment where the Commission found, based on the testimony of plaintiff's doctor, that she was not capable of working in a job that required standing eight to ten hours a day but that she could perform a seated job with her leg elevated, that plaintiff made no effort to find alternative employment within her restrictions after she reached maximum medical improvement, and that she failed to present any medical or vocational evidence that it would be futile for her to seek other employment. **Royce v. Rushco Food Stores, Inc., 322.**

Industrial Commission panel—two signatures on opinion—Although intervenor argued that two Commissioners cannot constitute a panel of the Industrial Commission for the decision of a workers' compensation action, the opinion here clearly stated that there was a third commissioner on the panel even though the third signature was lacking due to illness. **Pearson v. C.P. Buckner Steel Erection, 394.**

Kentucky policy—Kentucky law—no North Carolina coverage—The Industrial Commission did not err by not applying Kentucky law to determine whether a workers' compensation insurance policy provided coverage for plaintiff's injury where defendant-employer was a Kentucky corporation with its principal place of business in Kentucky, plaintiff was hired in North Carolina by a supervisor for defendant, plaintiff testified that he sometimes worked for the supervisor but did not know the name of the supervisor's employer or that the employer was located in Kentucky, and plaintiff resided in North Carolina, performed his work here, was injured here, and never traveled outside of North Carolina. **Harrison v. Tobacco Transp., Inc., 561.**

Kentucky policy—language of policy—no North Carolina policy—A workers' compensation insurance carrier was properly dismissed from a workers' compensation proceeding where the plain language of the policy provided competent evidence sufficient to uphold the Commission's determination that the policy did not provide workers' compensation insurance to defendant in North Carolina. **Harrison v. Tobacco Transp., Inc., 561.**

Kentucky policy—no North Carolina coverage—employer fined—The Industrial Commission did not err by assessing a fine against defendant where it had been determined in the same workers' compensation action that a Kentucky

WORKERS' COMPENSATION—Continued

ZONING

ZONING—Continued

WORD AND PHRASE INDEX

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