NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 140

5 SEPTEMBER 2000

5 DECEMBER 2000

RALEIGH
2001

CITE THIS VOLUME
140 N.C. APP.

TABLE OF CONTENTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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*Deceased 4 December 2000.

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1. Retired 31 July 2001.
2. Retired 30 September 2001.
3. Resigned 30 September 2001.
4. Resigned 25 September 2001.
5. Currently assigned to Court of Appeals.

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1. Appointed Chief Judge effective 3 September 2001 to replace Rodney R. Goodman who retired 1 September 2001.
2. Appointed and sworn in 21 September 2001 to replace Jack E. Klass who retired 30 June 2001.
3. Appointed Chief Judge effective 1 October 2001 to replace William G. Jones who retired 3 September 2001.
4. Appointed and sworn in 27 August 2001.
5. Appointed and sworn in 1 July 2001.

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RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

CONSTITUTION OF UNITED STATES CITED

Rules No.	
2	Taylor v. City of Lenoir, 337
10(a)	Tepper v. Hoch, 354
12(a)	Taylor v. City of Lenior, 337
28(b)(5)	Hummer v. Pulley, Watson, King & Lischer, P.A., 270 State v. Jones, 691
28(g)	State v. Cunningham, 315

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. RICKY NEAL YOUNG

No. COA99-843

(Filed 5 September 2000)

Constitutional Law; Sexual Offenses— registration of sex offenders—defendant adjudicated incompetent

N.C.G.S. § 14-208.11, which requires sex offenders to register their address, is unconstitutional as applied to an adjudicated incompetent defendant because it fails to afford sufficient notice under the Fifth and Fourteenth Amendments. Although the defendant here was provided with sufficient actual notice to satisfy due process requirements for any reasonable and prudent man, defendant has been legally determined to be incapable of managing his own affairs and is not a reasonable and prudent man. Due to the nature of this statute's requirement and the wholly innocent act through which it may easily be violated, proof of an adjudicated incompetent defendant's ability to comply with this statute must necessarily be an element of the State's prima facie case, and a test for determining competency to stand trial is substantially different from one which would determine whether defendant was competent to comply with the requirements of this statute.

Judge HORTON concurs in the result.

Appeal by defendant from judgment entered 18 December 1998 by Judge James L. Baker, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 16 May 2000.

Attorney General Michael F. Easley, by Assistant Attorney General John J. Aldridge, III, for the State.

Michael E. Casterline for defendant-appellant.

HUNTER, Judge.

Ricky Neal Young ("defendant") appeals the jury verdict convicting him of failing to register his change of address as a sex offender, in violation of N.C. Gen. Stat. § 14-208.11. Finding this statute to be unconstitutional as applied to this defendant, an adjudicated incompetent, we reverse his conviction.

The record before us reveals that on 7 July 1989 defendant was adjudicated incompetent and his mother, Patsy Riddle ("Ms. Riddle") was appointed his guardian. In 1991, defendant was charged with taking indecent liberties with a minor child. However, the trial court found he lacked capacity to be tried and he was committed to Dorothea Dix and Broughton Hospitals. In 1998, defendant pled guilty to the indecent liberties charge and received an eight-year sentence. Having already served most of his time, he was released on parole to Country Time Village, a family care home, in May 1998. While there, his meals were prepared for him, medication dispensed to him and transportation provided to him for his appointments with his parole officer.

Detective Tim Israel ("Det. Israel"), of the Buncombe County Sheriff's Department, testified that on 12 May 1998 defendant came into the sheriff's department to register his change of address, listing Country Time Village as his residence. Det. Israel further testified that, as was the department's procedure, he read the registration form with all of its requirements to defendant, took the appropriate information from defendant to fill out the form, filled out the form, read "Defendant's acknowledgement" [sic] to defendant and then had defendant sign the form. Det. Israel also signed the form. Defendant was given a copy of the registration requirement form. When asked if he knew how defendant got to the sheriff's department, Det. Israel stated that he did not know how defendant got there but that someone was with defendant when he arrived.

On 28 June 1998, defendant was released from Country Time Village and the day following, someone from the sheriff's department came for him and involuntarily committed him to Broughton Hospital. On Sunday, 4 October 1998, defendant was discharged from

Broughton, into Ms. Riddle's care. After picking defendant up, Ms. Riddle testified that she drove defendant to the Buncombe County Sheriff's Department, where defendant and his brother went inside to register defendant's change of address. Ms. Riddle further testified that upon her sons' return to the car she asked, " 'Well, did you get it took [sic] care of?' And he says, 'Yeah.' He said, 'I had to talk to some lady on the telephone and she said everything would be all right.' "

Buncombe County Detective Jerry Dean Owenby, Jr. ("Det. Owenby") testified that, on or about 4 October 1998, the department received a recorded message from Blue Ridge, a mental health facility, informing them that defendant had been released from Broughton Hospital, and that defendant's new address was that of his mother. Det. Owenby further testified that he began calling around on 5 October 1998 "to see if [defendant] was still at Country Time Village. . . . I found out that [defendant] had left Country Time on the 28th of June." Det. Owenby further testified that "prior to . . . the voice mail that I got, I had found out that [defendant] was also—had been in Broughton Hospital for some time. I called down there to see if he was still there, and he wasn't there." Nevertheless, Det. Owenby never called defendant's mother's house to contact defendant or his mother in an effort to get defendant to come in and register. Instead, Det. Owenby waited the required ten days and, on 15 October 1998, Det. Owenby charged defendant with "failing to notify the sheriff's department of a change of address for being a registered sex offender[.]"

At trial Det. Owenby testified, that on 15 or 16 October, "I come into to [sic] work one morning and my secretary asked me if I'd call this guy [defendant] back. He'd called a couple of times and was irate." Det. Owenby further testified that when he returned defendant's call, it was "probably within about four or five days after I charged him." Defendant "answered the phone." "He wanted to know why I had charged him with failing to change his address." "I told him that he had—I'd received a phone call." In response to whether he knew where defendant was at that time, Det. Owenby answered,

> [Defendant] was at his mother's residence.
>
> . . .
>
> I called him there. . . .
>
> . . .

> He was—he was—actually, he was very nice to me, polite to me. He wanted to know why I had charged him, and at that particular time I found out that he had already had the warrant served. I didn't know prior to that. He told me that he had come to register and somebody told him they would take care of it on that Sunday.
>
> . . .
>
> [Not knowing who, defendant] said the person on the phone, on the green phone, which on the weekends in our—in the main entrance to the sheriff's office, when you walk in there's a green phone you pick up. You get a dispatcher and they will—they will help you from there.

Det. Owenby further stated that sex offender registration is not available on Sundays, but only during normal business hours. Det. Owenby testified that he later inquired of the people in his office as to whether they had advised defendant that they would take care of it, but was unable to discover anyone who had.

Defendant was brought to trial on the subject charge, and his attorney filed a motion to have defendant examined to determine whether he had the capacity to proceed, which motion was granted. In his evaluation report of defendant dated 15 December 1998, certified forensic screening evaluator Marc Strange ("Mr. Strange"), stated:

> [Defendant] has an extensive history of inpatient and outpatient psychiatric treatment. He appears to have been psychiatrically hospitalized at least 35 times to date. This included multiple commitments to Broughton State Hospital and Dorothea Dix Hospital. His most recent commitment was at Broughton for approximately 10 days on December 2, 1998. Historically, [defendant's] commitments have been the result of an active psychotic thought disorder, poor medication compliance, inappropriate and illegal sexual behavior (primarily exposing his genitals in public accompanied by loud and sometimes aggressive behavior), and/or assaultive behavior. He has been adjudicated to be legally incompetent, with his mother being made his guardian, and is a Registered Sex Offender in Buncombe County. In the past, [defendant] has routinely refused to comply with psychotropic medications due to his stated belief that they are either poisons or that he does not require them. His compliance has been notably improved by the use of neuroleptic injections.

> During his last commitment to Broughton, he was removed from injections and once again placed on oral medication. [Defendant's] current psychiatric diagnoses are Schizophrenia, chronic, undifferentiated; Antisocial Personality Disorder; and, Alcohol Abuse. . . .
>
> . . .
>
> [Defendant's] comprehensions of his current legal situation, and of the courtroom process involving him, appear to be intact. He is able to clearly describe the current charge against him (failure to register as a sex offender), how that charge came about (he moved and failed to notify authorities within the legal time limit), and the range of possible consequences he would face should he be convicted of that charge. . . .
>
> [Defendant] does demonstrate limited insight with regard to the extent and significance of his sexual offenses and consistently minimizes these events. This would seem consistent with his level of cognitive impairment and his Axis I and II characteristics. Although occasional loose associations of a nondisruptive nature mark his comments, [defendant] is clearly able to effectively meet the state's criteria to demonstrate competency to proceed. . . .

Thus, the trial court allowed the trial to proceed. Defendant was tried by a jury and found guilty. Finding aggravating factors, the trial court sentenced defendant to fifteen to eighteen months in prison.

At trial, defendant preserved six assignments of error, but he argues only four to this Court, thus we deem the others abandoned. N.C.R. App. P. 28(b). In his first three assignments of error, defendant argues that the statute under which he was convicted (N.C. Gen. Stat. § 14-208.11) is unconstitutional under both the United States Constitution and the North Carolina Constitution because: (1) it violates due process requirements by making a sex offender's failure to notify of change of address a strict liability felony offense; (2) as applied to defendant, it severely punishes an incompetent person for failing to take some affirmative action, without regard to fault or legal excuse; and (3) it violates the Constitutions' prohibition on *ex post facto* laws by increasing the punishment for sex offenders after the commission of their crimes. Defendant further assigns error to the trial court's failure to dismiss the bill of indictment when the indictment included the term "knowingly" committed, an element of the

crime which was not required of the State to prove. Due to our disposition of the case, we address only defendant's argument that the statute is unconstitutional as applied to him.

This is a case of first impression for North Carolina and, based on our extensive research, it may well be a case of first impression for the nation. That is, whether a state statute requiring a convicted sex offender to register with the county sheriff's department his wholly innocent act of changing addresses, applies to an individual who has been adjudicated incompetent.

Our Supreme Court has held that:

> The authority of this Court to declare an act of the Legislature unconstitutional arises from its duty to determine, in accordance with applicable and valid rules of law, the rights of litigants in a controversy brought before it by proper procedure. Consequently, when asked to determine the constitutionality of a statute, the Court will do so *only* to the extent necessary to determine that controversy. It will not undertake to pass upon the validity of the statute as it may be applied to factual situations materially different from that before it. . . .

Watch Co. v. Brand Distributors and Watch Co. v. Motor Market, 285 N.C. 467, 472, 206 S.E.2d 141, 145 (1974) (citation omitted) (emphasis added). Therefore, we hold that as applied to the facts of this case involving this defendant, an adjudicated incompetent, N.C. Gen. Stat. § 14-208.11 is unconstitutional because it fails to provide him with sufficient notice or knowledge to overcome United States Constitutional Fifth and Fourteenth Amendment due process requirements.

This Court in *In re Lamm*, 116 N.C. App. 382, 448 S.E.2d 125 (1994) opined that,

> "The Fifth and Fourteenth Amendments to the United States Constitution, together with the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution, provide that no person shall be deprived of life, liberty or property without due process of law." *State v. McCleary*, 65 N.C. App. 174, 180, 308 S.E.2d 883, 888 (1983), *affirmed*, 311 N.C. 397, 316 S.E.2d 870 (1984). Article I, § 19 of the North Carolina Constitution is synonymous with "due process of law" as that term is applied under the Fourteenth Amendment to the federal Constitution. *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976); *McNeill v. Harnett County*, 327 N.C. 552,

398 S.E.2d 475 (1990), and United States Supreme Court interpretations of the latter, though not binding, are highly persuasive in construing the former. *Watch Co. v. Brand Distributors*, 285 N.C. 467, 206 S.E.2d 141 (1974). However, in deciding what procedural safeguards are due under Article I, § 19 of the North Carolina Constitution, the North Carolina Supreme Court has employed a somewhat different method of decision than that employed by the United States Supreme Court for deciding similar questions under the due process clause of the federal constitution. *Henry v. Edmisten*, 315 N.C. 474, 340 S.E.2d 720 (1986). *Accordingly we must examine the procedures prescribed by the State [statute] at issue, and* ***particularly as applied to respondent in this case,*** *to determine whether they comport with the requirements of due process* under both constitutions.

. . .

Due process of law formulates a flexible concept, to insure fundamental fairness in judicial or administrative proceedings which may adversely affect the protected rights of an individual. Due process means simply a procedure which is fair and does not mandate a single, required set of procedures for all occasions; *it is necessary to consider the specific factual context . . . involved. In resolving any claimed violation of procedural due process, a balance must be struck between the respective interests* of the individual and the governmental entity seeking a remedy. . . . *At a minimum, due process requires adequate notice of the charges and a fair opportunity to meet them, and* ***the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard.***

Id. at 384-86, 448 S.E.2d at 128-29 (emphasis added) (citations omitted).

In the present case, the North Carolina statute at issue states in pertinent part:

(a) A person required . . . to register who does any of the following is guilty of a Class F felony:

(1) Fails to register.

(2) Fails to notify the last registering sheriff of a change of address.

(3) Fails to return a verification notice as required under G.S. 14-208.9A.

. . .

(a1) If a person commits a violation of subsection (a) of this section, the probation officer, parole officer, or any other law enforcement officer who is aware of the violation shall immediately arrest the person in accordance with G.S. 15A-401, or seek an order for the person's arrest in accordance with G.S. 15A-305.

(b) Before a person convicted of a violation of this Article is due to be released from a penal institution, an official of the penal institution shall conduct the prerelease notification procedures specified under G.S. 14-208.8(a)(2) and (3). If upon a conviction for a violation of this Article, no active term of imprisonment is imposed, the court pronouncing sentence shall, at the time of sentencing, conduct the notification procedures specified under G.S. 14-208.8(a)(2) and (3).

N.C. Gen. Stat. § 14-208.11 (1999).

We begin by noting that the statute, as it is written, states that an individual *who DOES a thing*, is in violation of the statute. However in actuality, violation of the statute is in the *passive act* of *the individual's NOT doing the thing*—specifically at issue here, defendant's not registering his change of address. Furthermore, we note that the statute has no requirement of knowledge or intent, so as to require that the State prove either defendant knew he was in violation of or intended to violate the statute when he failed to register his change of address. However, in line with due process notice requirements, our Legislature has written the statute such that it mandates a convicted sex offender be notified of the registration requirements. N.C. Gen. Stat. § 14-208.11(b). Under ordinary circumstances such a provision would work to remove the statute from due process notice attacks. Thus the State argues that in having registered once before and having signed and received notification of the on-going requirement to register any changes of address, "defendant was affirmatively put on notice yet again by Detective Timothy Israel . . . ." We disagree.

Our General Assembly has clearly set out the legal meaning of an incompetent as one

> who lacks sufficient capacity to manage [his/her] own affairs or *to make or communicate important decisions concerning*

[his/her] person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101(7) (1999) (emphasis added). Furthermore, in an effort to protect these individuals, our laws authorize the judiciary to appoint guardians to assist these individuals in conducting their daily affairs. "The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions." N.C. Gen. Stat. § 35A-1201(a)(3) (1999). Thus, we know that in order for defendant to have been adjudicated incompetent by a court of this state and his mother appointed his guardian, the court must have found that defendant either (1) lacked sufficient capacity to manage his own affairs; or (2) lacked sufficient capacity to make or communicate important decisions concerning his person. *Id.* The record does not indicate the court's findings with regard to the adjudication; however, that is of no importance since the State does not (and could not at this time) argue that the adjudication was improper.

It is true—the record before us revealing—that based on Det. Israel's explaining to defendant the sex offender's registration requirements, defendant was provided with "actual knowledge" enough to satisfy due process requirements for any reasonable and prudent man. However, "defendant has been legally determined to be incapable of managing his own affairs." In light of defendant's incompetency, he is not a reasonable and prudent man. His mother testified that defendant was of average mental capacity until the age of seventeen when he suffered injuries sustained in a moped accident and, since that time, he has been unable to manage his own personal affairs. Consequently, defendant was adjudicated incompetent in 1989, pursuant to N.C. Gen. Stat. § 35A, and has lived the last eleven years of his life in and out of state mental hospitals, having been hospitalized "at least 35 times" over the course of his lifetime. Therefore, because defendant was adjudicated incompetent, we believe that what constituted "actual notice" to a reasonable and prudent man, was not sufficient notice to this defendant.

Pursuant to North Carolina statutory and case law which govern the affairs of adjudicated incompetents, our courts have long held that it is impermissible (if not impossible) to solely give notice to the

actual incompetent person himself, expecting then to enforce rights against him:

> If any person, to whom notice must be given . . . is a minor or is incompetent, then the notice shall be given to his duly appointed guardian or other duly appointed representative . . . .

N.C. Gen. Stat. § 35A-1353 (1999). Furthermore:

> Once an adjudication of incompetency is made, [and] a guardian is appointed, [] the incompetent becomes a ward of the guardian. The authority of the guardian then replaces the authority of the ward to manage the ward's affairs. Therefore, upon an adjudication of incompetence, the ward loses h[is] legal rights, including the right to make contracts, to control and sell property and to vote. . . . [T]he legal ability to form contracts [even] encompasses basic rights including the ability to purchase groceries or retail items . . . .

Laura M. Wolfe, Comment, *A Clarification of the Standard of Mental Capacity in North Carolina for Legal Transactions of the Elderly*, 32 Wake Forest L. Rev. 563, 564 (1997) (footnotes omitted citing N.C. Gen. Stat. §§ 35A-1120, 35A-1201(a)(3), 35A-1241 and 35A-1251). Thus, we find that N.C. Gen. Stat. § 14-208.11 does not provide adequate notice for an incompetent sex offender to comply with the statute's requirements. Due process requires not just the mechanical act of notifying a defendant or the automatic assumption that the notice is good, but in fact, we believe due process requires that notice be synonymous with the ability to comply.

We find *Lambert v. California*, 355 U.S. 225, 2 L. Ed. 2d 228 (1957), dispositive. In *Lambert*, the plaintiff was a convicted felon who as such, under the California Municipal Code, was required to register with the city if she remained (or intended to remain) in Los Angeles for more than five days. After living in Los Angeles for more than seven years, plaintiff was arrested on suspicion of another offense and then charged with violation of the registration law. On appeal to the United States Supreme Court on the grounds that the Code was unconstitutional, the Court opined:

> The question is whether a registration act of this character violates due process *where it is applied to a person who has no actual knowledge of his duty to register*, and where no showing is made of the probability of such knowledge.

[We recognize that] conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence [intent] from its definition. *But we deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed.* [Nevertheless,] [t]he rule that "ignorance of the law will not excuse" (*Shevlin-Carpenter Co. v. Minnesota, supra,* (218 U.S. 68)) is deep in our law, as is the principle that of all the powers of the local government, the police power is "one of the least limitable." *District of Columbia v. Brooke,* 214 U.S. 138, 149, 53 L. Ed. 941, 945, 29 S.Ct. 560. On the other hand, due process places some limits on its exercise. Engrained [sic] in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. . . . [T]he principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.

Registration laws are common and their range is wide. . . . But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking. . . . *We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand.* As Holmes wrote in The Common Law, "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." *Id.* at 50. *Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process.* Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

Id. at 227-30, 2 L. Ed. 2d at 231-32 (emphasis added) (citations omitted). Thus, although ignorance of the law is no excuse, and the statute at issue does *not* require the State to prove intent, due process requires that defendant have knowledge, actual or constructive, of the statutory requirements before he can be charged with its violation. *Id.*

We recognize that *Lambert* has been very narrowly construed and that few cases since have been able to successfully argue its application to new facts before the Court. However, we note that each time a court has refused to apply *Lambert*, the defendant at hand either knew or should have known of the possible violation. For example, where the defendant in *U.S. v. Lamb*, 945 F.Supp. 441 (N.D.N.Y. 1996), was charged with the distribution of child pornography, the court opined

> the possession and distribution of child pornography is an activity which the average person would think unlawful. Moreover, the conduct defendant is charged with is not wholly passive, but rather involves transmission over the computer and possible solicitation of downloads from like-minded individuals. . . .

Id. at 454. Similarly, in *U.S. v. Meade*, 175 F.3d 215 (1st Cir. 1999), defendant Meade argued that although he had been charged with stalking his wife, his possession of a handgun was wholly innocent. Disagreeing, the court opined:

> Meade nevertheless tries to bring his case within the *Lambert* exception by arguing that firearms possession is an act sufficiently innocent that no one could be expected to know that he would violate the law merely by possessing a gun. As *Staples v. United States*, 511 U.S. 600, 610-12, 114 S.Ct. 1793, 128 L. Ed. 2d 608 (1994), makes clear, firearms possession, without more, is not a kind of activity comparable to possession of hand grenades, *see Freed*, 401 U.S. at 609, 91 S.Ct. 1112, narcotics, *see United States v. Balint*, 258 U.S. 250, 253-54, 42 S.Ct. 301, 66 L. Ed. 604 (1922), or child pornography, *see United States v. Robinson*, 137 F.3d 652, 654 (1st Cir. 1998). But possession of firearms by persons laboring under the yoke of anti-harassment or anti-stalking restraining orders is a horse of a different hue. The dangerous propensities of persons with a history of domestic abuse are no secret, and the possibility of tragic encounters has been too often realized. We think it follows that a person who is subject to such an order would not be sanguine about the legal consequences of

> possessing a firearm, let alone of being apprehended with a handgun in the immediate vicinity of his spouse. . . .

Id. at 226. Likewise, the 4th Circuit District Court rejected defendant Bostic's argument that *Lambert* applied, stating:

> By engaging in abusive conduct toward [his wife and child, the defendant] removed himself from the class of ordinary citizens. . . . Like a felon, a person in [defendant's] position cannot reasonably expect to be free from regulation when possessing a firearm.

U.S. v. Bostic, 168 F.3d 718, 722 (4th Cir. 1999).

Nonetheless, it is the State's contention before this Court that defendant was competent enough to register his change of address himself. In support of its argument, the State cites the fact that "[a]fter leaving the Sheriff's Office on Sunday, October 4, 1998, the defendant's mother gave him money to catch a bus to come back to the Sheriff's Office to change his address," an indication that defendant was capable of registering himself. The State further argues that although defendant was adjudicated incompetent years ago, the trial court found defendant competent to stand trial for the charge of violating the statute's change of address requirement and properly "instructed the jury that [defendant's being adjudicated] incompeten[t] . . . does not absolve the defendant from criminal liability." We find the State's rationale unpersuasive.

To start, the State's own witness, Det. Israel admitted that when defendant showed up at the sheriff's office to register the first time (May 1998), defendant had not driven himself, nor had he come alone. Additionally, when defendant attempted to register on Sunday, 4 October 1998 his mother drove him and his brother accompanied him inside the sheriff's office. Furthermore, when defendant's mother gave him money to catch a bus to register, defendant never arrived. We do not find these facts persuasive to show that defendant was capable of registering himself. On the contrary, we deduce from these incidents that defendant was only able to comply with registering when he was accompanied by another adult. Furthermore, we note that in finding defendant competent to stand trial, the trial court was only finding that defendant—**at the time of trial**—was competent to assist in his defense. 21 Am. Jur. 2d *Criminal Law* § 96 (1981). This is *NOT* the same as a finding of whether defendant knew, understood and was able to comply with the requirement that he register his

change of address during the ten days in which he had to register to avoid arrest. Thus, it is irrelevant as to whether defendant had proper notice.

Next, we address the State's contention that because the trial court found defendant competent to stand trial, whatever the jury's verdict, defendant received due process. We again, disagree. It is true that under most circumstances, a criminal defendant is not absolved from criminal liability just because he has been adjudicated incompetent. However, a test for determining defendant's competency to stand trial (which the trial court conducted) is substantially different from one which would determine whether defendant was competent to comply with the requirements of registration at the time he must necessarily have registered to avoid violating the subject statute. 21 Am. Jur. 2d *Criminal Law* § 96 (1981). The latter was NOT a test conducted by the trial court. (We note that up until now, this type of test would fall in line with an insanity defense for criminal acts *committed.*) However, taking our lead from *Lambert, supra*, we believe that due to the nature of the subject statute's requirement and the wholly innocent act (an *omission*) through which the statute may so easily be violated, proof of an adjudicated incompetent defendant's ability to comply must necessarily be an element of the State's *prima facie* case to satisfy due process requirements. Thus, N.C. Gen. Stat. § 14-208.11 is unconstitutional as applied to him.

Defendant at bar received a sentence of fifteen to eighteen months in prison for failing to register his change of address from a mental institution to his mother's home (with whom he had lived all of his life). From the time the defendant moved back home, the sheriff's office not only knew where to find the defendant, its officers served the warrant on defendant at his mother's home and later telephoned defendant at his mother's home before they arrested him there. Granted, our statutes do not require the sheriff to contact a sex offender and advise them to come in and register before the ten-day period has run. However, in the case of this incompetent defendant, the sheriff could easily have avoided the extreme time and cost of litigation to the State had he seen fit to advise this defendant's mother that defendant had yet to register. (We note that even in cases involving an incompetent's property, our case law has long required notice be given to the guardian of the incompetent.) However, we do not suggest that had the State contacted defendant's mother, notice to defendant would then have been perfected. On the contrary, as written, our current sex offender registration laws do not adequately

address the situation at hand, neither do they efficiently provide a way for the State to enforce the registration requirements against an adjudicated incompetent. Our General Assembly must revisit this issue to adequately provide the State a way to enforce these registration laws while protecting the rights of adjudicated incompetents in North Carolina.

Nevertheless, we hold that as applied to an adjudicated incompetent defendant, N.C. Gen. Stat. § 14-208.11 is unconstitutional because it fails to afford him sufficient notice as required by due process under the Fifth and Fourteenth Amendments to the United States Constitution. Finding it so, we need not address the statute's unconstitutionality under North Carolina's Constitution. Therefore, the trial court's judgment is hereby

Reversed.

Judge GREENE concurs.

Judge HORTON concurs in the result.

STATE OF NORTH CAROLINA v. ANTHONY TERRELL GODLEY

No. COA99-1005

(Filed 19 September 2000)

1. **Jury— selection—questions restricted**

The trial court did not abuse its discretion during jury selection in a prosecution for first-degree murder and assault by restricting certain lines of questioning while allowing defendant the opportunity to gain information about the prospective jurors' interests and prejudices or by not allowing defendant to ask individual jurors questions about relationships with other prospective jurors but permitting a question sufficient to determine whether the prospective jurors would be affected by the relationships.

2. **Evidence— exhibition of gun—gun not introduced—no relationship established with gun used in crime**

The State's exhibition of a gun and use of the gun to illustrate defendant's testimony in a prosecution for murder and assault

was erroneous but not prejudicial where the evidence did not establish any relationship between the gun used in the exhibition and defendant's gun and the gun was never introduced into evidence, but the exhibition did not establish that defendant knew the procedure for firing the gun used in the shootings.

3. Criminal Law— reasonable doubt—instructions

The trial court did not err in a prosecution for murder and assault by giving an alternate definition of reasonable doubt instead of the Pattern Jury Instruction requested by defendant.

4. Sentencing— mitigating factors—voluntary acknowledgment of wrongdoing—responsibility for criminal conduct

The trial court did not err when sentencing defendant for assault by failing to find as mitigating factors that defendant voluntarily acknowledged wrongdoing and accepted responsibility for his criminal conduct. N.C.G.S. § 15A-1340.16(e)(11); N.C.G.S. § 15A-1340.16(e)(15).

5. Sentencing— aggravating factor—great monetary loss—insufficient evidence

The trial court erred when sentencing defendant for assault by finding as an aggravating factor that the offense involved damage causing great monetary loss where there was no evidence that the assault resulted in damage to the victim's property causing a monetary loss. N.C.G.S. § 15A-1340.16(d)(14).

Judge EDMUNDS concurring in the result.

Appeal by defendant from judgments dated 20 August 1998 by Judge W. Russell Duke, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 15 August 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Francis W. Crawley, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

GREENE, Judge.

Anthony Terrell Godley (Defendant) appeals judgments dated 20 August 1998 finding him guilty of first-degree murder and assault with a deadly weapon inflicting serious injury (assault). Defendant was

sentenced to life imprisonment without parole for the first-degree murder conviction and a minimum term of 36 months and a maximum term of 53 months for the assault conviction.

Voir Dire

During *voir dire*, Defendant questioned a prospective juror regarding the types of hobbies, television programs, and books she enjoyed. The State objected to these questions, and the trial court sustained the objections. Defendant, however, was permitted to ask the prospective juror whether she "read literature involving crime, law enforcement officer[s], that sort of thing," whether she read books written by John Gresham, and whether she had "any particular interest in law enforcement or crime in general." Defendant subsequently stated, outside the presence of the prospective jurors, his continuing exception to the trial court's ruling that he not be permitted to ask questions regarding the prospective jurors' "interests in reading, hobbies, . . . movies, and criminal trials." The trial court sustained the State's objection to these questions, stating the proposed questions resulted in Defendant "visiting with the jury or establishing a rapport with the jury regarding television programs and books [and] other ideas, fashions."

Defendant also asked a prospective juror whether she was "opposed to citizens owning and possessing firearms" and whether she had "any prejudicial feelings about the use or possession of firearms." The State objected to these questions, and the trial court sustained the objections. Defendant, however, was permitted to ask the panel of prospective jurors whether any of them were "members of any anti-gun organizations." Additionally, Defendant asked a prospective juror whether she had "any particular feelings [or] prejudices against the use of alcohol." The State objected to this question, and the trial court sustained the objection and instructed Defendant to address his questions to the entire panel of prospective jurors. Defendant then asked the panel of prospective jurors whether any of them felt "that drinking or using alcohol [was] a sin or an evil thing to do." The trial court sustained the State's objection to this question. Defendant then was permitted to ask the prospective panel whether any felt "that their decision about how they received the evidence and how they . . . might interpret the testimony . . . would be affected . . . if there were evidence that . . . [D]efendant had consumed some type of alcoholic beverage."

Finally, Defendant discovered during *voir dire* that two of the prospective jurors had a landlord/tenant relationship, two of the

prospective jurors had a prior teacher/student relationship, and two of the prospective jurors were brother and sister. Defendant asked the panel of jurors the following question:

> Those of you that know individuals, other individuals on the jury, do any of you know of any reason why your contact or association with that other party would have an influence upon you or affect you in any way in sitting on the jury and being fair and impartial throughout this trial?

None of the jurors responded in the affirmative to this question. Defendant, however, also sought to question individual jurors regarding whether their relationships with other jurors would affect their deliberations. The trial court sustained the State's objection to these questions.

Trial

The State presented evidence at trial that on the evening of 21 February 1997, James Earl Cox, Jr. (Cox) was sitting on his bike across the street from Gibbs Grocery in Washington, North Carolina. This area of Washington is known as "the block." Cox testified that he was talking to several other individuals who were standing at the block when Defendant pulled up his vehicle to the curb and exited the vehicle. Defendant, who was carrying a gun, approached Cox and stated, " 'Don't I know you?' " When Cox responded that he did not know Defendant, Defendant asked Cox where he was from and called Cox by a wrong name. Defendant then stated, " 'I do know you,' " and proceeded to shoot Cox in his side. After Defendant shot Cox, Cox ran to an area nearby the scene of the shooting and waited for medical assistance to arrive. An ambulance arrived several minutes later and Cox was transported to the hospital. As a result of his gunshot wound, a portion of Cox's liver was removed and he was hospitalized for approximately four days.

Tony Sinclair (Sinclair) testified for the State that he was standing in front of Gibbs Grocery with Tiran Gray (Gray) on the evening of 21 February 1997, when he heard a gunshot fired in the area. Sinclair then saw Defendant, who was carrying a gun, walking in the direction of Sinclair and Gray. As Defendant approached where Sinclair and Gray were standing Defendant stated, " 'Do [sic] anybody want it.' " When no one responded to Defendant, he shot Gray. Gray then ran away from Defendant while holding his side. As Gray was running, he said, " '[P]lease don't shoot me no more.' " Defendant

then followed behind Gray and shot him a second time. After the second shot, Gray fell to the ground and began crawling away from Defendant. Gray continued to ask Defendant not to shoot him anymore, and Defendant shot Gray five or six more times. Defendant then threw the gun to the ground and stood in the street until a police officer arrived at the scene. Gray was transported by ambulance to the hospital; however, he did not survive the shooting.

M.G.F. Gilliland (Dr. Gilliland), a forensic pathologist, testified she performed an autopsy on Gray. She testified Gray had gunshot wounds on his left leg, left arm, left side, buttocks, pelvis, and right shoulder. In Dr. Gilliland's opinion, Gray died as a result of gunshot wounds to his trunk, arm, and leg.

Brad Brantley (Officer Brantley), an officer with the Washington Police Department, testified that on the evening of 21 February 1997, he was driving his patrol car when he responded to a call of "shots fired" in the area of Gibbs Grocery. Officer Brantley drove to the area of the shooting and parked his patrol car in front of Gibbs Grocery. After exiting his patrol car, Officer Brantley immediately saw Defendant walking toward him. When Defendant approached Officer Brantley, Officer Brantley asked him "what was happening." Defendant responded, "I shot him. I shot the mother f-----." Officer Brantley asked Defendant where his gun was located, and Defendant responded that he did not know. Officer Brantley then placed Defendant under arrest and drove him to the Washington Police Department.

Officer Brantley testified that after arriving at the Washington Police Department, he began to fill out an arrest report on Defendant. While Officer Brantley was asking Defendant his name, address, and other general information required for the arrest report, Defendant asked whether both victims had been rescued. Defendant told Officer Brantley that one of the victims had gone in the direction of Ninth Street, and Officer Brantley was later notified that Cox was found in the direction of Ninth Street.

Defendant presented evidence at trial that in January of 1997, Defendant and his girlfriend were assaulted and robbed in their home by two men. Defendant did not contact the police department regarding this incident because it was drug-related; however, Defendant did attempt to find out who had robbed him. Defendant believed some of the people who met at the block knew he had been robbed. On 21 February 1997, Defendant took a gun from his home and went to the

block to "ask about [his] money." When Defendant arrived at the block, he walked toward Gibbs Grocery where he saw a man he believed might have been one of the robbers. Defendant asked the man whether he knew who Defendant was, and when the man did not answer Defendant "raised up [his] hand and the gun went off." Defendant then saw people walking toward him and "the gun raised and [he] shot."

Defendant testified during cross-examination that the gun was a "45" and that he did not recall the brand of the gun. The State then approached an investigating officer who was in the courtroom and requested his gun. The investigating officer removed the clip from his gun and gave it to the State. The State then approached Defendant and asked whether the investigating officer's gun "looked like" the gun Defendant used in the shootings. Defendant responded that Defendant's gun "[c]ould have been a little bigger." The State proceeded to ask Defendant several questions regarding Defendant's use of the gun Defendant had possession of on 21 February 1997, and the State used the investigating officer's gun to illustrate Defendant's testimony. Specifically, the State questioned Defendant regarding the procedures necessary for firing the gun, including loading the gun, pulling back the gun's "lever," and pulling the trigger. Defendant objected to the exhibition of the investigating officer's gun on the ground the exhibition was "entirely prejudicial and inflammatory to the jury"; however, the trial court overruled Defendant's objection. The State did not offer the investigating officer's gun into evidence at any time during the trial.

William Byron Scarborough, Jr. (Dr. Scarborough), an expert in forensic psychology, testified that he conducted several tests on Defendant subsequent to the shootings. Based on these tests, Dr. Scarborough determined that on 21 February 1997, Defendant was experiencing cognitive disorganization and psychological distress. Dr. Scarborough testified these psychological factors "would have interfered with [Defendant's] ability to . . . make decisions, to process information, to think things through." Additionally, Defendant was experiencing depression, anxiety, and suspiciousness of others at the time of the shootings. Defendant's suspiciousness of others would "probably lead [Defendant] to misinterpret what other people are doing." Finally, on 21 February 1997, Defendant's "perceptual accuracy" had deteriorated, preventing Defendant from "accurately seeing and perceiving and interpreting what's going on around [him]." Dr. Scarborough concluded that at the time of the shootings Defendant's

"psychological abilities were significantly impaired" and Defendant did not have "the capacity to clearly and accurately think-through and plan action."

During his closing argument to the jury, Defendant conceded to the jury his guilt of second-degree murder, pursuant to *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986).

Jury instructions

During the charge conference, Defendant requested the trial court instruct the jury on "reasonable doubt" and, specifically, requested the definition of "reasonable doubt" found in North Carolina Pattern Jury Instruction 101.10.[1] Although the trial court did instruct the jury on the meaning of "reasonable doubt," it denied Defendant's request to use the pattern jury instruction's definition and instead instructed the jury as follows:

> A reasonable doubt is not a mere possible doubt, for most things that relate to human affairs are open to some possible or imaginary doubt, but rather a reasonable doubt is a fair doubt, based on reason and common sense, and growing out of some of the evidence or lack of evidence in the case.

Sentencing phase

Subsequent to its deliberations, the jury found Defendant guilty of first-degree murder and assault with a deadly weapon inflicting serious injury. During the sentencing phase, the State recited to the trial court that Cox and Gray incurred expenses totaling $20,008.48 as a result of Defendant's actions, including medical and funeral expenses. The State did not provide any additional evidence regarding these expenses.

Prior to the trial court's pronouncement of Defendant's sentences, Defendant apologized to the families of Gray and Cox "for the pain [he had] caused [them]." The trial court then proceeded to sentence Defendant for his assault conviction. The trial court found as an

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1. North Carolina Pattern Jury Instruction 101.10 provides:

> A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

N.C.P.I., Crim. 101.10.

aggravating factor, pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(14), that the offense involved "damage causing great monetary loss." Additionally, the trial court failed to find as mitigating factors that Defendant "voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer," pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(11), and Defendant "has accepted responsibility for [his] criminal conduct," pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(15).

The issues are whether: (I) the trial court abused its discretion during *voir dire* by restricting Defendant's questions to prospective jurors regarding their general interests, feelings regarding alcohol and gun use, and relationships to other prospective jurors; (II) the State's use of a gun to illustrate Defendant's testimony was relevant pursuant to Rule 401 of the North Carolina Rules of Evidence and, if not, whether the erroneous exhibition of the gun resulted in prejudicial error; (III) the trial court's instruction to the jury regarding the meaning of "reasonable doubt" violated Defendant's due process rights under the United States Constitution; (IV) the only reasonable inference that can be drawn from the evidence is that Defendant "voluntarily acknowledged wrongdoing," N.C.G.S. § 15A-1340.16(e)(11) (1999), and "accepted responsibility for [his] criminal conduct," N.C.G.S. § 15A-1340.16(e)(15) (1999); and (V) the trial court's finding as an aggravating factor, pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(14), that Defendant's assault on Cox involved "damage causing great monetary loss" is error when the evidence of monetary loss shows only loss caused by medical expenses.

I

[1] Defendant argues the trial court's refusal to allow questions posed by Defendant to prospective jurors during *voir dire* "denied [D]efendant the opportunity to intelligently exercise his peremptory challenges, to ascertain the existence of bias justifying challenges for cause, and to secure an impartial jury." We disagree.

"The purpose of *voir dire* is to ensure an impartial jury to hear defendant's trial." *State v. Gregory*, 340 N.C. 365, 388, 459 S.E.2d 638, 651 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). The questioning of prospective jurors enables counsel "to determine whether a basis for challenge for cause exists" and "enable[s] counsel to intelligently exercise peremptory challenges." *Id.* The extent and manner of questioning, however, is within the sound discretion of the

trial court, and the trial court's restriction of questions will not be overturned absent an abuse of discretion. *State v. Mash*, 328 N.C. 61, 63, 399 S.E.2d 307, 309 (1991); *see State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996) ("trial court may be reversed for an abuse of discretion only upon a showing that its ruling could not have been the result of a reasoned decision").

In this case, Defendant sought to question a prospective juror regarding the types of hobbies, television programs, and books she enjoyed. The trial court allowed questions regarding whether the prospective juror read books involving crime or law enforcement and whether she had "any particular interest in law enforcement or crime in general." The trial court refused, however, to allow questions regarding the general interests of the prospective juror. The trial court's restriction of this line of questioning, which it found resulted in Defendant "visiting with the jury or establishing a rapport with the jury," was not an abuse of discretion. *See State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980) (during *voir dire*, counsel should not "engage in efforts to indoctrinate, visit with or establish 'rapport' with jurors").

Additionally, during *voir dire*, the trial court restricted Defendant's questions to the prospective jurors regarding the use of firearms and alcohol. The trial court refused to allow as questions whether a prospective juror was "opposed to citizens owning and possessing firearms"; had "any prejudicial feelings about the use or possession of firearms"; and had "any particular feelings [or] prejudices against the use of alcohol." The trial court also refused to allow questioning, directed to the panel of prospective jurors, of whether they felt that "drinking or using alcohol [was] a sin or an evil thing to do." Defendant was, however, permitted to ask the panel whether any were "members of any anti-gun organizations" and whether any felt their decision regarding Defendant's guilt would be affected "if there were evidence that . . . [D]efendant had consumed some type of alcoholic beverage." Defendant, therefore, had an opportunity to obtain information about prejudices by the prospective jurors regarding gun and alcohol use. Accordingly, the trial court did not abuse its discretion by restricting questions regarding these views. *See State v. Leroux*, 326 N.C. 368, 384, 390 S.E.2d 314, 325 (trial court's restriction of questions not an abuse of discretion when defendant had an opportunity to gain the information sought by asking permitted questions), *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990); *Mash*, 328 N.C. at 63-64, 399 S.E.2d at 309 (trial court's refusal to allow questions

regarding prospective juror's views on mental health experts and juror's personal experiences with alcohol not an abuse of discretion).

Finally, the trial court refused to allow Defendant to ask prospective jurors who had various relationships with other jurors on the panel, individually, whether their relationships would affect their deliberations. Defendant was, however, permitted to ask the prospective jurors who were acquainted with other prospective jurors whether they knew "any reason why [their] contact or association with that other party would have an influence upon [them] or affect [them] in any way in sitting on the jury and being fair and impartial." Because this permitted question was sufficient to determine whether the prospective jurors would be affected during deliberations by their relationships with other prospective jurors, the trial court's refusal to allow Defendant to ask individual jurors about the effect of these relationships was not an abuse of discretion. *See Leroux*, 326 N.C. at 384, 390 S.E.2d at 325.

II

[2] Defendant argues the State's exhibition of a gun during Defendant's cross-examination, used to illustrate Defendant's testimony, was improper because the exhibition of the gun was "irrelevant."

Defendant objected to the use of the gun at trial on the ground the use of the gun to illustrate the testimony of Defendant was "entirely prejudicial and inflammatory to the jury."[2] The issue of whether testimony regarding the gun was relevant, pursuant to Rule 401 of the North Carolina Rules of Evidence, is therefore not properly before this Court. *See* N.C.R. App. P. 10(b)(1) (objecting party must state "specific grounds for the ruling the party desired"). Nevertheless, in our discretion we address Defendant's argument.[3] N.C.R. App. P. 2.

Relevancy

Generally, any object, including a weapon, may be exhibited at trial for the purpose of illustrating the testimony of a witness pro-

2. Defendant states in his brief to this Court that he objected at trial to the use of the gun, "specifically contending no appropriate foundation had been laid." Our review of the record on appeal, however, does not reveal any objection by Defendant on the ground an appropriate foundation had not been laid.

3. Defendant also argues the State's use of the gun during cross-examination of Defendant "amounted to prosecutorial misconduct." Defendant, however, did not raise this issue in an assignment of error. Accordingly, this issue is not properly before this Court. N.C.R. App. P. 10(c)(1) (assignments of error "shall state plainly, concisely and without argumentation the legal basis upon which error is assigned").

vided the testimony regarding the object is relevant. *State v. See*, 301 N.C. 388, 391, 271 S.E.2d 282, 284 (1980); *State v. Willis*, 109 N.C. App. 184, 189, 426 S.E.2d 471, 474, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 29 (1993). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999). "[E]ven though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard . . . , such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. review denied and dismissal allowed*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

In this case, the State, while cross-examining Defendant regarding the operation of the gun used in the shootings, used a gun belonging to an investigating officer in the courtroom to illustrate Defendant's testimony. Although Defendant testified the gun used in the shooting was a "45" that "[c]ould have been a little bigger" than the investigating officer's gun, the record contains no evidence regarding whether the investigating officer's gun was a "45." Because the evidence does not establish any relationship between the investigating officer's gun and the gun used by Defendant other than Defendant's gun "[c]ould have been a little bigger" than the investigating officer's gun, the State's exhibition of the investigating officer's gun was not relevant under Rule 401. The State's use of the gun to illustrate Defendant's testimony was, therefore, error. *See* N.C.G.S. § 8C-1, Rule 401.

Exhibit

Even assuming the exhibition of the investigating officer's gun was relevant, the exhibition of the gun was nevertheless error because the gun was never introduced into evidence. Generally, an item must be introduced into evidence before it may be used to illustrate the testimony of a witness. *State v. Rich*, 13 N.C. App. 60, 63, 185 S.E.2d 288, 291 (1971) (photographs must be introduced into evidence before they may be used to illustrate testimony of witness), *cert. denied and appeal dismissed*, 280 N.C. 304, 186 S.E.2d 179 (1972); *State v. Burbank*, 59 N.C. App. 543, 545, 297 S.E.2d 602, 603 (1982) (identification card must be introduced into evidence before it may be used to illustrate testimony of witness). In practice, however, a party using an item not previously introduced into evidence during cross-examination to illustrate the testimony of a witness may be

unable to introduce the item during presentation of the opponent's case. *See* N.C.G.S. § 15A-1221(a) (1999) (providing for order of proceedings in a jury trial). In such cases, the item not previously introduced into evidence may be used to illustrate the testimony of a witness if the item is otherwise admissible under the North Carolina Rules of Evidence and with the further understanding that the party will introduce the item into evidence when permitted by the trial court. *See* N.C.G.S. § 15A-1226(b) (1999) ("judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict"); *State v. Quick*, 323 N.C. 675, 682, 375 S.E.2d 156, 159-60 (1989) (trial court did not err by admitting during the State's presentation of rebuttal evidence an exhibit used by the State to cross-examine the defendant during the defendant's presentation of evidence).

Prejudicial error

Defendant argues the exhibition of the investigating officer's gun was prejudicial error because Defendant's intent was contested by Defendant, and the State "used the [investigating] officer's gun in an effort to establish that [D]efendant knew exactly what he was doing and intentionally shot the victims." We disagree.

The erroneous admission of evidence requires a new trial only when the error is prejudicial. *State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). To show prejudicial error, a defendant has the burden of showing that "there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred." *Id.*; N.C.G.S. § 15A-1443(a) (1999).

In this case, the State, exhibiting the investigating officer's gun as an example, asked Defendant several questions regarding the procedure for firing the gun used by Defendant. Defendant testified the gun would fire when it was loaded, the "lever" was pulled back, and the trigger was pulled. The exhibition of the investigator's gun by the State did not establish that Defendant knew the procedure for firing the gun that he used in the shootings; rather, this fact was established by Defendant's testimony regarding his use of his own gun. Accordingly, there is no reasonable possibility that a different result would have been reached at trial if the State had not exhibited the investigating officer's gun. The exhibition of the gun, therefore, was not prejudicial error.

III

[3] Defendant argues the trial court's instruction to the jury did not properly define "reasonable doubt" and, therefore, violated Defendant's right to due process under the United States Constitution. We disagree.

In the absence of a request by a party, the trial court is not required to define "reasonable doubt" in its instructions to the jury. *State v. Hunt*, 339 N.C. 622, 643, 457 S.E.2d 276, 288 (1995). Further, when a definition is requested by a party, the trial court is not required to read verbatim the requested definition; rather, the definition used by the trial court in its instruction is sufficient if it is "in substantial accord with" a definition of "reasonable doubt" which has been found constitutional by the North Carolina Supreme Court. *Id.* at 643-44, 457 S.E.2d at 288.

In this case, Defendant requested the trial court instruct the jury on the definition of "reasonable doubt" found in North Carolina Pattern Jury Instruction 101.10. The trial court, however, declined to give the requested definition and instead gave an alternate definition. As the North Carolina Supreme Court has held this alternate definition of "reasonable doubt" is constitutional, *id.* at 643-44, 457 S.E.2d at 289, the trial court did not err by refusing to instruct the jury using the definition of "reasonable doubt" requested by Defendant.

IV

[4] Defendant argues the trial court erred, in sentencing Defendant for his assault conviction, by failing to find as mitigating factors that Defendant "voluntarily acknowledged wrongdoing in connection with the offense," N.C.G.S. § 15A-1340.16(e)(11), and "accepted responsibility for [his] criminal conduct," N.C.G.S. § 15A-1340.16(e)(15). We disagree.

A defendant has the burden of proving by a preponderance of the evidence the existence of mitigating factors. *State v. Canty*, 321 N.C. 520, 523, 364 S.E.2d 410, 413 (1988). A trial judge is given "wide latitude in determining the existence of . . . mitigating factors," and the trial court's failure to find a mitigating factor is error only when "no other reasonable inferences can be drawn from the evidence." *Id.* at 524, 364 S.E.2d at 413.

N.C. Gen. Stat. § 15A-1340.16(e)(11) provides as a mitigating factor that "[p]rior to arrest or at an early stage of the criminal

process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." N.C.G.S. § 15A-1340.16(e)(11). A defendant "acknowledge[s] wrongdoing" when he admits "culpability, responsibility or remorse, as well as guilt." *State v. Rathbone*, 78 N.C. App. 58, 67, 336 S.E.2d 702, 707 (1985), *disc. review denied*, 316 N.C. 200, 341 S.E.2d 582 (1986).

In this case, Officer Brantley testified that when he arrived at the scene of the shooting, Defendant approached him and stated, "I shot him. I shot the mother f-----." Officer Brantley also testified that at the police station Defendant asked him whether both victims had been rescued. While this evidence shows Defendant was aware two people had been shot and that he had admitted to shooting one of these two people, a reasonable inference can be drawn that Defendant's statements did not amount to an admission of "culpability, responsibility or remorse, as well as guilt" for the shooting of Cox. The trial court, therefore, did not err by failing to find this mitigating factor.

Defendant also contends the trial court erred by failing to find as a mitigating factor that Defendant "accepted responsibility for [his] criminal conduct" pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(15). N.C.G.S. § 15A-1340.16(e)(15). A defendant "accept[s] responsibility for [his] criminal conduct" when he accepts that he is "answerable [for] . . . the result" of his criminal conduct. *See Webster's Third New International Dictionary* 1935 (1968).

Defendant argues he accepted responsibility for his criminal conduct when he admitted to Officer Brantley that he had shot one of the victims. Assuming Defendant's statement is sufficient to show an acceptance of responsibility for his actions, a reasonable inference can be drawn that Defendant's statement that he "shot the mother f------" related to the shooting of Gray and not the shooting of Cox. Defendant also argues he accepted responsibility for his criminal conduct when he testified at trial that he shot Cox. Defendant's testimony regarding the shooting of Cox, however, was that he "raised up [his] hand and the gun went off." This testimony does not show Defendant's acceptance of responsibility for shooting Cox; rather, it tends to show Defendant did not accept that he was answerable for the injuries of Cox. Additionally, Defendant argues he accepted responsibility for his criminal conduct when he "allowed his defense lawyers to concede his guilt of second-degree murder to the jury." This concession, which relates only to Defendant's role in Gray's death and not his assault on Cox, has no relation to Defendant's

alleged acceptance of responsibility for his assault on Cox. Finally, Defendant argues his apology to the families of Gray and Cox subsequent to his convictions amounts to an acceptance of responsibility for his criminal conduct. Defendant's apologetic statement, which he made after the return of the jury's verdicts, is not so persuasive that Defendant's acceptance of responsibility for his conduct is the only reasonable inference that can be drawn from the statement. *See Canty*, 321 N.C. at 524, 364 S.E.2d at 413 (trial court is given discretion in determining existence of mitigating factor because it has the opportunity to observe the witnesses' demeanor). Accordingly, the trial court did not err by failing to find this mitigating factor.

V

[5] Defendant argues and the State concedes that the trial court erred, in sentencing Defendant for his assault conviction, by finding as an aggravating factor that the offense involved "damage causing great monetary loss," pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(14). We agree.

N.C. Gen. Stat. § 15A-1340.16(d)(14) (1999) provides as an aggravating factor that the offense involved "damage causing great monetary loss." N.C.G.S. § 15A-1340.16(d)(14). The "monetary loss," however, must "result[] from damage to property." *State v. Bryant*, 318 N.C. 632, 635, 350 S.E.2d 358, 360 (1986) (interpreting the meaning of this statutory factor under the Fair Sentencing Act).

In this case, there is no evidence Defendant's assault on Cox resulted in damage to Cox's property causing a monetary loss. The trial court, therefore, erred by finding this aggravating factor. Accordingly, Defendant's sentence for his assault conviction is vacated and this case is remanded for resentencing on this conviction. *See id.* at 637, 350 S.E.2d at 361.

Trial: No error.

Sentence for assault conviction: Vacated and remanded.

Judge SMITH concurs.

Judge EDMUNDS concurs in the result with a separate opinion.

Judge EDMUNDS concurring in the result.

Although I concur in the result, I disagree with the majority's analysis in Part II relating to the prosecutor's display of a weapon to defendant during cross-examination. Defendant denied the element of intent as to one of the charges. Specifically, he admitted that victim Cox was shot, but claimed on direct examination, "I raised the gun, and it went off." Because defendant was charged with assault on Cox with a deadly weapon with intent to kill, inflicting serious injury, his intent was an element to be proved by the State. By contrast, defendant's testimony as to shooting victim Gray was more specific in that defendant stated he "shot the gun." Accordingly, when defendant continued to maintain on cross-examination that the shooting of Cox happened when the gun "went off," the State was permitted to explore defendant's suggestion that this shooting was not intentional.

Defendant admitted that the pistol he carried the night of the shooting was a semi-automatic. This weapon was never recovered. It appears from the record that while cross-examining defendant, the prosecutor borrowed a semi-automatic pistol from the investigating officer, displayed it to defendant, and went through the steps with defendant necessary to load, cock, and fire a semi-automatic pistol. At each point, the prosecutor asked defendant if the action taken in court with the borrowed pistol illustrated the action necessary to accomplish the same result with defendant's pistol. Therefore, the prosecutor's questions established defendant's familiarity with semi-automatic weapons. The pistol was not shown for the purpose of suggesting that the two weapons were of similar caliber or appearance, and the State never contended that the pistol shown during cross-examination was the same one that defendant used to shoot Cox. This use of the borrowed pistol to illustrate relevant characteristics of another weapon was proper. *See State v. See*, 301 N.C. 388, 271 S.E.2d 282 (1980) (holding no error where firearm similar to that used in robbery displayed to jury); *State v. Reaves*, 132 N.C. App. 615, 513 S.E.2d 562 (holding no error when prosecutor displayed revolver and semi-automatic pistol to illustrate differences between the two types of guns), *disc. review denied*, 350 N.C. 846, — S.E.2d — (1999). In turn, the process of loading, cocking, and firing a semi-automatic pistol was relevant to defendant's contention that the shooting of Cox was not intentional. *See* N.C. Gen. Stat. § 8C-1, Rule 401 (1999).

I agree with the majority that a clearer foundation would have been preferable. The record does not reflect the type of weapon being

used to illustrate defendant's testimony, nor does it establish the grounds for which the weapon was being shown to defendant. Nevertheless, I contend that the prosecutor's use of a semi-automatic pistol during cross-examination of defendant to illustrate the operation of such a weapon was proper to challenge defendant's suggestion that the shooting of Cox was not intentional. I concur in all other aspects of the majority opinion.

DAVID ARROWOOD, PETITIONER-APPELLANT v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT-APPELLEE

No. COA99-940

(Filed 19 September 2000)

1. Administrative Law— welfare benefits limitation—agency decision—judicial review—federal waiver

A de novo review of respondent North Carolina Department of Health and Human Services' decision in August 1996 to implement a 24-month limitation on public assistance after receiving a waiver from the United States Department of Health and Human Services under 42 U.S.C. § 1315(a) in order to implement a demonstration of its "Work First Program" reveals that respondent agency's action was not barred by N.C.G.S. § 150B-19(4), because: (1) the grant of a waiver under 42 U.S.C. § 1315(a) operates as the removal of federal standards in order to allow the state to promulgate its own welfare regulations consistent with state procedures without losing federal welfare funding; and (2) N.C.G.S. § 150B-19(4) exempts respondent from the rule-making requirements of the Administrative Procedure Act.

2. Public Assistance— welfare benefits limitation—agency decision—unpromulgated rule

The trial court erred in failing to find that respondent North Carolina Department of Health and Human Services acted contrary to law in enforcing an unpromulgated provision of general applicability to limit petitioner's welfare benefits to a 24-month period prior to authority from the North Carolina General Assembly or federal government, because: (1) respondent agency's 24-month limitation on welfare benefits constitutes a rule within the meaning of the Administrative Procedure Act

(APA) under N.C.G.S. § 150B-2(8a); (2) a rule under the APA must be promulgated in accordance with Article 2A of the APA; (3) the Work First Program enacted in August 1997 under N.C.G.S. § 108A-25(b1) did not operate retroactively to apply the 24-month limitation to 1996 when the statute makes no reference to the 24-month limitation applying retroactively, does not incorporate by reference any materials that suggest the limitation should apply prior to August 1997, and does not show a legislative intent that the limitation should apply retroactively; (4) a state agency cannot circumvent the requirements of the APA by enforcing a policy of entering into contracts with private individuals; and (5) respondent agency could have simply incorporated its Work First Program Manual into a rule promulgated under the APA as adopted to meet a requirement of the federal government, N.C.G.S. § 150B-21.6.

Judge WALKER dissenting.

Appeal by petitioner from order entered 27 May 1999 by Judge J. Marlene Hyatt in Rutherford County Superior Court. Heard in the Court of Appeals 26 April 2000.

Pisgah Legal Services, by Curtis B. Venable, for petitioner-appellant.

North Carolina Justice and Community Development Center, the North Carolina Chapter of the National Organization of Women, the North Carolina Hunger Network, Southerners for Economic Justice and North Carolina Fair Share, by Carlene McNulty; and Hunton & Williams, by Charles D. Case; and Elizabeth McLaughlin, amicus curiae, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Belinda A. Smith, for the N.C. Department of Health and Human Services, respondent-appellee.

MARTIN, Judge.

Petitioner-appellant David Arrowood ("petitioner") appeals from an order of the superior court upholding a decision by respondent-appellee North Carolina Department of Health and Human Services ("respondent") to terminate his public assistance benefits.

Petitioner and his family began receiving public assistance from respondent in January 1996 under the federal Aid to Families with

Dependent Children program ("AFDC"), 42 U.S.C. § 601, *et seq.* Under the AFDC program, the federal government partially reimbursed states for welfare programs that were either in compliance with the federal program, or if modified from federal prescriptions, for programs where the state applied for and received a waiver from the United States Department of Health and Human Services ("HHS") under § 1115 of the Social Security Act. 42 U.S.C. § 1315(a).

In 1995, respondent requested such a waiver in order to implement a "demonstration" of its "Work First Program" which contained welfare reform concepts that differed from those under the AFDC program, including a 24-month limitation on the receipt of public assistance. In February 1996, HHS granted respondent's waiver request to implement the proposed provisions of respondent's Work First Program, and respondent subsequently took measures to implement the provisions, including the 24-month limitation. Respondent compiled a Work First Program Manual outlining the procedures for instituting the new policies, and developed a contract for beneficiaries of the program (the "Work First Personal Responsibility Contract-Part II"). According to respondent's manual, beneficiaries were required to sign the contract in order to continue receiving benefits, and a signed contract signified commencement of the 24-month time limitation. Petitioner signed such a contract on 3 May 1996. Respondent did not, however, take any formal action to promulgate rules regarding the Work First policies, and at the time respondent instituted the 24-month time limitation, neither federal law nor state law or regulation contained any such time limit.

In August 1996, the United States Congress repealed the AFDC program and replaced it with a federal block grant entitled Temporary Assistance to Needy Families ("TANF"), 42 U.S.C. § 601, *et seq.*, in which Congress granted states greater flexibility to design and operate their own welfare programs. Thereafter, on 28 August 1997, the North Carolina General Assembly formally enacted the Work First Program, which met the minimum requirements of TANF and included the 24-month limitation on receipt of benefits. N.C. Gen. Stat. § 108A-25(b1). Prior to this enactment, North Carolina statutes simply required compliance with the AFDC program, and contained no time limitation on the receipt of benefits. Following the enactment, on 6 October 1997, respondent requested that petitioner sign a second contract wherein he acknowledged that he had received 15 months of public assistance and was entitled to only 9 more months of participation in the program.

Effective 31 July 1998, the Rutherford County Department of Social Services terminated petitioner's benefits in accordance with the Work First Program Manual, following a determination that petitioner and his family had been receiving benefits for over 24 months. On 19 November 1998, respondent conducted an evidentiary hearing on the termination of petitioner's benefits in which it determined that in April 1996 HHS granted North Carolina's request for waiver authority to institute the Work First Program; that the waiver gave North Carolina the ability to deny AFDC benefits to adults who had received such benefits for 24 months; that the waiver had the force and effect of federal law; that North Carolina lawfully implemented the Work First Program, including the 24-month limitation, in August 1996; and that petitioner's household had received public assistance prior to August 1996 through July 1998. Accordingly, respondent upheld the termination of petitioner's benefits, which termination was reviewed and affirmed by respondent's Chief Hearing Officer.

On 12 March 1999 petitioner filed a Petition for Judicial Review of respondent's decision with the Superior Court of Rutherford County, and on 27 May 1999 the superior court entered an order affirming respondent's decision "as being made upon lawful procedure and not affected by error of law." Petitioner appeals.

Petitioner brings forth two assignments of error on appeal: (1) that the superior court erred in failing to find that respondent acted contrary to law in enforcing the 24-month time limitation on public assistance prior to the limit's proper promulgation pursuant to the Administrative Procedure Act, N.C. Gen. Stat. § 150B, *et seq.*; and (2) that the superior court erred in failing to find that respondent acted contrary to law in enforcing an unpromulgated provision of general applicability to limit petitioner's public assistance prior to authority from the North Carolina General Assembly or federal government.

The Administrative Procedure Act ("APA") governs both trial and appellate review of decisions rendered by an administrative agency such as respondent. N.C. Gen. Stat. § 150B, *et seq.*; *Living Centers-Southeast, Inc. v. N.C. Dept. of Health and Human Services, Div. of Facility Services, Certificate of Need Section*, 138 N.C. App. 572, 532 S.E.2d 192 (2000). Pursuant to the APA, an agency decision is first reviewed in superior court, which court may affirm or remand the decision, or may modify or reverse the decision if "the substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions or decisions" are any of the following:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b).

"In reviewing a superior court order regarding an agency decision, our scope of review consists of the two-fold task of '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Avant v. Sandhills Center for Mental Health, Developmental Disabilities & Substance Abuse Services*, 132 N.C. App. 542, 545, 513 S.E.2d 79, 82 (1999) (quoting *ACT-UP Triangle v. Com'n for Health Serv.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). The applicable standard of review depends upon the errors alleged, *Dorsey v. University of North Carolina-Wilmington*, 122 N.C. App. 58, 468 S.E.2d 557, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996), and "[t]he appropriate standard of review for an assertion that a Department of Health and Human Services decision is based on an error of law is *de novo* review." *Bio-Medical Applications of North Carolina, Inc. v. North Carolina Dept. of Human Resources, Div. of Facility Services, Certificate of Need Section*, 136 N.C. App. 103, 108-09, 523 S.E.2d 677, 681 (1999).

In the present case, petitioner alleges that the superior court erred in failing to find that respondent's decision was based on errors of law; petitioner does not allege that the superior court applied an inappropriate standard of review. Thus, our sole task is a *de novo* review of the propriety of respondent's decision, and accordingly, the superior court's affirmation of that decision.

A.

[1] Petitioner first argues that the August 1996 implementation of the 24-month limitation on receipt of public assistance was affected by

error of law in that no rules regarding the limit's implementation were officially promulgated pursuant to the APA. It is undisputed that in August 1996, following the grant of the waiver request, respondent began implementing the Work First Program, including the 24-month time limitation found in the Work First Manual, without prior approval from the state legislature or through rule-making procedures under the APA.

Respondent does not dispute, however, that the APA ordinarily requires that rules be promulgated in accordance with the Act; rather, respondent contends that, under G.S. § 150B-19(4), the 24-month limitation was exempt from the rule-making requirement of the APA, and could be effective upon receipt of the HHS waiver approval. G.S. § 150B-19(4) provides that an agency is prohibited from promulgating a rule that "[r]epeats the content of a law, a rule, or a federal regulation." N.C. Gen. Stat. § 150B-19(4). Respondent argues that the grant of the waiver to implement the time limitation was, in essence, federal law that operates as an "amendment to the state plan" upon its grant. Respondent maintains that "the waiver authority was granted on February 5, 1996. Therefore, beginning February 5, 1996, petitioner, as an ongoing participant in the program, was subject to the new law." Thus, respondent contends that it could not, under G.S. § 150B-19(4), have promulgated any rules regarding the limitation, and implementation of the 24-month limitation in 1996 was therefore not affected by error of law.

Respondent cites no authority for the proposition that a 42 U.S.C. § 1315(a) waiver operates as binding federal law or regulation, or an immediate amendment to the state plan such that promulgation of the procedures for its implementation would offend G.S. § 150B-19(4). Indeed, our review of case law, the federal waiver statute, and the HHS document granting the waiver leads to the conclusion that the grant of a waiver operates as the *removal* of federal standards in order to allow the state to promulgate its *own* welfare regulations consistent with state procedures.

The United States Court of Appeals for the Fourth Circuit has recognized that "[t]he proper starting point for review of any state initiative in AFDC administration is a recognition of the fact that AFDC is a 'scheme of cooperative federalism.' AFDC is largely financed by the federal government, *but the states bear the primary responsibility for administering the program.*" *Deel v. Jackson*, 862 F.2d 1079, 1083 (4th Cir. 1988), *cert. denied*, 490 U.S. 1092, 104 L.Ed.2d 991 (1989) (emphasis added). Moreover, our own Supreme Court has recognized

that "[s]tates are not required to participate [in the AFDC program], but those states that do must *administer their AFDC programs pursuant to a state plan* that complies with federal statutes and regulations." *Morrell v. Flaherty*, 338 N.C. 230, 232, 449 S.E.2d 175, 176 (1994), *cert. denied*, 515 U.S. 1122, 132 L.Ed.2d 282 (1995) (emphasis added). *See also*, *Anderson v. Edwards*, 514 U.S. 143, 146, 131 L.Ed.2d 178, 184 (1995) (quotation omitted) (The AFDC program " 'reimburses each State which chooses to participate with a percentage of the funds it expends,' so long as the State 'administer[s] its assistance program pursuant to a state plan that conforms to applicable federal statutes and regulations.' "); *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994) (quotation omitted) (§ 1315(a) waiver provision enacted in order to allow states to " 'test out new ideas and ways of dealing with the problems of public welfare recipients.' "); *C. K. v. Shalala*, 883 F. Supp. 991, 997-98 (D.N.J. 1995), *affirmed*, *C. K. v. New Jersey Dept. of Health and Human Services*, 92 F.3d 171 (3rd Cir. 1996) (quotation omitted) (emphasis added) ("The AFDC statutes create a 'scheme of cooperative federalism' in which states are given 'considerable latitude' in the *administration of their own programs.*").

The preceding case law authority establishes that, under the AFDC program, the federal government provides a framework of minimum standards for state-developed plans that are implemented and administered by the state. In *C. K.*, a New Jersey state agency took proper measures to administer its own welfare program approved by an HHS § 1315(a) waiver. *Id.* at 1000. The waiver allowed the agency to implement a statewide family welfare cap, and under the terms and conditions of the waiver, the state was permitted to phase-in welfare reform in various counties "by no later than June 1995." *Id.* at 1001. Two months following the grant of the waiver, New Jersey properly adopted regulations pursuant to state procedures in order to implement the program, and the regulations thereafter became operative on 1 October 1992, the date on which HHS had approved the program to begin. *Id.* Nothing in *C.K.* suggests that the waiver was binding federal law, or that the state encroached on a matter of federal concern when it adopted rules to implement the program pursuant to the state APA. *See also*, *Deel*, at 1088 ("Plaintiffs' view that a federal statute or regulation must authorize every state initiative in this field would impair the cooperative role of the states in the AFDC program. Congress envisioned such a role for the states, and we decline to restructure the program that Congress has enacted.").

Moreover, it has been held that when interpreting a provision of the AFDC, the language of the statute itself is controlling, and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *State By and Through Pender County Child Support Enforcement Agency ex rel. Crews v. Parker*, 319 N.C. 354, 358, 354 S.E.2d 501, 504 (1987) (citation omitted). The waiver provision at issue here provides in relevant part that,

> [i]n the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of subchapter I, X, XIV, XVI, or XIX of this chapter, or Part A or D of subchapter IV of this chapter, in a State or States—
>
> (1) the Secretary may *waive compliance* with any of the requirements of section 302, 602, 654, 1202, 1352, 1382, or 1396a of this title, as the case may be, to the extent and for the period he finds necessary to *enable such State or States to carry out such project* . . . .

42 U.S.C. § 1315(a) (emphasis added).

This provision does not suggest that the waiver is to operate as a binding federal law or regulation, nor an automatic amendment to a state plan. Rather, the language unambiguously explains the purpose of the waiver: to *remove* the requirement of compliance with federal regulations and allow the state to carry out *its own* welfare provisions that will further the objectives of the federal statute. *See Anderson*, at 156, 131 L.Ed.2d. at 190-91 (quotation omitted) (" 'If Congress had intended to pre-empt state plans and efforts in such an important dimension of the AFDC program . . ., such intentions would in all likelihood have been expressed in direct and unambiguous language.' "). The language of § 1315(a) does not contain any unambiguous intention that a waiver operate as a federal regulation, and we therefore hold that while the waiver is issued under federal law, respondent, the party charged with developing and implementing its own demonstration, was still bound by state law in the implementation of these changes.

Moreover, the language of the 1996 HHS document granting the waiver supports a conclusion that the waiver does not immediately, upon its approval, function as binding federal law or a federal amendment to the state plan. Section 1.0 under "Waiver Terms and Conditions" provides respondent the right to unilaterally terminate

the demonstration. Clearly, states do not generally have the authority to unilaterally terminate binding federal laws and regulations. Moreover, section 1.1 of the HHS document reveals the federal government's intent that state law play a role in the implementation of the proposed demonstration: "[f]ailure to operate the demonstration as approved and according to Federal and State statutes and regulations may result in withdrawal of waivers." Section 1.2 further establishes the possibility that future state statutes may alter the effect of the design and impact of the demonstration, and as a result, a need may arise to re-evaluate the waiver. Had the federal government intended the waiver to operate as binding federal law, it is dubious that it would expressly provide the state with unfettered discretion to enact rules that alter the law's effect.

Additionally, the fact that the HHS waiver does not specify an effective date for commencement of the 24-month limitation establishes that HHS intended that the actual implementation be a matter of state concern. The HHS document merely states that implementation shall be no earlier than 1 March 1996, and no later than 1 March 1997. The letter from HHS accompanying the terms and conditions of the waiver supports this position, as it states that the purpose of granting the waivers is the department's belief "that the Federal Government must give states the flexibility to design new approaches to their local problems, provided that these proposals meet Federal standards."

Indeed, this State's 18 August 1997 Work First Program enactment, G.S. § 108A-25(b1), reveals the legislature's intent that the program be implemented by rules properly promulgated in accordance with state procedures. Section 108A-27.8(c) of the statute provides that the Social Services Commission "may *adopt rules* in accordance with G.S. 143B-153 *when necessary to implement* this Article and subject to delegation by the Secretary of any rule-making authority to implement the provisions of the State Plan." N.C. Gen. Stat. § 108A-27.8(c) (emphasis added). Moreover, § 108A-27(c) provides that the Department "may change the Work First Program when required to comply with federal law. Any changes in federal law that necessitate a change in the Work First Program *shall be effected by temporary rule* until the next State Plan is approved by the General Assembly." N.C. Gen. Stat. § 108A-27(c) (emphasis added). Clearly, the legislature intended that provisions of the Work First Program, even where necessarily changed to comply with federal law, be promulgated as rules in accordance with state procedures; none of the

statutes addressing implementation of the Work First Program portends to waive the requirements of the APA for implementation of the program.

The waiver operates as a grant of permission from HHS for respondent to deviate from the requirements of federal law without losing federal welfare funding. Nothing in the waiver provision itself, in the HHS document granting the waiver, nor any other authority which we have reviewed, including the Code of Federal Regulations, indicates that the waiver has the binding effect of federal law duly promulgated by a federal agency or other law-making body such that G.S. § 150B-19(4) exempts respondent from the rule-making requirements of the APA.

B.

[2] Having decided that respondent was not barred under G.S. § 150B-19(4) from promulgating rules for implementation of the 24-month limitation, we must determine whether the APA required that the 24-month limitation be promulgated under the Act. This inquiry requires an analysis of whether the limitation constitutes a "rule" within the meaning of the APA. A rule, as defined by G.S. § 150B-2(8a), is not valid unless adopted in substantial compliance with Article 2A of the APA. N.C. Gen. Stat. § 150B-18. The APA defines a rule as "any agency regulation, standard, or statement of general applicability which implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency, or that describes the procedure or practice requirements of an agency." N.C. Gen. Stat. § 150B-2(8a).

The 24-month time limitation adopted by respondent is a "rule" within the meaning of the APA and must therefore be promulgated in accordance with Article 2A of the APA. The limitation clearly creates a binding standard of general applicability that describes respondent's procedures and practice requirements. This Court recently addressed a similar argument in the context of Title XIX of the Social Security Act which, like the AFDC program, gives states the option of participating in a federal Medicaid program in order to receive federal reimbursement for a portion of program costs. *See Dillingham v. North Carolina Dept. of Human Services*, 132 N.C. App. 704, 513 S.E.2d 823 (1999).

The petitioner in *Dillingham* argued that the respondent-agency's State Adult Medicaid Manual, which required a presumption of ineli-

gibility to be rebutted by clear and convincing evidence, was invalid because the manual provision had not been promulgated pursuant to the APA. *Id.* at 707-08, 513 S.E.2d at 826. This Court determined that the eligibility provision was a "rule" within the meaning of the APA, as the provision created a "binding standard" that "describes the procedure and evidentiary requirements utilized by [the agency]." *Id.* at 710, 513 S.E.2d at 827. Thus, the provision in the manual was held to be invalid as it was not promulgated pursuant to Article 2A of the APA. *Id.* at 710, 513 S.E.2d at 827. Likewise, the 24-month limitation at issue here is a rule within the meaning of the APA, and therefore requires promulgation pursuant to the APA. *See also Duke University Medical Center v. Bruton*, 134 N.C. App. 39, 52, 516 S.E.2d 633, 641 (1999) (holding Division of Medical Assistance policy denying Medicaid payments to those eligible for Medicare, but who failed to enroll, is an administrative "rule" under APA: "the requirement creates a binding standard which interprets the eligibility and coverage provisions of the Medicaid law and, in addition, denies a substantial right.").

Moreover, we are unpersuaded by any argument that the Work First Program as properly enacted in August 1997 operates retroactively to apply the 24-month limitation in 1996. "Ordinarily, statutes are presumed to act prospectively only, unless it is clear that the legislature intended that the law be applied retroactively." *Twadell v. Anderson*, 136 N.C. App. 56, 66, 523 S.E.2d 710, 717 (1999), *disc. review denied*, 351 N.C. 480, — S.E.2d — (2000) (citation omitted). " '[A]n intention to give a statute a retroactive operation will not be inferred.' " *Brannock v. Brannock*, 135 N.C. App. 635, 644, 523 S.E.2d 110, 115 (1999), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 123 (2000). Here, the statute makes no reference to the 24-month limitation applying retroactively, does not incorporate by reference any materials that suggest the limitation should apply prior to August 1997, nor otherwise evinces a legislative intent that the limitation apply retroactively.

Nor are we persuaded by respondent's contention that the APA does not apply, but rather, petitioner's signing of the Work First Personal Responsibility Contract-Part II and subsequent contract "changed the relationship between the State and the benefits recipient to one of a contractual nature." A state agency cannot circumvent the requirements of the APA by enforcing a policy of entering into contracts with private individuals.

Finally, we note that the burden placed on respondent to comply with the APA is not heavy. Indeed, respondent could have simply incorporated its Work First Program Manual into a rule promulgated under the APA as "adopted to meet a requirement of the federal government." N.C. Gen. Stat. § 150B-21.6. Having failed to do so, and upon our determination that the 24-month limitation constitutes a "rule" within the meaning of the APA, we hold that respondent's termination of petitioner's public assistance effective 31 July 1998 was affected by error of law, and accordingly, the superior court erred in upholding respondent's decision. In view of this holding, an analysis of petitioner's remaining assignment of error with alternative arguments is unnecessary.

Reversed.

Judge LEWIS *concurs.*

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent from the majority opinion holding that respondent was not barred under N.C. Gen. Stat. § 150B-19(4) from promulgating rules for implementation of the twenty-four month limitation of Work First benefits.

After the Rutherford County Department of Social Services upheld the decision to terminate petitioner's Work First Family Assistance, he exercised his right of review by respondent. After a hearing, the respondent issued a decision, later upheld by the chief hearing officer, which, in part, found facts and conclusions as follows:

> REGULATORY HISTORY AND AUTHORITY—42 U.S.C. § 1315 allows the Secretary of the United States Department of Health and Human Services (HHS) to waive requirements contained in 42 U.S.C. § 602 that pertain to state plans for Aid to Families with Dependent Children (AFDC) in cases of demonstration or pilot projects. On September 14, 1995, Governor Hunt formally submitted a request for authority to operate a statewide welfare demonstration project, entitled *Work First*, to HHS. In April, 1996 HHS issued waiver authority to North Carolina to operate the *Work First* program. The waiver gave North Carolina authority to

deny AFDC benefits to adults who had received AFDC for 24 months. North Carolina implemented the *Work First* program, including the 24-month time limit for benefits, in August, 1996. This waiver authority had the legal effect of superseding existing federal statutes that contain no such provision for time limiting benefits. G.S. 150B-19(4) prohibits an agency from adopting a rule that repeats the content of a law, rule, or federal regulation. The waiver authority cited above had the force and effect of federal law. Furthermore, it was sufficiently clear as to the provisions of the waiver authority. There was, therefore, no need for state regulation, and any such regulation would have been repetitive in violation of G.S. 150B-19.

The respondent then concluded that petitioner's benefits were properly terminated effective 31 July 1998. Petitioner was advised that he could seek a review of the decision in superior court.

Petitioner apparently does not contend that Work First benefits could be limited to twenty-four months. He only contends that an APA rule should have been adopted to authorize such. Likewise, petitioner did not petition the respondent to adopt such a rule pursuant to N.C. Gen. Stat. § 150B-20.

The respondent's position is summed up as follows: When petitioner signed the contract, he knew of the twenty-four month limitation. The purpose of APA rules is to assume that benefits recipients, such as petitioner, are afforded their due process rights. Petitioner was afforded notice and exercised his appeal rights at every level of review. The Work First Program waiver constitutes federal law in that 42 U.S.C. § 602 establishes the program and 42 U.S.C. § 1315 allows federal authorities to modify federal law by approving a state's waiver request. The waiver then became the federal law with which a state must comply. Thus, any APA rules would only repeat the law that is in the waiver and N.C. Gen. Stat. § 150B-19(4) prohibits an agency from adopting a rule that "repeats the content of a law, a rule or a federal regulation." The waiver authority includes waiver terms and conditions for the Work First Program and comprises approximately twenty pages in the record.

In the waiver authority granted to this State, the waiver terms and conditions required:

(1) the demonstration provisions (Work First program) be implemented statewide no earlier than March 1, 1996 and no later than March 1, 1997;

(2) the State to deny AFDC to a family if the parent refused to sign the Personal Responsibility contract;

(3) the State to limit the amount of time a family participating in Work First employment and training receiving AFDC benefits to twenty-four months.

Thus, respondent could elect a time within this one-year period to begin implementation of the program. Petitioner was required to sign a contract which clearly set forth the beginning time for the twenty-four month period he was to receive benefits.

I do not believe that this Court's recent decision in *Dillingham v. N.C. Dept. of Human Resources*, 132 N.C. App. 704, 513 S.E.2d 823 (1999) is controlling authority. There, the manual required the applicant/recipient to present "clear and convincing written evidence" to rebut the presumption while federal law only required a "satisfactory showing." *Dillingham*, 132 N.C. App. at 711, 513 S.E.2d at 828. This Court held the applicable standard of proof be "by a preponderance of the evidence." *Id.* at 712, 513 S.E.2d at 828.

Thus, I agree that an APA rule was necessary in *Dillingham* in order to establish the proper burden of proof consistent with the federal law requirement of a "satisfactory showing." *Id.* at 711, 513 S.E.2d at 828. I further conclude from *Dillingham* that any APA rule adopted with the higher standard of proof of "clear and convincing written evidence" would have been invalid since our Court held: "In the absence of a valid statute or regulation establishing the standard of proof, G.S. § 150B-29 requires that 'the rules of evidence as applied in the trial division of the General Court of Justice shall be followed.' " *Id.* at 711-712, 513 S.E.2d at 828. Our Supreme Court has further stated "the standard of proof in administrative matters is by the greater weight of the evidence, and it is error to require a showing by clear, cogent and convincing evidence." *Id.* at 712, 513 S.E.2d at 828, *citng In re Thomas*, 281 N.C. 598, 189 S.E.2d 245 (1972).

I conclude the waiver, with its terms and conditions, is clear and no APA rule is required. I would affirm the order of the superior court which affirmed the respondent's decision as being made upon lawful procedure and not affected by error of law.

IN RE FORECLOSURE OF AZALEA GARDEN BD. & CARE, INC.

[140 N.C. App. 45 (2000)]

IN THE MATTER OF FORECLOSURE UNDER THAT DEED OF TRUST EXECUTED BY: AZALEA GARDEN BOARD AND CARE, INC., DATED DECEMBER 28, 1989 AND RECORDED AT BOOK 1683 PAGE 740, FORSYTH COUNTY REGISTRY. SEE APPOINTMENT OF SUBSTITUTE TRUSTEE RECORDED IN BOOK 2003 PAGE 2351, FORSYTH COUNTY REGISTRY

No. COA99-463

(Filed 19 September 2000)

1. Mortgages— foreclosure—assignment—no default based solely on earlier default

The trial court did not err in a foreclosure action by its findings and conclusions that Azalea Garden Board and Care, Inc. (Azalea) did not default under its deed of trust assigned to WRH Mortgage, Inc. (WRH) based solely on Azalea's earlier default on a debt to Housing and Urban Development, because WRH purchased the debt under new terms with a new default provision.

2. Mortgages— foreclosure—de novo hearing

The trial court in the appeal of a foreclosure action is to conduct a de novo hearing to determine the same four issues determined by the clerk of court, including: (1) the existence of a valid debt of which the party seeking foreclosure is the holder; (2) the existence of default; (3) the trustee's right to foreclosure under the instrument; and (4) the sufficiency of notice of hearing to the record owners of the property.

3. Mortgages— foreclosure—default—modification of deed of trust—compromise and settlement agreement

The trial court erred in denying WRH Mortgage Inc.'s right to foreclosure by finding no default by Azalea Garden Board and Care, Inc. under the deed of trust, because the trial court improperly determined the rights of the parties under the deed of trust only when the provisions of the original promissory note, modified by the compromise and settlement agreement and the amended plan of reorganization, also apply.

4. Collateral Estoppel and Res Judicata— collateral estoppel—issue not precluded

The trial court was not barred by collateral estoppel in a foreclosure action from hearing evidence concerning factual disputes relating to whether Azalea Garden Board and Care, Inc. (Azalea) had performed its obligations under the compromise and settle-

ment agreement executed by the parties even though WRH contends those disputes had previously been litigated in the Bankruptcy Court, because: (1) the Bankruptcy Court determined the issue of whether Azalea was in compliance with its confirmed plan of reorganization and lifted the automatic stay allowing WRH to proceed with the foreclosure action in state court; and (2) the state foreclosure action determined the issue of whether Azalea was in default under the promissory note and deed of trust.

5. Mortgages— foreclosure—equitable defenses—acceptance of late payments

The trial court erred in a foreclosure action by considering the equitable defense of acceptance of late payments in its findings and conclusions that no default had occurred, because equitable defenses to foreclosure may not be raised in a hearing under N.C.G.S. § 45-21.16, but must instead be asserted in an action to enjoin the foreclosure sale under N.C.G.S. § 45-21.34.

Appeal by WRH Mortgage, Inc. from an order entered 17 September 1998 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 13 January 2000.

Northen Blue, L.L.P., by J. William Blue, Jr., for petitioner-appellant.

Tuggle Duggins & Meschan, P.A., by Robert C. Cone, for respondent-appellee.

McGEE, Judge.

The issue on appeal is whether the trial court erred in finding that Azalea Garden Board and Care, Inc. (Azalea) did not default under its deed of trust assigned to WRH Mortgage, Inc. (WRH), and therefore WRH could not foreclose on the deed of trust. Azalea is a North Carolina corporation that owns and operates Brookside Gardens, a rest home in Winston-Salem, North Carolina. Azalea executed a promissory note on 28 December 1989 to First Union Mortgage Corporation in the amount of $2,838,200 and a deed of trust on the rest home real property as security for the note. The promissory note was amended on 22 July 1991 and again on 16 March 1994. The promissory note and deed of trust were assigned to the Secretary of Housing and Urban Development (HUD) on 10 April 1995. HUD initiated foreclosure proceedings in early 1996 after Azalea defaulted on the debt.

Azalea filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Middle District of North Carolina on 24 February 1997 and filed a plan of reorganization on 2 July 1997. WRH purchased Azalea's note and deed of trust from HUD for $1,700,000 on 29 July 1997. In a compromise and settlement agreement effective 1 October 1997, Azalea agreed to satisfy its debt to WRH by: (1) monthly payments of $20,000, beginning on or before 1 November 1997, (2) lump sum payment to WRH of $2,750,000 on or before 31 December 1998, and (3) execution of a new promissory note for $150,000 to be paid over five years, secured by a deed of trust on the real property. Azalea then signed an amendment to the plan of reorganization of the debtor in possession on 8 October 1997, which included a provision that Azalea would execute and deliver to its attorney a deed in lieu of foreclosure on or before 5 November 1997 to be held in escrow by Azalea's attorney for delivery to WRH in the event of a default under the plan of reorganization. WRH voted to accept the plan as amended and the Bankruptcy Court approved the amended plan by an order entered 12 November 1997.

WRH notified Azalea in a letter dated 28 January 1998 that "WRH considers the Debtor to be in default under the applicable agreements, but may be willing to defer the exercise of its remedies without waiving the default under certain conditions." In response, Azalea sought review of its conduct by the Bankruptcy Court by filing a motion requesting a determination that Azalea had complied with its obligations under the compromise and settlement agreement. In a hearing on 24 March 1998, the Bankruptcy Court determined that "the Debtor is in default under the various terms and conditions of the Plan as amended and . . . the terms and conditions of the Settlement Agreement were incorporated into the Plan amendment by reference." The Bankruptcy Court concluded in an order dated 1 April 1998 that "WRH is entitled to proceed with foreclosure[.]"

Azalea appealed the order of the Bankruptcy Court to the United States District Court for the Middle District of North Carolina. In a memorandum opinion entered 7 December 1998, the United States District Court determined the Bankruptcy Court had subject matter jurisdiction to enter the 1 April 1998 order, and that "the Bankruptcy Court's factual findings [were] not clearly erroneous and thus must be applied to the law to determine whether a default occurred." The court concluded that there was a default by Azalea under the amended plan and agreement, and that WRH was entitled to foreclose on the property. Azalea appealed to the United States Court of

Appeals for the Fourth Circuit, which affirmed the District Court in an order entered 31 May 2000. The Fourth Circuit Court of Appeals rejected Azalea's challenge to the Bankruptcy Court's jurisdiction and Azalea's arguments and noted that Azalea "does not dispute the supporting facts" underlying its decision that Azalea defaulted.

WRH filed this action before the Clerk of Superior Court in Forsyth County on 15 May 1998, pursuant to N.C. Gen. Stat. § 45-21.16, to commence foreclosure against the rest home property. A hearing was held before an assistant clerk of Superior Court on 16 June 1998 and in an order dated 22 June 1998, the clerk made findings of fact, including

> [t]hat the Debtor is in default under the Note and Deed of Trust as modified for the following reasons:
>
> a. Failure to make timely installment payments of principal and interest;
>
> b. Failure to pay ad valorem property taxes as they become due;
>
> c. Failure to deliver specific financial reports requested by WRH; and
>
> d. Failure to maintain insurance on the real property described in the Deed of Trust.

Azalea filed notice of appeal to Forsyth County Superior Court. Following a hearing, the trial court entered an order on 17 September 1998 finding no default by Azalea under the deed of trust and denying WRH's right to foreclose against the real property. WRH appeals from this order.

In its appeal to our Court, WRH argues the trial court erred in finding no default by Azalea under the deed of trust and in denying WRH the right to foreclose. WRH specifically argues the trial court erred: (I) in its findings of fact and conclusions of law that no default had occurred in light of the prior acknowledgment by Azalea that it was in default and other evidence of default; (II) in hearing evidence concerning factual disputes as to whether Azalea had performed its obligations under the compromise and settlement agreement when those disputes had previously been litigated in Bankruptcy Court; (III) in considering equitable defenses raised by Azalea that no default had occurred; and (IV) in finding no right to foreclose existed

under the deed of trust in light of the plain language of the deed of trust.

I.

[1] WRH first argues the trial court erred in its findings and conclusions that no default had occurred because Azalea "had previously acknowledged it was in default of its obligations and all of the other competent evidence before the trial court indicated that Azalea was in default of its obligations." WRH further contends that Azalea may not "assert a particular position in an action and then assert a contrary position in subsequent proceedings after having accepted the benefits of its first position."

Prior to 29 July 1997, the day WRH purchased the note and deed of trust from HUD, Azalea had already filed its bankruptcy petition and filed a plan for reorganization. The amendment to the plan of reorganization was dated 2 July 1997, at which time HUD still held Azalea's note and deed of trust. WRH subsequently purchased the note and deed of trust from HUD and executed a compromise and settlement agreement with Azalea effective 1 October 1997. The compromise and settlement agreement expressly states that "the Debtor has sought protection under the provisions of Chapter 11 . . . by filing a petition with the United States Bankruptcy Court" and "the note and deed of trust are in default[.]" Knowing these facts, WRH purchased Azalea's debt and created a payment schedule by which Azalea would pay WRH.

The compromise and settlement agreement stated that "the parties hereto have now negotiated, agreed, and announced to the Court a settlement of this dispute whereby, with appropriate further orders of the Court, the claims of WRH will be treated in the manner set forth below." The compromise and settlement agreement further stated that "[i]n the event the Debtor fails to timely pay . . . or fails to comply with any other provision of this Agreement . . . WRH may proceed with its rights and remedies under the Loan Documents." We are not persuaded by WRH's argument that Azalea is in default under their agreement merely because Azalea was earlier in default on a debt to HUD, a debt that WRH purchased under new terms with a new default provision.

[2] We next determine whether other competent evidence before the trial court indicated that Azalea was in default of its obligations as argued by WRH. Our Supreme Court has stated that the trial court in

the appeal of a foreclosure action is to conduct a *de novo* hearing to determine the same four issues determined by the clerk of court: (1) the existence of a valid debt of which the party seeking foreclosure is the holder, (2) the existence of default, (3) the trustee's right to foreclose under the instrument, and (4) the sufficiency of notice of hearing to the record owners of the property. *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993). The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings. *Walker v. First Federal Savings and Loan*, 93 N.C. App. 528, 532, 378 S.E.2d 583, 585, *disc. review denied*, 325 N.C. 320, 381 S.E.2d 791 (1989).

The order of the trial court states that "[f]oreclosure of the Deed of Trust is not permissible under Chapter 45 of the North Carolina General Statutes." The trial court's order reviewed the reasons WRH argued it was entitled to foreclose and found that:

> (10) Except for [the 22 July 1991 and 16 March 1994 amendments], the Deed of Trust has not been amended. The confirmed amended plan did not amend the Deed of Trust. WRH, Azalea and the trustee under the Deed of Trust did not execute any instrument modifying or purporting to modify the Deed of Trust.
>
> . . .
>
> (12) Nothing in the Deed of Trust requires that any monthly financial statements or other monthly reports be provided by Azalea to WRH.
>
> . . .
>
> (15) Azalea was current on all of the Monthly Payments as of May 13, 1998, two (2) days prior to commencement of the foreclosure proceeding on May 15, 1998.
>
> . . .
>
> (18) At the time foreclosure was commenced, there were in fact no unpaid delinquent ad valorem taxes due on the Real Property, and there are no delinquent ad valorem taxes owing at this time.
>
> . . .

(22) At the time foreclosure was commenced, the Real Property was in fact covered by insurance and such coverage remains in effect.

Five documents set out the rights of the parties in this case: (1) the original 1989 promissory note from Azalea to First Union Mortgage Corporation, (2) the 1989 deed of trust securing that promissory note, (3) the plan of reorganization in Bankruptcy Court filed 2 July 1997, (4) the compromise and settlement agreement effective 1 October 1997, and (5) a subsequent amendment to the plan of reorganization accepted by WRH and approved by the Bankruptcy Court in an order entered 12 November 1997.

First, the original 1989 promissory note from Azalea to First Union Mortgage Corporation, and later transferred to HUD, evidences the actual indebtedness of Azalea. Second, the accompanying deed of trust is "essentially a security" by which "the legal title to real property is placed in one or more trustees, to secure the repayment of a sum of money or the performance of other conditions." Black's Law Dictionary 414 (6th ed. 1990). A deed of trust gives the note holder a contractual remedy for default, namely a right to foreclose under the instrument. *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918 (1980). The power of sale in a deed of trust is "a contractual arrangement in a mortgage or a deed of trust which 'confer[s] upon the trustee or mortgagee the "power" to sell the real property mortgaged without any order of court in the event of a default.' " *In re Foreclosure of Michael Weinman Associates*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (citing James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 281, at 331 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 3d ed. 1988)).

Third, the plan of reorganization specifies that "[t]he documents securing the loan remain in full force and effect, subject to the forbearances specifically provided for in this Plan with respect to enforcement of the loan documents." Fourth, the compromise and settlement agreement between Azalea and WRH, signed after Azalea defaulted on its obligation to HUD and after WRH purchased the promissory note, states that the parties "have now negotiated, agreed, and announced to the Court a settlement of this dispute whereby . . . the claims of WRH will be treated in the manner set forth below." Fifth, the subsequent amendment to the plan of reorganization specifically states that the compromise and settlement agreement "will be incorporated into the Plan as Amended as a part of the Court's Order Confirming the Plan as Amended."

[3] WRH contends, and we agree, that in this case the promissory note, modified by the compromise and settlement agreement and amended plan of reorganization, imposes payment obligations on Azalea as the debtor.

> Where a [subsequent] contract involves the same subject matter as the first, but where no recission has occurred, the contracts must be construed together in identifying the intent of the parties and in ascertaining what provisions of the first contract remain enforceable, and in such construction the law pertaining to interpretation of a single contract applies.

In re Foreclosure of Fortescue, 75 N.C. App. 127, 130, 330 S.E.2d 219, 221 (1985) (citation omitted) (applying terms of a loan modification agreement to find default of promissory note and foreclosure of deed of trust). "The court's primary purpose in construing a contract is to ascertain the intention of the parties." *Id.* at 130, 330 S.E.2d at 222; *see also In re Foreclosure of Sutton Investments*, 46 N.C. App. 654, 659-60, 266 S.E.2d 686, 689 (1980) ("[W]e conclude initially that proper interpretation of the provisions in the Note and the Deed of Trust prescribing the conditions of default requires that the instruments be read together as one contract rather than as two independent agreements."). The compromise and settlement agreement and the amended plan of reorganization set new, specific requirements that the parties in this case intended to follow, in addition to any agreements in the original promissory note and deed of trust, that were not irreconcilable. The issue for determination is whether Azalea defaulted under the original promissory note, modified by the compromise and settlement agreement and the amended plan of reorganization, thus entitling WRH to foreclose under the deed of trust.

WRH specifically contends that Azalea was clearly in default for: (1) failure to submit to WRH required monthly financial reports for at least three months; (2) mailing its February 1998 payment on 9 February 1998, causing WRH to receive the payment after the 10 February due date; (3) leaving a $488.65 deficit in property tax liabilities; (4) allowing insurance on the rest home to lapse due to nonpayment of premiums; and (5) failure to submit by 5 November 1997 a deed in lieu of foreclosure to be held in escrow by its attorney, which the parties had agreed upon in order to secure Azalea's performance under the compromise and settlement agreement and amended plan of reorganization.

As to the monthly financial reports, Azalea counters that "[w]hile it is clear that [it] . . . did provide detailed financial information on a monthly basis, [the trial court] correctly found . . . that nothing in the Deed of Trust required that any monthly financial statements or other monthly reports be provided[.]" Azalea states, "Obviously . . . WRH was relying upon language in the Compromise Agreement." The provisions of the compromise and settlement agreement are valid, and Azalea provides no support for the contention that it provided detailed financial information on a monthly basis. Appearing in the record is a letter dated 8 December 1997, in which WRH requested from Azalea several financial reports. WRH named three specific financial reports that had not been received for September and October 1997, and six specific reports that had not been received for November 1997 and subsequent months.

Azalea next argues that "WRH contended that the payment for February had been received two (2) days late, but there was no contention that this payment had been late by a month or more, as required [for a finding of default] by Paragraph 10 of the Deed of Trust." One of the detailed provisions of the compromise and settlement agreement between the parties reached in Bankruptcy Court instructs Azalea to produce $20,000 payments "on or before the 10th day of each month[.]" Additionally, the amendment to the plan of reorganization provides "Azalea Gardens has agreed to make an adequate protection payment to WRH in the amount of $20,000.00 . . . on or before the 10th day of each month beginning in December, 1997[.]" Azalea does not claim it paid the February amount at a time that would have permitted WRH to receive it on or before 10 February 1998 as agreed. The boilerplate language in the deed of trust securing a note originally owed to First Union Mortgage Corporation and then to HUD does not contain the full agreement between Azalea and WRH. The compromise and settlement agreement and plan of reorganization that were negotiated, amended and ratified by the parties in this case modified the original documents as in *In re Foreclosure of Fortescue*, 75 N.C. App. at 129-130, 330 S.E.2d at 221.

Azalea further contends "the evidence clearly show[s] . . . at the time the foreclosure was commenced on May 15, 1998, there were in fact no unpaid delinquent *ad valorem* taxes due . . . nor were there any delinquent *ad valorem* taxes owing at the time of the [trial court] hearing [of 21 August 1998]." Azalea cites no evidence in the record to support such contention. The amendment to the plan of reorganization provides "Azalea Gardens agrees to pay ad valorem property

taxes as they become due during the term of its payment agreement with WRH." In the record on appeal, a billing statement from the office of the Forsyth County Tax Collector dated 21 August 1997 indicates a total liability of $24,432.38 due on 1 September 1997, and past due on 6 January 1998. A receipt dated 28 January 1998 indicates a remaining balance due of $488.65.

With regard to payment of insurance premiums, Azalea insists WRH did not follow the terms of the deed of trust that required Azalea be notified of "the pending lapse" in coverage, nor did WRH pay the premiums and make demand for reimbursement in the event the debtor failed to pay the premiums. However, the compromise and settlement agreement provides that "the Debtor shall . . . maintain insurance upon the Property, which shall name WRH as an additional insured[.]" The compromise and settlement agreement does not provide that WRH give notice to Azalea when coverage may terminate, nor does it provide for payment by WRH and subsequent demand for reimbursement. A notice of cancellation in the record dated 10 February 1998 states "[o]ur records indicate that your premium payment was not received by the due date [of 31 January 1998]. The policy described herein is canceled for non-payment of premium effective . . . 03/01/98." A handwritten notation indicates that the policy was canceled on 4 March 1998.

We believe the trial court erred in determining the rights of the parties under the deed of trust only, when the provisions of the original promissory note, modified by the compromise and settlement agreement and the amended plan of reorganization, also apply. We hold the trial court's order denying WRH's right to foreclose by finding no default by Azalea under the deed of trust was in error.

II.

[4] WRH contends the trial court erred in "hearing evidence concerning factual disputes relating to whether Azalea had performed its obligations under the compromise and settlement agreement executed by the parties when those disputes had previously been litigated in the Bankruptcy Court." Through this argument WRH seeks the application of collateral estoppel to prevent the trial court from making determinations it contends the Bankruptcy Court had already adjudicated.

Although mutuality of parties is no longer required when invoking either offensive or defensive collateral estoppel, the parties in the

case before us are clearly the same in both actions. *Rhymer v. Estate of Sorrells*, 127 N.C. App. 266, 488 S.E.2d 838 (1997). "Having decided that the parties are the same, we must next determine whether another requirement for the application of collateral estoppel—identity of issues—is present." *King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973).

> In determining whether collateral estoppel is applicable to specific issues, certain requirements must be met: (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Id. (citations omitted); *see also State v. Summers*, 351 N.C. 620, 528 S.E.2d 17 (2000) (citing *Grindstaff* and enumerating same four requirements for identity of issues).

We focus on the first requirement that "[t]he issues to be concluded must be the same as those involved in the prior action[.]" *King*, 284 N.C. at 358, 200 S.E.2d at 806. Generally in the bankruptcy proceeding, Azalea sought a determination from the Bankruptcy Court that it was in compliance with its confirmed plan of reorganization. The Bankruptcy Court entered an "[o]rder denying the motion by debtor for determination of compliance with the terms of the debtor's confirmed plan of reorganization" on 1 April 1998. According to the order, the result was that "WRH is entitled to proceed with foreclosure and WRH is entitled to receive all documents that Debtor's counsel presently holds in escrow."

The role of the Bankruptcy Court was to determine whether Azalea was in compliance with its plan of reorganization. WRH contended Azalea had failed to comply and that it was entitled to relief from the automatic stay in order to pursue its claims against the rest home property that was security for Azalea's debt. *See* 11 U.S.C. § 362(d). While the automatic stay is in effect, a creditor cannot pursue the bankruptcy debtor for a money judgment on any debt listed in the bankruptcy petition. Such protection serves as an injunction against enforcing the personal obligation of the debtor but it does not affect a security interest that a debtor has voluntarily given in property to secure the payment of a debt.

During the bankruptcy proceedings, a creditor can move for relief from stay in order to pursue property that is security for a debt. 11 U.S.C. § 362(d). Once a motion for relief from stay is granted to a creditor, the creditor is free to foreclose on its security interest in the property. However, the Bankruptcy Court in this case had no jurisdiction over the foreclosure action and could not have granted a decree of foreclosure. The Bankruptcy Court appropriately considered the issue brought before it by Azalea for a determination of whether Azalea was in compliance with its confirmed plan of reorganization. The Bankruptcy Court also determined the relief sought by WRH for an "Order in Aid of Consummation" entitling WRH to receive a deed in lieu of foreclosure and for the stay to be lifted allowing WRH to proceed with a foreclosure action in state court. WRH was free to proceed with the foreclosure action in state court as soon as the stay of proceedings against the real property was lifted in Bankruptcy Court.

In the state foreclosure action, Azalea argued no default occurred under the deed of trust and WRH could not foreclose. The procedure for foreclosure of a deed of trust is governed principally by N.C. Gen. Stat. § 45-21.16, providing that "[i]f the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice . . . then the clerk shall authorize [foreclosure]." N.C. Gen. Stat. § 45-21.16(d) (1999). A hearing was held before the Forsyth County Clerk of Superior Court resulting in a determination that Azalea was in default under the promissory note and deed of trust. Azalea appealed to Forsyth County Superior Court and the trial court entered an "[o]rder finding no default under deed of trust and denying right to foreclose." The order states that "[f]oreclosure of the Deed of Trust is not permissible under Chapter 45 of the North Carolina General Statutes."

In order for collateral estoppel to apply in this case, the issues to be concluded must be the same as those in the prior Bankruptcy Court action, and as shown above, the issues determined by the trial court were not the same as those determined by the Bankruptcy Court. *See Edmundson Investment Company v. Florida Treco, Inc.*, 633 S.W.2d 599 (Tex. App.-Hous. 1982) (not same distinct issue in Bankruptcy Court, where issue was whether property could be removed from under the stay, and in state court, the issue was foreclosure).

The Bankruptcy Court in the Chapter 11 proceeding and, in turn, the clerk of court and the trial court in the state foreclosure proceeding appropriately carried out their required consideration of the issues before each court. Collateral estoppel did not preclude each court from considering the appropriate issues before it.

III.

[5] WRH's third argument is that the trial court erred in considering equitable defenses raised by Azalea with regard to its findings and conclusions that no default had occurred.

> Legal defenses which negate any of these requisite findings [(the four factors set out in N.C.G.S. § 45-21.16)] are properly considered at this hearing. . . . [T]o preclude presentation of legal defenses to the four requisites to authorization of sale would render the hearing provided by this statute a largely purposeless formality.

In re Foreclosure of Deed of Trust, 55 N.C. App. 373, 375-76, 285 S.E.2d 615, 616, *aff'd*, 306 N.C. 451, 293 S.E.2d 798 (1982); *see also In re Foreclosure of Godwin*, 121 N.C. App. 703, 705, 468 S.E.2d 811, 812 (1996). The mortgagor in *In re Foreclosure of Fortescue*, 75 N.C. App. at 131, 330 S.E.2d at 222, contended that the trial court erred in finding default because "even if respondent-appellant tendered payments after they were due, the lender waived its right to prompt payment by accepting late payments[.]" Our Court determined this was an equitable defense and held that "equitable defenses [to foreclosure] may not be raised in a hearing pursuant to G.S. 45-21.16, but must instead be asserted in an action to enjoin the foreclosure sale under G.S. 45-21.34." *Id.* (citations omitted); *In re Foreclosure of Godwin*, 121 N.C. App. at 705, 468 S.E.2d at 813; *accord Meehan v. Cable*, 127 N.C. App. 336, 339, 489 S.E.2d 440, 442-43 (1997); *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978). "Equitable defenses to foreclosure, such as waiver of the right to prompt payment through acceptance of late payments must be asserted in an action to enjoin the foreclosure sale [.]" *Meehan*, 127 N.C. App. at 340, 489 S.E.2d at 444 (emphasis omitted) (citing *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 859 (1993)).

In the case before us, the order of the trial court tends to show the court considered an equitable defense of Azalea when the order stated that "[e]ven if Azalea had been late by more than one (1) month on any particular payment, any such timing default was waived by

WRH's accepting Monthly Payments prior to commencement of the foreclosure proceeding and thereafter." An equitable defense of acceptance of late payment was considered by the trial court even though the trial court did not specifically state it used equity in reaching its decision. "Although a Superior Court Judge has general equitable jurisdiction, N.C. Const. Art. IV, § 1, *Hospital v. Comrs. of Durham*, 231 N.C. 604, 58 S.E.2d 696 (1950), a court is without jurisdiction unless the issue is brought before the court in a proper proceeding." *In re Watts*, 38 N.C. App. at 94, 247 S.E.2d at 429 (citations omitted). Judicial economy and efficient resolution of disputes would be well served in this case if the trial court could determine equity in the foreclosure proceeding; however, equitable defenses must be determined pursuant to the procedure set forth in N.C. Gen. Stat. § 45-21.34 (1999). The trial court erred in considering an equitable defense to foreclosure, which Azalea must pursue through an action to enjoin the foreclosure based on that equitable defense.

Based upon our determination of WRH's first three arguments, it is not necessary for us to review its final argument.

The order of the trial court denying WRH's right to foreclose by finding no default by Azalea is reversed. Reversed and remanded for action by the trial court consistent with this opinion.

Judges JOHN and HUNTER concur.

Judge JOHN concurred in this opinion before 31 August 2000.

BHARAT SHAH, EMPLOYEE, PLAINTIFF-APPELLANT v. HOWARD JOHNSON, EMPLOYER, SELF-INSURED, KEY RISK MANAGEMENT SERVICES, SERVICING AGENT, DEFENDANT-APPELLEES

No. COA99-964

(Filed 19 September 2000)

1. Workers' Compensation— payment of compensation without prejudice to right to contest—improper

The Industrial Commission did not act arbitrarily or abuse its discretion in a workers' compensation action arising from the shooting of a motel night auditor by finding that defendant improperly used Form 63 and improperly stopped payments. An

employer or insurer using Form 63 under N.C.G.S. § 97-18(d) has the burden of demonstrating the reasonableness of its uncertainty about the compensability of the claim, which this defendant failed to do; moreover, by utilizing the Form 63 procedure, defendant effectively avoided the necessity of filing Form 24 and seeking permission from the Commission to stop weekly compensation payments.

2. Workers' Compensation— lodging furnished with job—value

There was sufficient evidence in a workers' compensation action arising from the shooting of a motel night auditor to support the Industrial Commission's finding that the value of the lodging furnished to plaintiff at the business was $100 per week and that plaintiff received lodging in lieu of additional wages.

3. Workers' Compensation— refusal of suitable job offer—change of location—fears for safety

The conclusion of the Industrial Commission in a workers' compensation action that the employment offered by defendant-employer was suitable and unjustifiably refused by plaintiff was supported by the findings. Plaintiff contended that the Commission failed to consider his change of residence from North Carolina to California and his fear of returning to his former employment, but it is clear from plaintiff's testimony that he based his rejection of the job offer on his perceived physical limitations rather than his fears for his safety or his distance from his former job location.

4. Workers' Compensation— refusal of suitable job offer—all compensation suspended

The Industrial Commission in a workers' compensation action correctly suspended plaintiff's right to compensation from the date a suitable job offer was rejected. Although plaintiff argued that the job offer included only salary and not lodging, as had his former job, and that he should therefore receive an amount based on the value of the lodging even after he refused the job offer, the express terms of N.C.G.S. § 97-32 prohibit an employee from receiving any compensation during the continuance of his refusal to accept employment suitable to his capacity.

Appeals by both plaintiff and defendant from an Opinion and Award filed 23 March 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 April 2000.

On 16 December 1995, Bharat Shah (plaintiff) began work for UDP, Inc., d/b/a Howard Johnson (defendant-employer) as a night auditor. Plaintiff worked the third shift, which began at 11:00 p.m. and ended at 7:00 a.m., and was responsible for the front desk during his shift. Plaintiff received a salary of $200.00 per week, was allowed to lodge at the business, and ate meals with the manager's family.

On the night of 31 December 1995, shortly after plaintiff's shift began, plaintiff and another employee were robbed at gunpoint and shot. Plaintiff survived gunshot wounds to his back, hand and left leg, but the other employee's injuries were fatal. Plaintiff was admitted to Carolinas Medical Center (CMC) shortly after midnight on 1 January 1996 and subsequently underwent six surgical procedures while there. After his discharge from the hospital on 14 January 1996, plaintiff flew to his brother's home in California to recuperate.

On 13 January 1996, a Claims Representative for defendant's servicing agent executed a Form 63, Notice to Employee of Payment of Compensation Without Prejudice to Later Deny the Claim, advising plaintiff that payments of workers' compensation benefits would be made without prejudice to defendant's right to contest plaintiff's claim or its liability. On 14 January 1996, defendant began paying plaintiff compensation in the amount of $133.34 per week, based on a salary of $200.00 per week.

While in California, plaintiff was treated by Dr. Stephen A. Smith, an orthopedic surgeon. Dr. Smith recommended that plaintiff use crutches and receive physical therapy. Plaintiff testified he used two crutches until the end of February 1996, one crutch until the end of April 1996, and a cane through the end of June 1996. On 26 March 1996, Dr. Smith released plaintiff to return to work as a night auditor with restrictions placed on the amount of time he could stand. Soon thereafter defendant offered plaintiff his old job as a night auditor in Charlotte at his former salary of $200.00 per week, but plaintiff refused the offer. It does not appear that room and board was included in the job offer to plaintiff. After plaintiff's refusal, defendant stopped payments of compensation to him and filed Form 61, Denial of Workers' Compensation Claim, denying any *further* liability on plaintiff's claim in that he had refused to accept suitable employment.

While plaintiff was in California, he took a temporary job with a computer company from 1 June until 20 June 1996, working as an accountant and bookkeeper and earning $10.00 per hour. After 20 June 1996, plaintiff returned to India with his parents and remained there for six months in order to care for his parents. He married while in India but neither worked nor sought employment while there. He was able, however, to operate a motor scooter during the six months he was in India. Plaintiff returned to the United States in December 1996 and was seen again by Dr. Smith, who felt that plaintiff was "doing as well as he'll do." Dr. Smith also opined that plaintiff would "always have some permanent objective residual with regard to his quadriceps weakness secondary to the shotgun blast damage that was done."

Following a hearing, a deputy commissioner found that the value of the room and meals furnished to plaintiff was $100.00 per week and awarded plaintiff additional compensation of $66.67 per week for the period from 31 December 1995 through 29 March 1996, the date plaintiff refused defendant's job offer. The deputy commissioner also concluded that defendant's use of Form 63 and Form 61 was proper. Both parties appealed to the Full Commission. The Full Commission upheld the additional payment of $66.67 per week to plaintiff for the time period beginning 31 December 1995 and ending 29 March 1996, but reversed that portion of the order regarding defendant's use of Forms 63 and 61. The Commission levied sanctions against defendant in the amount of $2,500.00 for failure to file the proper forms and adhere to the proper procedures in terminating plaintiff's benefits. Both parties appealed.

Mark T. Sumwalt for plaintiff appellant-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe and Sharon E. Dent, for defendant appellant-appellee.

HORTON, Judge.

The law governing appellate review of Industrial Commission decisions is well settled in this state. Review "is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). Furthermore, so long as there is some "evidence of substance which

directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary." *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980).

Defendant's Appeal

First, defendant argues that the Commission erred in imposing sanctions for its allegedly improper use of Form 63. Second, defendant argues that the Commission erred in finding that plaintiff's free lodging and food, valued at $100.00 per week, was in lieu of wages so that plaintiff's salary at the time of the injury by accident was actually $300.00 per week. While we have carefully considered both arguments, we affirm the decision of the Commission in both respects.

Sanctions for use of Form 63

[1] With respect to the alleged improper use of Form 63, the Full Commission made the following findings of fact:

> 5. Plaintiff began employment with the defendant-employer on December 16, 1995 as a desk clerk and night auditor.
>
> 6. On December 31, 1995, plaintiff was performing his regular job duties as a desk clerk and night auditor when he was robbed at gunpoint. Plaintiff received multiple gunshot wounds in his back, right arm and left thigh. A co-worker was fatally wounded at the same time.
>
> * * * *
>
> 22. On January 14, 1996, defendant began paying plaintiff pursuant to a Form 63, Payment of Compensation Without Prejudice to Later Deny the Claim. Under the unquestionably compensable circumstances in which plaintiff was injured, defendant should have paid plaintiff for his compensable injuries pursuant to either a Form 21 Agreement for Compensation or a Form 60 Employer's Admission of Employee's Right to Compensation. If defendant had used the proper form, defendant would have been required to obtain Commission approval prior to terminating plaintiff's benefits for his compensable injuries. Further, the filing of the proper form with the Commission would have prevented defendant from unilaterally terminating the plaintiff's benefits.

Based on these findings of fact, the Commission then concluded that:

2. Defendant should have filed a Form 21 Agreement for Compensation or a Form 60 Admission of Employee's Right to Compensation, but instead defendant filed a Form 63 Payment of Compensation Without Prejudice to Later Deny the Claim. Defendant's decision to deny plaintiff's claim based on a disagreement over continuing liability during the 90-day period following defendant's notice of the plaintiff's injury was not permissible. Plaintiff should have been allowed the opportunity to be heard on the termination of his benefits pursuant to the Form 24 procedure adopted by the Commission. N.C. Gen. Stat. §§ 97-18(b), 97-18(d) and 97-18.1.

Based on its conclusion of law, the Commission ordered that the defendant pay $2,500.00 as sanctions "for its failure to file the appropriate Form 21 or Form 60 and for subsequently failing to follow statutory procedures for termination of benefits."

Despite the Commission's finding that plaintiff was injured under "unquestionably compensable circumstances," defendant contends that the police were investigating the shooting incident, and it had no way of being certain that this was a compensable claim. Therefore, defendant argues that it was justified in filing the Form 63. We disagree.

N.C. Gen. Stat. § 97-18(d) (1999) provides that when the employer or insurer is uncertain "on reasonable grounds" whether a claim is compensable, it may begin payments of compensation "without prejudice and without admitting liability." *Id.* In order to comply with the statute,

> [t]he employer or insurer is required to file the prescribed form, I.C. Form 63, stating that the payments are made without prejudice, and that such payments continue until the claim is either accepted or contested or until 90 days from the date upon which the employer first obtains written or actual notice of the injury. If, during the 90 day period, which may be extended by the Commission for an additional 30 days upon application, the employer or insurer contests compensability, it may cease payment upon giving the proper notice specifying the grounds upon which liability is contested. However, if the employer or insurer does not contest compensability of the claim or its liability therefor within the statutory period, it waives its right to do so and the entitlement to compensation becomes an award of the Commission pursuant to G.S. § 97-82(b).

Higgins v. Michael Powell Builders, 132 N.C. App. 720, 723-24, 515 S.E.2d 17, 20 (1999).

The evidence in the record overwhelmingly supports the Commission's finding that plaintiff was shot during a robbery and thus was injured under "unquestionably compensable circumstances." Plaintiff and a coworker were held at gunpoint and forced to give the perpetrators the money in the cash register. The police investigation was aimed at ascertaining the circumstances of the incident and the identities of the perpetrators. Defendant responds that the assault on plaintiff by an unknown assailant might have been for personal reasons and thus not compensable under the holding of *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E.2d 350 (1972).

In *Robbins*, the deceased employee was shot and killed by the husband of a coworker. Because the underlying impetus for the attack lay in an ongoing domestic dispute, the court held that the fatal injury to the employee did not arise out of his employment with the defendant in that case. In *Robbins*, our Supreme Court stated that

> when the moving cause of an assault upon an employee by a third person is personal, or the circumstances surrounding the assault furnish no basis for a reasonable inference that the nature of the employment created the risk of such an attack, the injury is not compensable. This is true even though the employee was engaged in the performance of his duties at the time, for even though the employment may have provided a convenient opportunity for the attack, it was not the cause.

Id. at 240, 188 S.E.2d at 354.

Here, there is nothing in the record to support defendant's speculation that the assault on plaintiff might have been personally motivated. When an employer or insurer avails itself of the procedure set out in N.C. Gen. Stat. § 97-18(d) and utilizes Form 63 to make payments to an employee without prejudice, the employer or insurer has the burden of demonstrating that it had at that time "reasonable grounds" for its uncertainty about the compensability of the claim. Defendant states in its appellate brief that "the Record is devoid of evidence of what Defendant knew and did not know when the Form 63 was filed . . . ." The burden was on the defendant to place in the record evidence to support its position that it acted on "reasonable grounds." Defendant having failed to offer evidence to support the

reasonableness of its belief, we affirm the conclusion of the Commission that defendant's use of Form 63 in this case was improper.

Even had defendant demonstrated reasonable grounds to use the Form 63 procedure, it erred when it unilaterally terminated plaintiff's benefits because plaintiff allegedly refused suitable employment. The professed grounds for termination of benefits had no relation as to whether the assault on plaintiff had its origins in a personal dispute. Had defendant properly admitted compensability in the first instance by filing Form 21, it would not have been allowed to unilaterally cease payments to plaintiff but would have had to first seek the permission of the Commission. By utilizing the Form 63 procedure, defendant effectively avoided the necessity of filing Form 24 and seeking permission of the Commission to stop weekly compensation payments. The Commission found, and we agree, that is an improper use of Form 63. If an employer or insurer initially believes that a claim may not be compensable and utilizes the Form 63 procedure, then discovers after investigation that the claim is clearly compensable, the better practice would be for defendant to promptly file either Form 21 or Form 60. In the case before us, the Commission found that defendant improperly used the Form 63 procedure and improperly stopped payments to plaintiff. In its discretion, the Commission then imposed sanctions of $2,500.00 on defendant. On this record, we cannot say that the Commission acted arbitrarily or abused its discretion. This assignment of error is overruled.

Value of Lodging as Wages

[2] Defendant also argues that the Commission erred in finding that the value of plaintiff's lodging was $100.00 per week, and that plaintiff received lodging in lieu of additional wages. N.C. Gen. Stat. § 97-2(5) (1999) provides in pertinent part that "[w]herever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings." *Id.*

On this issue, the Commission found the following facts:

> 3. The Full Commission reopened this matter for additional evidence on the value of the lodging that was provided to the plaintiff in order to calculate the average weekly wage. The parties were unable to stipulate to or provide additional evidence on the reasonable market value of plaintiff's lodging. Therefore, the

Commission finds as fact, based upon the stipulated Form 22 Wage Chart, that the value of the lodging provided to the plaintiff was $100.00 per week.

4. At the time that he sustained the compensable injury by accident on December 31, 1995, plaintiff's average weekly wage was $200.00 a week salary plus $100.00 for food and lodging for a total of $300.00. Plaintiff's salary would have been higher if he had secured his own living arrangements.

Because we are bound by the findings so long as there is some evidence of record to support them, we must disagree with defendant's argument. On 11 January 1996, the employer-defendant submitted Form 22 to the Industrial Commission, indicating that plaintiff's salary was $200.00 per week, and that a motel room was provided for him at a value of $100.00 per week. In the Form 33R it filed on 1 July 1996, defendant contended that "employee/plaintiff's average weekly wage is $300.00, which includes $100.00 lodging allowance." Further, in its answers to interrogatories served by plaintiff, defendant admitted that lodging was part of plaintiff's employment contract, and that the value of such lodging was $100.00 per week. Finally, we note that defendant's general manager testified that plaintiff was hired for $800.00 per month "plus living expenses." Although defendant obtained new counsel and subsequently sought to amend its Form 33R and interrogatories to deny that lodging was a part of plaintiff's employment package, there was ample evidence to support a finding that lodging was furnished to plaintiff as part of his employment contract, and that such lodging had a value of $100.00.

We are aware that plaintiff elicited evidence that the room provided for plaintiff normally rented to the public for $42.00 per night, plus taxes. There was no evidence of the cost of the room when rented on a long-term basis. Even if the daily rental figure is some indication of the "value" of the room as part of plaintiff's wage package, the Commission could reject that figure as a measure of value and adopt the figure of $100.00 per week. We hold there is substantial competent evidence to support the Commission's finding that the value of plaintiff's lodging was $100.00, and overrule this assignment of error.

Plaintiff's Appeal

Plaintiff makes three arguments on appeal. First, plaintiff argues that the Commission erred in finding the value of his lodging to be only $100.00 per week. Next, plaintiff argues that the Commission

erred in concluding that he had unjustifiably refused suitable employment offered him by defendant. Finally, plaintiff argues that the Commission erred in concluding that his refusal of the job offered by defendant subjected him to loss of benefits.

Value of Plaintiff's Lodging

For the reasons stated above in our discussion of defendant's appeal, we find competent evidence in the record to support the Commission's finding regarding the value of the lodging provided to plaintiff and overrule this assignment of error.

Plaintiff's Refusal of Employment Offer

[3] Plaintiff next assigns error to the Commission's conclusion that the employment offered him by defendant-employer, following his release to return to work, was "suitable" and was unjustifiably refused by plaintiff. Our review is limited to whether or not the findings made by the Commission support this conclusion. *Barham*, 300 N.C. 329, 331, 266 S.E.2d 676, 678.

The Commission made the following pertinent findings:

> 11. On March 26, 1996, Dr. Smith signed a work release form authorizing plaintiff to return to his night auditor position with the restriction that plaintiff could not stand for extended periods of time.
>
> * * * *
>
> 13. Sometime in late March 1996, Chet Dakoriya offered to allow the plaintiff to return to the night auditor position that he had held at the time that he was shot. Mr. Dakoriya agreed to make accommodations for the plaintiff. Earlier on February 21, 1996, medical case manager Jo Anne Johnson faxed a job description form to Mr. Dakoriya. Mr. Dakoriya did not complete the form in its entirety so Ms. Johnson went to Charlotte and specifically had Ash Patel assist in completing the form. This job description form was reviewed by Dr. Smith who then released plaintiff to return to work as a night auditor with the restrictions of no prolonged standing or walking. Mr. Dakoriya agreed to accommodate these restrictions. The job offered to plaintiff was an offer of suitable employment that took into consideration plaintiff's physical limitations and was not so modified to be considered make-work.
>
> * * * *

16. Plaintiff did not testify that he was afraid to return to the position offered by the defendant-employer in late March 1996 nor was any evidence presented that plaintiff could not safely perform the night auditor position.

Based on these findings the Commission concluded that

3. Plaintiff unjustifiably refused the March 1996 job offer of a suitable night auditor position with the defendant-employer. Assuming arguendo that plaintiff did not accept this job offer for the position in Charlotte, North Carolina because he was afraid to return to his former position, such a fear does not justify plaintiff's refusal when no evidence was presented that such a fear caused plaintiff to suffer an inability to perform the job safely.

We hold that the findings made by the Commission support its conclusion that the position offered to plaintiff was "suitable" in terms of his physical ability to perform it, as well as its conclusion that the plaintiff's refusal to accept the tendered employment was unjustified.

N.C. Gen. Stat. § 97-32 (1999) requires the employment offered an employee be "suitable to his capacity." Our appellate decisions have defined "suitable" employment to be any job that a claimant "is capable of performing considering his age, education, physical limitations, vocational skills, and experience." *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994). Although there is ample medical evidence that plaintiff was able to perform the job of night auditor at Howard Johnson's when that job was offered to him, he strenuously argues that the Commission erred in failing to consider his change of residence from North Carolina to California and his fear of returning to his former employment in determining that his refusal of employment was unjustified. We disagree.

While it seems obvious that suitable employment for a person would normally be located within a reasonable commuting distance of that person's home, none of our appellate decisions deal with the situation where a worker moves from North Carolina to a distant state following his compensable injury and then rejects an offer to return to his former employment. Our Employment Security Act provides in part that "[i]n determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and

prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence." N.C. Gen. Stat. § 96-14(3) (1999).

Some of our sister states have held that their counterpart of our Industrial Commission could consider the residence of the employee at the time of the job offer in determining whether the employee was justified in refusing the offer of employment. See, for example, *Food Lion, Inc. v. Lee*, 431 S.E.2d 342 (Va. App. 1993) (justification is a much broader inquiry than just the " 'intrinsic aspects of the job[]' ") (quoting *Johnson v. Virginia Employment Comm'n*, 382 S.E.2d 476, 478 (Va. App. 1989)); *Jones-Jennings v. Hutzel Hospital*, 565 N.W.2d 680 (Mich. App. 1997), *appeal denied*, 586 N.W.2d 233 (Mich. 1998) (holding where distance is a factor in determining the reasonableness of an employee's refusal of a bona fide offer of employment the court looks at the employee's place of residence at the time the offer is made); *Roadway Express, Inc. v. W.C.A.B.*, 659 A.2d 12 (Pa. Commw. 1995), *appeal denied*, 670 A.2d 145 (Pa. 1995) (holding that in order for a job to be "available" to an employee the court must consider physical limitations, age, education, work experience, and " 'other relevant considerations, such as his place of residence' ") (quoting *Kachinski v. W.C.A.B.*, 532 A.2d 374, 379 (Pa. 1987)); *City of Pittsburgh/PMA Mgmt. Corp. v. W.C.A.B.*, 705 A.2d 492 (Pa. Commw. 1998) (holding that an employee is not disqualified from receiving benefits when he relocates in good faith and the employer in that case must refer him to a job within reach of his new residence). Here, however, plaintiff's testimony regarding the job offer was centered on how he "felt" physically, not the location of the job.

As to plaintiff's contention that he was afraid to return to his former employment, this Court concluded in *Bowden v. The Boling Company*, 110 N.C. App. 226, 429 S.E.2d 394 (1993), that

> if a person's fear of returning to work renders the job unsafe for his performance then it is illogical to say that a suitable position has been offered. Although plaintiff may be able to perform work involving the use of his right arm, the availability of positions for a person with one functional arm does not in itself preclude the Commission from making an award for total disability if it finds upon supported evidence that plaintiff because of other preexisting conditions is not qualified to perform the kind of jobs that might be available in the marketplace. While the positions offered to plaintiff by defendants may in fact be performed by a person

> with only one functional arm, the question is whether the jobs could be performed safely by this plaintiff.

Id. at 232-33, 429 S.E.2d at 398 (citation omitted).

The evidence offered by plaintiff does not support his theory that he refused the offer of his former employment as night auditor because he was frightened to return to the job. The Commission found as a fact that "[p]laintiff did not testify that he was afraid to return to the position offered by the defendant-employer in late March 1996 nor was any evidence presented that plaintiff could not safely perform the night auditor position." An examination of the transcript of the plaintiff's hearing testimony reveals the correctness of the Commission's finding. Plaintiff testified at the hearing before the deputy commissioner that at the time of the defendant's job offer in March he could neither stand nor walk, so he was not interested in the offer because of "how [he] felt at that time." Therefore, it is clear that plaintiff based his rejection of the job offer on his perceived physical limitations, not on his fears for his safety or his distance from his former job location.

Faced with conflicting evidence about plaintiff's ability to perform the job of night auditor in March 1996, the Commission elected to accept the opinion of Dr. Stephen Smith that plaintiff was then able to carry out the job as offered by defendant. The credibility of witnesses and the weight to be given credible evidence are for the Commission. Therefore, we hold that the Commission's conclusion that plaintiff "unjustifiably refused the March 1996 job offer of a suitable night auditor position with the defendant-employer" is supported by the findings of fact, which are in turn supported by competent evidence of record.

[4] Finally, plaintiff assigns error to the effect of the Commission's decision, pursuant to N.C. Gen. Stat. § 97-32, to halt all compensation from the date that the offer was made and rejected. Plaintiff argues that even if the Commission was correct in concluding that the plaintiff rejected without justification a suitable job offer, plaintiff would still be entitled to some compensation following his rejection of the night auditor position. Plaintiff reasons that he was offered his former job at the same weekly salary of $200.00 but was not offered lodging, which the Commission valued at $100.00 per week. Therefore, he concludes, he would be entitled to $66.67 per week (two-thirds of $100.00) for his loss of earnings.

While plaintiff capably argues his position, we must agree with the Commission that the express terms of N.C. Gen. Stat. § 97-32 prohibit an employee from receiving *any* compensation during the continuance of his refusal to accept employment suitable to his capacity. *Id.* The statutory provision has been held inapplicable to an employee determined to be *totally* and permanently disabled pursuant to N.C. Gen. Stat. § 97-29. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986). One of its purposes is to prevent an employee who is *partially* disabled from refusing suitable employment and thus increasing the amount of compensation payable to him. *Id.* As we discussed above, the Commission correctly concluded that the plaintiff unjustifiably refused an offer of suitable employment. Therefore, the Commission was also correct in concluding that plaintiff's "right to compensation is suspended so long as he continues to refuse suitable employment." Plaintiff's final assignment of error is overruled.

Affirmed.

Judges WYNN and SMITH concur.

JARRETT KAMINSKY AND SUSAN KAMINSKY, PLAINTIFF-APPELLEES V. ALFRED SEBILE, DEFENDANT-APPELLANT

No. COA99-1037

(Filed 5 September 2000)

1. Appeal and Error— appealability—motion in limine

Although defendant assigns error to the trial court's denial of his motion in limine to exclude the injured plaintiff's medical bills, a motion in limine is not appealable.

2. Damages and Remedies— Civilian Health and Medical Program of the Uniformed Services—medical expenses—recovery by individual plaintiff

The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict on the issue of whether an individual plaintiff may bring an action to recover medical expenses under the Federal Medical Recovery Act of 42 U.S.C.A. §§ 2651-2653 paid through the Civilian Health and Medical Program of the Uniformed Services under 10 § U.S.C.A. 1072,

because the individual plaintiff's right exists regardless of the United States' right to pursue an action to recover from the tortfeasor.

3. Damages and Remedies— Civilian Health and Medical Program of the Uniformed Services—medical expenses—government fails to assert or abandons right—collateral source rule

An individual plaintiff may bring an action to recover medical expenses under the Federal Medical Recovery Act of 42 U.S.C.A. §§ 2651-2653 paid through the Civilian Health and Medical Program of the Uniformed Services under 10 § U.S.C.A. 1072 only when the government fails to assert or abandons its right of recovery under the Federal Medical Recovery Act since the collateral source rule applies to permit full recovery.

4. Collateral Estoppel and Res Judicata— res judicata—no privity—interests not legally represented

The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict even though defendant asserted res judicata barred plaintiff from asserting a claim for medical expenses after the United States' prior case and dismissal with prejudice, because: (1) there is no privity between plaintiff and the United States; and (2) plaintiff had no control over the previous litigation, and nothing in the record indicates plaintiff's interests were legally represented in the previous trial.

Appeal by defendant from judgment entered 9 March 1999 and order entered 21 April 1999 by Judge Ronald L. Stephens in Cumberland County Superior Court. Heard in the Court of Appeals 19 May 2000.

Boose and Gurnee, by Michael C. Boose, for plaintiff-appellee.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence and Robert A. Hasty, Jr., for defendant-appellant.

EDMUNDS, Judge.

Defendant Alfred Sebile appeals jury verdicts in favor of plaintiffs Jarrett and Susan Kaminsky. We find no error.

Jarrett is the son of Susan and Randall Kaminsky, both of whom were active-duty military personnel with the United States Army at

the time of the incident leading to this action. Defendant, a friend of Jarrett's father, was clearing land to build a house and farm, and Jarrett's father asked his son, who was then fourteen years old, if he would like to help. On 7 September 1993, while working with defendant at a hydraulic log-splitting machine, Jarrett's little finger on his left hand became trapped and was severed below the bottom joint. Jarrett received treatment first at Womack Army Hospital, then at Duke Medical Center.

Pursuant to 10 U.S.C.A. § 1072 (1998), Jarrett's injuries were covered by the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), because Jarrett was a dependent of members of the armed services. Accordingly, CHAMPUS paid most of the medical expenses resulting from Jarrett's injury.

Susan originally filed an action against defendant both individually and as the guardian *ad litem* of Jarrett, but later dismissed the case without prejudice. Thereafter, on 5 September 1996, the United States brought an action against defendant under the Federal Medical Care Recovery Act (FMCRA), 42 U.S.C.A. §§ 2651-2653 (1994 & Supp. 2000), to recover the "reasonable value of [] care and treatment" furnished to Jarrett. On 18 April 1997, the United States dismissed its claims against defendant with prejudice. The case at bar was filed on 5 June 1997 by Jarrett, who had then reached the age of majority, and Susan. Plaintiffs sought to recover for personal injuries and medical expenses.

When the case was called for trial on 8 February 1999, defendant filed and argued a motion *in limine* to preclude any evidence of medical bills incurred for the treatment and care of Jarrett. Defendant cited 10 U.S.C.A. §§ 1095 (1998, amended 1999), 2651 (1994, amended 1996) for the proposition that only the United States Government "incurred" medical expenses. Defendant also argued that the United States' dismissal with prejudice of its claim against defendant was *res judicata* as to any claim brought by Susan. The trial court denied defendant's motion.

The jury found in favor of plaintiffs and awarded Jarrett $35,000 in damages for personal injuries and Susan $29,000 in damages for medical expenses. The trial court entered judgment on 9 March 1999. On 15 March 1999, defendant filed a Motion for Judgment Notwithstanding the Verdict and Alternative Motion for New Trial, which was denied by the trial court on 21 April 1999. Defendant appeals.

I.

[1] Defendant assigns error to the trial court's denial of his motion *in limine* to exclude the medical bills for Jarrett's treatment. However, our appellate courts repeatedly have held that motions *in limine* are not appealable. *See, e.g., State v. Hayes*, 350 N.C. 79, 511 S.E.2d 302 (1999); *Southern Furn. Hardware v. Branch Banking and Trust*, 136 N.C. App. 695, 526 S.E.2d 197 (2000); *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 504 S.E.2d 102 (1998); *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 481 S.E.2d 347 (1997). This assignment of error is overruled.

II.

[2] Defendant's remaining assignments of error relate to the trial court's denial of his motion for judgment notwithstanding the verdict (JNOV). *See* N.C. Gen. Stat. § 1A-1, Rule 50 (1999). He argues, first, that the federal government had the exclusive right to recover from defendant, and second, that the United States' previous action and dismissal with prejudice is *res judicata* as to Susan's present claim. We will address these contentions *seriatim*.

In ruling on a motion for JNOV, "the [non-movants'] evidence must be taken as true and all the evidence must be viewed in the light most favorable to [them], giving [them] the benefit of every reasonable inference which may be legitimately drawn therefrom, with conflicts, contradictions, and inconsistencies being resolved in the [non-movants'] favor." *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 6, 437 S.E.2d 519, 522 (1993) (citation omitted). Our review of a denial of a motion for JNOV is "whether the evidence viewed in the light most favorable to [the non-movants] is sufficient to support the jury verdict." *Suggs v. Norris*, 88 N.C. App. 539, 543, 364 S.E.2d 159, 162 (1988) (citation omitted).

The FMCRA controls the nature of the United States' right to recover from a tortfeasor the reasonable value of the care and treatment furnished to an injured person. Section 2651 reads in pertinent part:

> (a) Conditions; exceptions; persons liable; amount of recovery; subrogation; assignment
>
> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment . . . to a person who is injured . . . after the

effective date of this Act, under circumstances creating a tort liability upon some third person . . . to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. . . .

(b) Enforcement procedure; intervention; joinder of parties; State or Federal court proceedings

The United States may, to enforce such right, (1) intervene or join in any action or proceeding brought by the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, against the third person who is liable for the injury or disease; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person who is liable for the injury or disease, in a State or Federal court, either alone . . . or in conjunction with the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors.

42 U.S.C.A. § 2651(a), (b) (1994). Additionally, the Act provides:

(b) Settlement, release and waiver of claims

. . . [T]he head of the department or agency of the United States concerned may (1) compromise, or settle and execute a release of, any claim which the United States has by virtue of the right established by section 2651 of this title; or (2) waive any such claim, in whole or in part, for the convenience of the Government, or if he determines that collection would result in undue hardship upon the person who suffered the injury . . . resulting in care or treatment . . . .

(c) Damages recoverable for personal injury unaffected

No action taken by the United States in connection with the rights afforded under this legislation shall operate to deny to the injured person the recovery for that portion of his damage not covered hereunder.

Id. § 2652(b), (c) (1994). The issue before us, calling for an interpretation of the Act, is one of first impression for the appellate courts of this state.

The cardinal principle of statutory construction is to ensure accomplishment of the legislative intent. *See L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C. App. 286, 289, 502 S.E.2d 415, 417 (1998). Accordingly, we must consider " 'the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.' " *Hayes v. Fowler*, 123 N.C. App. 400, 404-05, 473 S.E.2d 442, 445 (1996) (citation omitted). "When the language of a statute 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)). However, if a literal reading of the statutory language "yields absurd results . . . or contravenes clearly expressed legislative intent, 'the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.' " *Id.* (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)).

In the case at bar, we are asked to interpret the FMCRA to determine whether an individual plaintiff may bring an action to recover medical expenses paid through CHAMPUS, or whether that right belongs exclusively to the United States. Because the act requiring interpretation is a federal act and thus is applicable throughout the nation, we begin with a review of other jurisdictions. The majority of jurisdictions that have considered the issue permit a similarly-situated individual plaintiff to *assert* a claim for medical expenses against a tortfeasor. *See, e.g., Dempsey by and through Dempsey v. U.S.*, 32 F.3d 1490 (11th Cir. 1994); *Mays v. United States*, 806 F.2d 976 (10th Cir. 1986); *Kornegay v. U.S.*, 929 F. Supp. 219 (E.D. Va. 1996); *MacDonald v. U.S.*, 900 F. Supp. 483 (M.D. Ga. 1995); *Lozada for and on behalf of Lozada v. U.S.*, 140 F.R.D. 404 (D. Neb. 1991); *1st of America Bank, Mid-Michigan, N.A. v. U.S.*, 752 F. Supp. 764 (E.D. Mich. 1990); *Kennedy v. U.S.*, 750 F. Supp. 206 (W.D. La. 1990); *Guyote v. Mississippi Valley Gas Co.*, 715 F. Supp. 778 (S.D. Miss. 1989); *Transit Homes, Inc. v. Bellamy*, 671 S.W.2d 153 (Ark. 1984), *overruled on other grounds by Peters v. Pierce*, 858 S.W.2d 680 (Ark. 1993); *Whitaker v. Talbot*, 177 S.E.2d 381 (Ga. App. 1970); *Piquette v. Stevens*, 739 A.2d 905 (Md. Ct. Spec. App. 1999), *cert. granted*, 745 A.2d 436 (Md. 2000); *Arvin v. Patterson*, 427 S.W.2d 643 (Tex. Civ.

App. 1968). *But see McCotter v. Smithfield Packing Co., Inc.*, 868 F. Supp. 160, 163 (E.D. Va. 1994) ("Under the Federal Medical Care Recovery Act, the claim for medical damages suffered as the result of a tortious act and provided by the United States belongs solely to the United States.").

We agree with the majority rule that the individual plaintiff's right exists regardless of the United States' right to pursue an action to recover from the tortfeasor. The statute states in section 2651(a) that the United States has "*a* right to recover" as opposed to "*the* right to recover," indicating that the right of the United States is not exclusive. In addition, because the plain language of the FMCRA (a) allows for waiver by the United States of its claim for recovery and (b) specifically protects the rights of injured plaintiffs to recover "that portion of his damage not covered hereunder," it follows that the injured plaintiff has a cause of action for medical expenses against the tortfeasor. Accordingly, we hold that defendant's contention that the United States had the *exclusive* right to pursue recovery for medical expenses is without merit.

[3] This holding does not necessarily mean, however, that recovery by both the United States and the injured plaintiff is permitted. Continuing our review of other jurisdictions, we observe that while courts have allowed an individual plaintiff to bring an action, the amount he or she may recover has been guided largely by the state's collateral source doctrine. In the case at bar, defendant contends that application of North Carolina's collateral source rule precludes Susan's recovery of the medical expenses paid through CHAMPUS. Although the specific language of the collateral source rule varies from state to state, the gist of these rules is to "exclude[] evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff." *Badgett v. Davis*, 104 N.C. App. 760, 764, 411 S.E.2d 200, 203 (1991). The policy behind the rule is to prevent a tortfeasor from "reduc[ing] his own liability for damages by the amount of compensation the injured party receives from an independent source." *Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981).

Our survey of other jurisdictions indicates a generally consistent pattern that when a plaintiff brings an action under the Federal Tort Claims Act (FTCA), *see* 10 U.S.C.A. §§ 2731-1736 (1998), against the United States, which already has paid the medical expenses of the injured plaintiff, CHAMPUS benefits will not fall within the collateral

source rule. Consequently, in such a case, the damages that the plaintiff may recover will be offset by the amount paid by the government. *See, e.g., Dempsey*, 32 F.3d 1490; *Mays*, 806 F.2d 976; *Kornegay*, 929 F. Supp. 219; *MacDonald*, 900 F. Supp. 483; *Lozada*, 140 F.R.D. 404; *1st of America Bank*, 752 F. Supp. 764; *Kennedy*, 750 F. Supp. 206. However, when the tortfeasor is other than the United States, we find less uniformity. One court has interpreted the FMCRA to say that an injured plaintiff's entire claim for medical expenses is subrogated to the government, thus precluding the plaintiff from recovering from the defendant. *See Smith v. Foucha*, 172 So. 2d 318, 322 (La. App. 1965). However, the more common approach has been to apply the collateral source rule, thus allowing the individual plaintiff full recovery of medical expenses when the United States either does not assert or abandons its right under the FMCRA. *See, e.g., Guyote*, 715 F. Supp. 778 (holding that action was controlled by Mississippi's collateral source rule, which precluded tortfeasor from having damages reduced by amount paid by United States); *Bellamy*, 671 S.W.2d 153 (allowing plaintiff to recover damages for future medical expenses where, although Veterans' Administration had intervened pursuant to the FMCRA for cost of both past and future medical expenses, it had abandoned its claim for future medical services before trial and was only awarded costs of past medical services on its subrogation claim); *Whitaker*, 177 S.E.2d 381 (allowing plaintiff to recover medical expenses when government had not acted within the three-year statute of limitations in order to prevent tortfeasor from obtaining a windfall); *Piquette*, 739 A.2d 905 (stating that, pursuant to collateral source doctrine, an injured party may have a claim for medical expenses when the United States does not assert its right under the Act); *Arvin*, 427 S.W.2d 643 (holding that plaintiff could recover where government had not pursued its remedies against defendant). *But see Commercial Union Ins. Co. v. U.S.*, 999 F.2d 581, 588 (D.C. Cir. 1993) (stating that "an agency's decision not to sue is not the equivalent of an express waiver" under section 2652(b)).

We believe that the majority rule, which allows a plaintiff to recover only when the government *fails to assert or abandons* its right of recovery under the FMCRA, is the better rule. The FMCRA was enacted to protect the government's interests by permitting the United States to recover payments made as a result of a tortfeasor's acts. Accordingly, rights under the FMCRA exist for the United States to assert; they may not be asserted defensively to allow a windfall for a tortfeasor. As the *Guyote* court stated:

> [T]he focus of the Act is the government's right of recovery; it does not address or purport to affect the injured party's right other than to allow the government to require assignment of that right. Whatever rights of recovery an injured party may have under state law remain intact under the Act.

715 F. Supp. at 780. Additionally, if the government abandons its right or fails to assert it, there is no risk of double liability for the defendant.

Furthermore, the majority rule comports with North Carolina's collateral source rule. The Supreme Court decision in *Cates v. Wilson*, 321 N.C. 1, 361 S.E.2d 734 (1987), is the leading authority on the collateral source doctrine. In deciding whether Medicaid payments should fall within the rule, the Court stated:

> In *Young v. R.R.*, 266 N.C. 458, 466, 146 S.E.2d 441, 446 (1966), this Court explained the collateral source rule. According to this rule a plaintiff's recovery may not be reduced because a source collateral to the defendant, such as "a beneficial society," the plaintiff's family or employer, or an insurance company, paid the plaintiff's expenses. Rather, an injured plaintiff is entitled to recovery " '. . . [sic] for reasonable medical, hospital, or nursing services rendered him, whether these are rendered him gratuitously or paid for by his employer.' "
>
> The instant case presents the issue of whether the collateral source rule embraces gratuitous government benefits. . . .
>
> With regard to Medicaid payments already received we find our *Young* decision persuasive. In *Young* we held that receipt of insurance proceeds should not reduce a plaintiff's recovery. Medicaid is a form of insurance paid for by taxes collected from society in general. "The Medicaid program is social legislation; it is the equivalent of health insurance for the needy; and, just as any other insurance form, it is an acceptable collateral source."

Id. at 5-6, 361 S.E.2d at 737-38 (internal citations omitted). The Court went on to find justification for the application of the rule in the fact that "North Carolina law entitles the state to full reimbursement for any Medicaid payments made on a plaintiff's behalf in the event the plaintiff recovers an award for damages." *Id.* at 6, 361 S.E.2d at 738. The statute to which the Court referred is N.C. Gen. Stat. § 108A-57 (Supp. 1985), which provided in pertinent part:

> [T]he State, or the county providing medical assistance benefits, shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of such assistance, or of his personal representative, his heirs, or the administrator or executor of his estate . . . .

The *Cates* Court went on to say:

> Our decisions establish the principle that evidence of a collateral benefit is improper when the plaintiff will not receive a double recovery. *See Spivey v. Wilcox Co.*, 264 N.C. 387, 390, 141 S.E.2d 808, 811-12 (1965). Because Medicaid provides for a right of subrogation in the state to recover sums paid to plaintiffs, we find that the principle enunciated in *Spivey* applies in the instant case as well.

321 N.C. at 6-7, 361 S.E.2d at 738.

Applying the *Cates* analysis to the case *sub judice*, the FMCRA, like section 108A-57(a), provides for a right of subrogation by the United States. Although the government here abandoned its right to recovery under the FMCRA, the existence of the right permits a sufficient analogy between Medicaid benefits and CHAMPUS coverage. Under *Cates*, if a plaintiff recovers for the past Medicaid payments he or she received and the state fails to seek reimbursement, the plaintiff would not then be required to return the money to the defendant-tortfeasor. Similarly, defendant here should not receive a windfall because the government abandoned its right under the FMCRA. Accordingly, plaintiff Susan properly sought to recover for the medical expenses of Jarrett and, because the United States abandoned its right to recover under the FMCRA, the collateral source rule applies to permit full recovery. This assignment of error is overruled.

[4] Finally, defendant contends his motion for JNOV should have been granted on the grounds of *res judicata*. He argues that the United States' prior case and dismissal with prejudice now precludes Susan from asserting a claim for medical expenses.

"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.' " *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996) (quoting *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)). For the doctrine to apply to now preclude Susan's claim, defendant must show

" 'that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both [the party asserting *res judicata* and the party against whom *res judicata* is asserted] were either parties or stand in privity with parties.' " *Id.* (alteration in original) (quoting *Hall*, 318 N.C. at 429, 349 S.E.2d at 557). Defendant has failed in this showing; there is no privity between Susan and the United States. In general, "privity" requires that Susan and the government be " 'so identified in interest' " as to " 'represent[] the same legal right.' " *Id.* (citations omitted). Privity is not established by the mere presence of a similar interest in a claim, nor by the fact that the previous adjudication may affect the subsequent party's liability. *See id.* Furthermore, because Susan had no control over the previous litigation and nothing in the record indicates that Susan's interests were legally represented in the previous trial, there can be no privity. *See County of Rutherford ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 76, 394 S.E.2d 263, 266 (1990). This assignment of error is overruled.

No error.

Chief Judge EAGLES and Judge LEWIS concur.

TERESA BRUNO, PLAINTIFF-APPELLANT v. CONCEPT FABRICS, INC., AND R. A. GLEISSNER, DEFENDANTS-APPELLEES

No. COA99-1032

(Filed 19 September 2000)

1. Workers' Compensation— industrial accident—supervisor's actions not willful—contributory negligence by plaintiff

The trial court did not err by granting defendant Gleissner's motion for summary judgment in a negligence action arising from an industrial accident which resulted in the amputation of plaintiff's arm where plaintiff was given prescription medication and advised not to operate heavy machinery; she went to work and reported to defendant Gleissner, her supervisor and the plant manager, that she had taken prescription medication; defendant Gleissner testified in his deposition that plaintiff was offered the chance to return home and not work; and plaintiff began operat-

ing the picker machine. The threshold question for determining whether an employee may maintain a common law action against a co-employee for injuries arising out of and in the course of the employment is whether the co-employee's conduct was willful, wanton and reckless; here, defendant Gleissner's actions do not support an inference that he intended that plaintiff be injured or was manifestly indifferent to the consequences of her operating the picker machine. Even assuming willful negligence, plaintiff's conduct in reporting to work after taking prescription medication in violation of company policy and multiple warnings and the manner of her operation of the machinery constitute contributory negligence as a matter of law.

2. **Workers' Compensation— industrial accident—civil action against employer—substantial certainty of injury—insufficient evidence**

The trial court did not err by granting summary judgment for defendant Concept Fabrics in an action arising from an industrial accident which resulted in the amputation of plaintiff's arm. An employee is allowed to pursue a civil action against her employer rather than a Workers' Compensation action where the employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death; here, substantial certainty of injury was not established, even considering in the most favorable light evidence that plaintiff was allowed to operate a machine which required jams to be cleared by hand while taking prescription medication, because the machine had been operating for eleven years without incident, had passed OSHA inspections prior to plaintiff's accident, and there was no evidence that defendant failed or refused to take necessary steps to reduce the likelihood of injury or failed to adhere to relevant industry standards.

Appeal by plaintiff from judgment entered 25 February 1999 by Judge Melzer A. Morgan, Jr., in Randolph County Superior Court. Heard in the Court of Appeals 14 August 2000.

On 17 October 1995, Teresa Bruno (plaintiff) was injured while operating a picker machine in the course and scope of her employment with the defendant Concept Fabrics, Inc. and under the supervision of the defendant R.A. Gleissner. As a result of her injuries, plaintiff's arm had to be amputated. Plaintiff brought this action seeking compensatory and punitive damages from both Concept Fabrics,

Inc. and Gleissner. The trial court entered summary judgment for both Concept Fabrics, Inc. and Gleissner, and plaintiff appealed.

Donaldson & Black, P.A., by Jeffrey K. Peraldo, for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten, for defendant appellees.

HORTON, Judge.

Plaintiff contends that there are disputed factual issues in this case which prevent the entry of summary judgment. As to defendant Gleissner, plaintiff alleges a claim pursuant to the decision of our Supreme Court in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). Further, plaintiff alleges that defendant Concept Fabrics, Inc. is liable for damages pursuant to the holding of the Supreme Court in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). We will discuss separately the propriety of summary judgment as to each defendant.

I. Defendant R.A. Gleissner

[1] Concept Fabrics, Inc. (Concept), operates a textile mill in Randolph County, North Carolina. Plaintiff began work at the plant in June 1994. On 16 June 1994, plaintiff signed her employer's Substance Abuse Policy, which included the following paragraph:

> It is also against the company's policy to report to work under the the [sic] influence of intoxicants such as alcohol or illegal or unprescribed drugs, as well as prescribed drugs which induce an unsafe mental or physical state. Employees who violate this policy will be subject to disciplinary action, up to and including termination.

On 17 October 1995, plaintiff was operating a "picker" machine, which breaks up fibers in order to spin and weave them into fabric. The machine uses a moving drum and rollers to break up the clumps of fibers. The processed material, known as "sliver," goes first to the carding department and then to the spinners. During processing, the material sometimes "laps," or gets caught up on the drum or rollers and must be cut off with a utility knife. The proper method of removing "the lap" is to disengage the machine and either remove the lap by hand or through the use of the operator's utility knife.

Plaintiff's shift began at 3 o'clock p.m. on 17 October 1995. Earlier that day, plaintiff visited her physician. Plaintiff had been experiencing marital problems, and the physician prescribed Amitriptyline, an antidepressant, and Ativan, "nerve pills," for her. Plaintiff took Ativan prior to arriving at her work site. Plaintiff's physician advised her not to operate heavy machinery while taking the Ativan, as did the pharmacist who filled the prescription. A leaflet which accompanied the prescription also warned the user against operating heavy machinery during its use. Plaintiff testified in her deposition that she read and understood the leaflet prior to arriving at work. When she arrived at the Concept plant, plaintiff informed her supervisor, defendant Gleissner, that she had gone to the doctor and that the doctor had given her medication. As plant manager, defendant Gleissner was responsible for employee safety at the Concept factory. Plaintiff testified that she then "asked [Gleissner] if I could back-wind or sweep or anything like that. And he said that there wasn't any of that to do and that he needed the picker to run. And he sent me to work." Mr. Gleissner testified in his deposition that when plaintiff reported to work on the date of the accident she told him about her husband "having just checked himself into rehab, and how she was . . . excited, upset about it . . . ." He recalled that plaintiff told him she had taken medicine to calm her nerves, but did not appear to be drugged. He also testified that she stated that she could work. He further testified:

> And I said, well, you know, if you want, you can go home; or if you get feeling upset or feeling bad, you can go sit down. Which that was common practice for me to offer that to anyone. But she said, I want to work, I need to work.

Id. Finally, Mr. Gleissner testified that he did not ask plaintiff what the side effects of her medication were, nor did she volunteer the information. Later that shift, plaintiff was injured as described above.

Plaintiff also offered the deposition testimony of defendant Gleissner's wife, Mary Louise Gleissner. Mrs. Gleissner testified that in their conversations after the accident, Mr. Gleissner stated that:

> Teresa did not want to run the picker that day, but that wasn't unusual, because nobody liked to run the picker. And he told her that if she—if she didn't want to run the picker, then he would have to let her go home. And that she said, no, she couldn't go home. She had to work.

> And I remember him saying that she had said, can't I sweep? And he said, no, you can't sweep. I can't pay you to sweep. That if you don't want to run the picker—if you can't run the picker, then you have to go home. And the decision was left, and she said, no, I have to work. I have to stay.

Normally, the Workers' Compensation Act provides an exclusive remedy for an employee injured as a result of an on-the-job accident. *Wiggins v. Pelikan, Inc.*, 132 N.C. App. 752, 755, 513 S.E.2d 829, 832 (1999). *See* N.C. Gen. Stat. §§ 97-9 and 97-10.1 (1999). Our Supreme Court held in *Pleasant*, however, that the Workers' Compensation Act does not shield a co-employee from liability for injury to another employee caused by willful, wanton and reckless negligence. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 249.

In *Pleasant*, plaintiff and defendant were co-employees. On 13 May 1980, plaintiff was seriously injured while walking across the work site parking lot when he was struck by a truck driven by defendant. Plaintiff sued defendant in a civil action alleging defendant's actions were willful, reckless and wanton in that he deliberately drove his truck towards plaintiff in an attempt to see how closely he could operate the vehicle to the plaintiff. Defendant testified at trial that he only intended to frighten the plaintiff with his actions.

Subsequently, the trial court granted defendant's motion for a directed verdict. Plaintiff appealed, and a divided panel of this Court affirmed. On appeal, the Supreme Court held that "the North Carolina Workers' Compensation Act does not insulate a co-employee from the effects of his willful, wanton and reckless negligence." *Id.* at 717, 325 S.E.2d at 250. Based on this holding, the *Pleasant* Court reversed the Court of Appeals' decision affirming a directed verdict in favor of the defendant, concluding that the plaintiff had alleged willful, wanton and reckless negligence by the defendant.

The threshold question in determining whether an employee may maintain a common law action against a co-employee for injuries arising out of and in the course of the employee's employment is, therefore, whether the co-employee's injurious conduct was willful, wanton and reckless. Thus, in the present case we must first determine whether the summary judgment evidence viewed in the light most favorable to plaintiff shows that Gleissner's alleged actions constituted willful, wanton and reckless negligence. "Wanton and reckless" conduct is defined as conduct "manifesting a reckless disregard for the rights and safety of others." *Pleasant*, 312 N.C. at 714, 325

S.E.2d at 248. "Willful negligence" is "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." *Id.*

In *Echols v. Zarn, Inc.*, 116 N.C. App. 364, 448 S.E.2d 289 (1994), this Court applied the willful, wanton and reckless standard to determine whether an employee could maintain a civil suit against a co-employee for injuries arising out of and in the scope of employment. In *Echols*, plaintiff Cynthia Echols suffered serious injury when her hand was caught in a molding machine that she was operating as an employee of Zarn, Inc. The injury occurred when plaintiff reached under the safety gate of the molding machine to remove a plastic part, and the molding machine closed on and crushed plaintiff's right hand. Plaintiff brought a civil action against Zarn, Inc. (Zarn) and a co-employee, Edith Barnett. As to the action against Barnett, plaintiff alleged that Barnett was willfully, wantonly and recklessly negligent in that she directed plaintiff to remove the plastic parts from the molding machine by reaching under the safety gate in violation of Zarn's safety rules. The trial court granted defendant's motion for summary judgment, and plaintiff appealed.

In affirming summary judgment for the defendant, this Court found that the alleged negligent behavior by defendant Barnett did not "rise to the level of conduct necessary to create personal liability over and above the Workers' Compensation Act." *Echols*, 116 N.C. App. at 377, 448 S.E.2d at 296. The evidence most favorable to the plaintiff tended to show that Barnett was a supervisory employee over plaintiff who was familiar with the molding machine and knew of the tremendous force exerted by the machine. Further, Barnett knew plaintiff was unfamiliar with the molding machine, and that plaintiff was also unfamiliar with the manual removal of the products from the machine. Moreover, although Barnett was in charge of enforcing Zarn's safety rules, Barnett explicitly violated such rules when she directed plaintiff to reach beneath the safety gates to remove parts from the molding machine. In reviewing this evidence the Court stated that "[e]ven if we assume that Barnett knew that reaching under the safety gate could be dangerous, we do not believe this supports an inference that Barnett intended that plaintiff be injured or that she was manifestly indifferent to the consequences of plaintiff reaching under the safety gate." *Echols*, 116 N.C. App. at 376, 448 S.E.2d at 296. Accordingly, this Court concluded that the trial court did not err in granting Barnett's motion for summary judgment.

In *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993), our Supreme Court applied the willful, wanton and reckless standard to a common law action brought by an employee against a co-employee for injuries arising out of the plaintiff's employment. There, plaintiff Donald Pendergrass was injured on the job when his arm was caught in a final inspection machine that he was operating. In the subsequent common law action against his employer and two co-employees, plaintiff alleged that the co-employees were wantonly negligent in that they directed him to operate the final inspection machine "when they knew that certain dangerous parts of the machine were unguarded, in violation of OSHA regulations and industry standards." *Pendergrass*, 333 N.C. at 238, 424 S.E.2d at 394. Our Supreme Court subsequently upheld a motion to dismiss by the co-employees, stating that:

> The negligence alleged as to [the co-employees did] not rise to the level of the negligence in *Pleasant*. Although they may have known certain dangerous parts of the machine were unguarded when they instructed Mr. Pendergrass to work at the machine, we do not believe this supports an inference that they intended that Mr. Pendergrass be injured or that they were manifestly indifferent to the consequences of his doing so.

Id.

With these standards in mind, we now address plaintiff's claim against her co-employee, Richard Gleissner. The evidence viewed in the light most favorable to the plaintiff in support of plaintiff's contention that Gleissner's conduct was willful, wanton and reckless is as follows: Gleissner was a supervisory employee over plaintiff who was familiar with the picker, a potentially dangerous machine. Further, Gleissner knew that plaintiff had taken prescription medication before reporting to work in violation of Concept's Substance Abuse policy. Finally, although Gleissner was in charge of employee safety, he allowed plaintiff to operate the picker instead of sending her home.

In light of the holdings in *Echols* and *Pendergrass*, we do not believe Gleissner's actions support an inference that he intended that plaintiff be injured or was manifestly indifferent to the consequences of her operating the picker machine. Even assuming that Gleissner was willfully negligent in allowing plaintiff to work on a dangerous machine when he knew that she had taken prescription medication, plaintiff's own conduct in reporting to work after taking prescription

medication in violation of Concept's Substance Abuse policy and after multiple warnings against operating heavy machinery, as well as her failure to disengage the picker machine before attempting to remove "lap" material from the drums and rollers, constitutes contributory negligence such as to bar plaintiff's claim. *See Coleman v. Hines*, 133 N.C. App. 147, 515 S.E.2d 57 (1999); *Coble v. Knight*, 130 N.C. App. 652, 503 S.E.2d 703, 706 (1998); and *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 648, 423 S.E.2d 72, 74 (1992).

In *Sorrells*, our Supreme Court reinstated the trial court's dismissal of a Rule 12(b)(6) claim in an action against a dram shop and stated that while they recognized

> the validity of the rule [that the defendant's willful or wanton negligence would avoid the bar of ordinary contributory negligence], we do not find it applicable in this case. Instead, we hold that plaintiff's claim is barred as a result of decedent's own actions, as alleged in the complaint, which rise to the same level of negligence as that of defendant.
>
> . . . In fact, to the extent the allegations in the complaint establish more than ordinary negligence on the part of defendant, they also establish a similarly high degree of contributory negligence on the part of the decedent. Thus, we conclude that plaintiff cannot prevail.

Sorrells, 332 N.C. at 648-49, 423 S.E.2d at 74.

Likewise, in the present case (heard in the context of a motion for summary judgment), assuming that the evidence establishes willful and wanton negligence on the part of defendant, it also establishes a "similarly high degree of contributory negligence on the part of" plaintiff. The uncontradicted evidence shows that plaintiff was admittedly aware that she should not have operated machinery on the day in question, that she was not obligated to operate the picker machine but could have returned home, and that she chose to remain at the plant and operate the picker because she needed to work. If defendant Gleissner is negligent because he allowed plaintiff to operate the picker after being informed that she had ingested some type of prescription medication, then plaintiff is equally negligent in operating the machine after being specifically warned against doing so by three separate sources. Thus, plaintiff's claim is barred because of her contributory negligence as a matter of law. Accordingly, we con-

clude that the trial court did not err in granting Gleissner's motion for summary judgment.

II. Defendant Concept Fabrics, Inc.

[2] Next, we will address whether plaintiff may maintain this action against her employer, Concept Fabrics, Inc. In addition to the prohibition of civil actions against negligent co-employees, the Workers' Compensation Act also bars an employee subject to the Act from maintaining a common law negligence action against her employer. *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247. In *Woodson*, however, our Supreme Court recognized that an employee may pursue a civil action against her employer when the employer "intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct . . . ." *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228.

Thus, the question we must answer in addressing whether plaintiff may maintain this action against her employer, Concept Fabrics, Inc., is whether the evidence, viewed in the light most favorable to the plaintiff, would tend to show that Concept intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death to employees, and plaintiff was injured by that misconduct. Substantial certainty is more than a possibility or substantial probability but is less than actual certainty. *Pastva v. Naegele Outdoor Advertising*, 121 N.C. App. 656, 658-59, 468 S.E.2d 491, 493, *disc. review denied*, 343 N.C. 308, 471 S.E.2d 74 (1996). Factors for substantial certainty which the Court has found instructive in the past include, but are not limited to, the following: (i) the risk existed without injury for some period of time; (ii) the instrumentality of the injury was defective in some manner; (iii) the employer attempted to remedy the risk; (iv) violations of state or federal work safety regulations; (v) failure to adhere to industry practice; and (vi) safety training in the context of the risk causing the harm. *Wiggins*, 132 N.C. App. at 756-58, 513 S.E.2d at 832-33.

One of the more recent cases to address Woodson's "substantial certainty" test is *Wiggins*. There, plaintiff suffered back injuries in the course and scope of her employment when a cart that she was maneuvering tipped, causing her to fall, whereafter the cart fell on plaintiff's back. Plaintiff subsequently brought a *Woodson* action against her employer, Pelikan, Inc., alleging that defendant knew or should have known that the cart was unstable and substantially

certain to cause serious injury or death to an employee. The trial court directed a verdict in favor of defendant, and plaintiff appealed to this Court.

The evidence most favorable to the plaintiff tended to show that the cart was unstable and had been taken to the plant maintenance shop for repairs, but that it had not been repaired due to production requirements. There was also testimony that tended to show that defendant Pelikan was aware of several similar tipping incidents in the past. Although there was no evidence that the cart violated any government safety regulations or industry standards, plaintiff's expert mechanical engineer testified that the design of the cart was inherently unsafe and required a knee brace or stop guard to prevent the cart from falling on the person using it. After plaintiff's injury, a knee brace was welded onto the cart.

After analyzing plaintiff's claim under the *Wiggins* factors, this Court found that plaintiff had failed to show that defendant's conduct with respect to the cart was such that defendant knew it was substantially certain to result in death or serious injury to plaintiff or other employees. The cart had been used for many years without injury and violated no safety regulations or industry standards. Moreover, there was no evidence that defendant refused to implement measures reducing the likelihood of plaintiff's injuries. Thus, plaintiff failed to show the appropriate standard of negligence necessary for her *Woodson* claim, and directed verdict in favor of defendant was affirmed.

In the instant case, evidence considered in the light most favorable to the plaintiff shows that Concept's supervisor allowed plaintiff to operate the picker despite knowledge that she had taken prescription medication and in violation of Concept's Substance Abuse policy. Further, evidence tends to show that the picker machine in question had a history of jamming, requiring the operator to clear the machine by hand, and that employees often left the machine on while clearing certain types of jams.

These allegations do not, however, establish substantial certainty of injury on the part of the defendant. The machine in question had been operating for eleven years without incident and had passed previous OSHA inspections prior to plaintiff's accident. There was no evidence that Concept Fabrics, Inc. had failed or refused to take necessary steps to reduce the likelihood of injury to any employee operating the picker machine, nor any evidence that defendant

failed to adhere to relevant industry standards. We hold that the trial court did not err in granting summary judgment for defendant Concept Fabrics, Inc.

Affirmed.

Chief Judge EAGLES and Judge MARTIN concur.

KAREN S. PATTERSON, PLAINTIFF v. PHILIP E. TAYLOR, DEFENDANT

No. COA99-815

(Filed 5 September 2000)

1. **Appeal and Error— appealability—integrated separation agreement—already stipulated**

   Although defendant contends the trial court erred in failing to conclude the parties' separation agreement was integrated, this issue does not need to be addressed because the parties' counsel stipulated at the hearing below and at oral argument that the agreement was integrated.

2. **Child Support, Custody, and Visitation— separation agreement—joint custody—extrinsic evidence**

   The trial court erred by failing to consider extrinsic evidence of the parties' intent as to the meaning of their children's custody at the time they executed the separation agreement because: (1) the term "joint custody" in the agreement is ambiguous based on the fact that the parties' intent as to their responsibilities to communicate between themselves about the children was not specified in the agreement; (2) the trial court considered only evidence pertaining to communication between the parties after the agreement was executed; and (3) the trial court should have considered all relevant and material extrinsic evidence of the parties' intent at the time the agreement was executed.

   Judge GREENE dissenting.

Appeal by defendant from order entered 13 April 1999 by Judge Charles L. White in Guilford County District Court. Heard in the Court of Appeals 18 April 2000.

Hatfield & Hatfield, by Kathryn K. Hatfield, for plaintiff-appellee.

Robinson & Lawing, L.L.P., by C. Ray Grantham, Jr., and Kristin M. Major, for defendant-appellant.

EDMUNDS, Judge.

Defendant Philip E. Taylor appeals the trial court's judgment finding that plaintiff Karen S. Patterson did not violate their separation agreement and ordering defendant to pay alimony. We reverse and remand for further proceedings.

Plaintiff and defendant were married on 14 February 1975. Three sons were born of the marriage. The parties separated on 16 March 1991 and later divorced. On 17 June 1991, plaintiff and defendant entered into a separation agreement (the agreement) in which they stated that "both parties are fit and proper persons to have care, custody and control of the minor children" and that it was in the "children's best interest that their custody be vested jointly in the parties." Pursuant to the agreement, plaintiff retained physical custody of the two younger children, while defendant retained physical custody of the eldest child. Defendant acknowledged under the agreement that plaintiff could move from North Carolina with the two children without interference from him. The agreement additionally provided that defendant would pay plaintiff alimony of $3,589 per month for 135 months, even if plaintiff re-married.

Plaintiff and the two sons moved to Oklahoma in 1992. Defendant maintained contact with the children by visiting them and telephoning them or plaintiff weekly. In September 1994, plaintiff informed defendant that their youngest son, who was then twelve years old, had experimented with marijuana on one occasion. (The behavior of this child is key to the actions taken by the parties; to preserve his privacy, we will refer to him in this opinion as "A.") Plaintiff added that "A" had told her that the other son in her custody had used LSD. Defendant responded with a letter to plaintiff expressing his concern that she was not treating the situation seriously and stating that he felt "A" should be removed from his current environment to defendant's residence in North Carolina. He ended the letter by writing:

> Knowing . . . you are still unwilling to give ["A"] a chance [in North Carolina], I can only insist that you respect my wishes on these following matters:

I will expect you to keep me informed directly and to advise the children's therapist to send me frequent reports of problems and progress. I will be contacting Ken directly to request these reports; if he asks you, please confirm that I have joint custody of the children and he is required by law to provide appropriate requested information to me just as he does to you.

I want you to send me copies of the drug testing you recently had performed on the boys. I want you to routinely (but at irregular and unexpected times) have drug testing repeated and have copies of those results sent to me also.

You must remember that I have joint custody of the children with you. My only interest lies in the desire to do what is best for all my children and my family.

Defendant contacted "A's" therapist in January 1995 to discuss the child. The therapist spoke of adjustment problems "A" was experiencing at school but did not mention drug use. Plaintiff continued to have "A" randomly tested for drugs from October 1994 through the summer of 1995. Although invoices for these tests were sent to defendant, the invoices did not indicate the test results, and defendant "assumed they were all negative." When "A" visited defendant in the summer of 1995, defendant had him tested and the results were negative.

However, in September, October, and December 1995, "A" tested positive for marijuana. Plaintiff did not advise defendant of these test results, nor did she inform him when she enrolled "A" in a weekly drug-counseling program. In 1996, plaintiff had an agreement with "A" whereby he was grounded until he received a negative drug test, but he was tested only when he chose to be tested. Plaintiff paid for tests with negative results, while "A" paid for tests with positive results. Defendant had no knowledge of or involvement in this agreement because plaintiff had not informed him about "A's" positive drug tests. When plaintiff spoke with defendant in 1996 after receiving positive test results, she testified that defendant, in reference to the children, "might have vaguely said, 'How are they doing?' And I would say, 'Well, they're doing okay.' "

"A" apparently continued using drugs because plaintiff observed that he was "getting more and more listless and losing weight . . . not having a lot of get up and go, [and] bad grades at school." In December 1996, plaintiff decided to place "A" in a voluntary residen-

tial program approximately ninety miles from her home. The program was to last six to twelve months, although it could extend for a longer period. On 20 January 1997, plaintiff wrote defendant to inform him that she was ending her dual health insurance on the children, but she did not mention that "A" would be entering the rehabilitation program. "A" began the program on 4 February 1997, and on 14 February 1997, plaintiff informed defendant of "A's" problems and his whereabouts.

Defendant visited "A" at the program in June 1997. However, after several unsuccessful attempts to contact "A" two months later, one of "A's" counselors informed defendant that "A" was no longer in the program. Convinced that plaintiff had breached the agreement, defendant stopped making alimony payments to plaintiff.

Plaintiff filed suit seeking to collect alimony payments due under the agreement. Defendant answered, denying he had breached the agreement, and counterclaimed, demanding specific performance or recission of the agreement. Defendant alleged that plaintiff breached the agreement by deciding unilaterally to place "A" in a residential substance abuse program without informing him, then removing "A" without defendant's knowledge or consent.

The case was heard without a jury. The trial court found that plaintiff did not breach the agreement because it placed no "affirmative obligation on . . . either party to provide medical records, or to consult with the other with regard to medical treatment, substance abuse treatment, and school decisions, or to obtain approval from the other for other decisions to be made in the child's life." The trial court also found "[t]here is no evidence that plaintiff failed to provide to the defendant any information which he requested related to the child's health, education, or substance abuse." The trial court ordered defendant to make the overdue payments and to pay plaintiff's attorney fees. Defendant appeals.

I.

[1] Defendant first argues that the trial court erred in failing to conclude that the agreement was integrated. Although the trial court did not make such a finding, counsel stipulated at the hearing below and at oral argument that the agreement was integrated. Therefore, we need not address this issue. Because the agreement is integrated, a party's breach of its provisions can relieve the non-breaching party from his or her alimony obligations. *See Nisbet v. Nisbet*, 102 N.C. App. 232, 402 S.E.2d 151 (1991).

II.

[2] We next address defendant's contention that the trial court erroneously failed to consider extrinsic evidence of the parties' intent as to the meaning of their children's custody at the time they executed the separation agreement. A marital separation agreement is subject to the same rules pertaining to enforcement as any other contract. *See Moore v. Moore*, 297 N.C. 14, 252 S.E.2d 735 (1979). When a trial judge sits without a jury, the court's findings of fact are binding on appeal if supported by any competent evidence in the record, but the court's conclusions of law are reviewed *de novo*. *See R.L. Coleman & Co. v. City of Asheville*, 98 N.C. App. 648, 651, 392 S.E.2d 107, 108-09 (1990).

The key to this case is the meaning of the phrase "custody [] vested jointly in the parties" in the context of the agreement. The agreement does not give a definition of the phrase, and both parties' briefs refer to this arrangement as "joint custody." Because the separate living arrangements for the children to which the parties agreed are not now contested, we assume that the phrase "custody [] vested jointly in the parties" is used in the separation agreement to mean "joint legal custody," as opposed to "joint physical custody." As in the case *sub judice*, the bench and bar have proven adept at distinguishing in practice between physical custody and legal custody. Nevertheless, we take this opportunity to suggest to courts and attorneys that precision in the use of these terms in fashioning orders and agreements may avoid later confusion and obviate litigation.

Because there is no question about the physical custody of the children in the case at bar, the following discussion of "joint custody" applies only to "joint legal custody." In addition, because the issue before us arises out of a voluntary separation agreement, our holding is limited to the interpretation of the term in such an agreement.

Other states have defined "joint custody" with varying degrees of specificity. *See, e.g.*, Cal. Fam. Code §§ 3002-3004 (West 1994); Ga. Code Ann. § 19-9-6 (1999); Ind. Code § 31-9-2-67 (1997); Mich. Comp. Laws § 722.26a (1992); N.M. Stat. Ann. § 40-4-9.1 (Michie 1999); Or. Rev. Stat. § 107.169 (1999). In contrast, North Carolina's governing statute refers to "joint custody" but contains neither a definition of the term nor a distinction between "joint legal custody" and "joint physical custody." N.C. Gen. Stat. § 50-13.2 (1999). (As noted above, where we use the term "joint custody" in this opinion, we specifically

mean "joint legal custody.") The statute is relatively unrestrictive, requiring a court ordering "joint custody" to focus on the best interests and welfare of the child, but otherwise allowing the court substantial latitude in fashioning a "joint custody" arrangement. We see no reason why parents entering a voluntary separation agreement should not have equal latitude. Therefore, parents entering such an agreement for "joint custody" may include or omit conditions pertaining to the child's education, health care, religious training, and the like. In short, the parties to a voluntary separation agreement have considerable freedom to reach an agreement for "joint custody" that takes into account various factors including the particularities of the relationships, the personalities involved, the bonds between family members, the needs of the parties, and any other appropriate features that together make each marriage and each family unique.

A practical result of the freedom to draft individualized separation agreements and set up specialized conditions of "joint custody" is that a corresponding responsibility is imposed on the parties to each agreement to allow for the possibility that matters initially "understood" between the parties may later become hotly contested issues. Moreover, the flexibility permitted those drafting custody agreements does not make the term "joint custody" infinitely elastic. The election by the parties to include the term (or, as here, its equivalent) without further definition implies a relationship where each parent has a degree of control over, and a measure of responsibility for, the child's best interest and welfare. *Cf. Black's Law Dictionary* 390 (7th ed. 1999) (defining "joint custody").

Nevertheless, in the absence of a controlling statutory definition or a definition in the voluntary agreement of the term "joint custody," difficulties may arise where the parties to a voluntary agreement use the term without detailing the means of its implementation. Defendant contends that the trial court should have considered extrinsic evidence as to the parties' intent at the time of the execution of the agreement when they agreed to "joint custody." Because of the many variables inherent in an action as complex in human terms as a separation or divorce, we agree with defendant that the bare term "joint custody" in a separation agreement may be ambiguous where there is no additional specific language in the agreement to define "joint custody" or to detail the pertinent duties and responsibilities of the parties. In such a case, the trial court may consider extrinsic evidence to determine the intent of the parties at the time of the execution of the separation agreement setting up "joint custody." *See Bicket*

v. McLean Securities, Inc., 124 N.C. App. 548, 552-53, 478 S.E.2d 518, 521 (1996).

In addition, a trial court seeking to determine the intent of the parties at the time a voluntary agreement was signed may also consider extrinsic evidence of the conduct of the parties as they carry out the agreement. Indeed, because actions speak louder than words, such evidence may be particularly persuasive; for instance, in the case at bar, the agreement was executed in 1991 and the parties lived under it for several years. "In contract law, where the language presents a question of doubtful meaning and the parties to a contract have, practically or otherwise, interpreted the contract, the courts will ordinarily adopt the construction the parties have given the contract *ante litem motam*." *Davison v. Duke University*, 282 N.C. 676, 713-14, 194 S.E.2d 761, 784 (1973) (citations omitted). However, even where a trial court concludes that extrinsic evidence of the parties' behavior implementing the agreement is probative of the parties' intent at the time of the execution of the agreement, the court is not free to consider such evidence to the exclusion of other probative and admissible evidence of the parties' intent when the agreement was executed. In other words, if a trial court considers extrinsic evidence pertaining to interpretation of an ambiguous term, it must consider all relevant and material evidence. It is then the responsibility of the trial court to determine the weight and credibility of that evidence.

Turning now to the case at bar, the trial court correctly noted that the agreement is "silent as to the affirmative obligation on behalf of either party to provide medical records, or to consult with the other with regard to medical treatment, substance abuse treatment, and school decisions, or to obtain approval from the other for other decisions to be made in the child's life." Such silence is not incompatible with "joint custody" because as noted above, unless the parties agree to the contrary, each parent having joint custody pursuant to a voluntary agreement has rights and responsibilities in the child's upbringing, even if these rights and responsibilities are not defined in the agreement. Nevertheless, the term "joint custody" is ambiguous because the parties' intent as to their responsibilities to communicate between themselves about the children was not specified in the agreement. The trial court considered only evidence pertaining to communication between the parties after the agreement was executed. Therefore, the trial court erred when it did not also consider all relevant and material extrinsic evidence of the parties' intent at

the time the agreement was executed. On remand, the court shall permit the parties to present extrinsic evidence of their intent as to this issue at the time the agreement was executed. Once the court has considered the parties' understanding of "joint custody" along with other admissible evidence, the court can determine the applicable duties and responsibilities of the parties. The court may then address the issue of whether plaintiff breached the separation agreement.

The trial court's holding that plaintiff did not breach the separation agreement is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judge McGEE concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

This case presents the single issue of whether the agreement between the parties, vesting child custody "jointly in the parties," is ambiguous so as to permit the introduction of extrinsic evidence regarding the intent of the parties with respect to the agreement. I agree with the majority that the agreement is ambiguous and this case must, therefore, be reversed and remanded for the taking of evidence on the intent of the parties. I do not agree, however, that the inclusion of joint custody language in the agreement "without further definition implies a relationship where each parent has a degree of control over, and a measure of responsibility for, the child's best interest and welfare."

Parties to a custody agreement have complete flexibility in defining the meaning of "joint custody" as it is used in their agreement. *See Lexington Ins. Co. v. Tires into Recycled Energy and Supplies, Inc.*, 136 N.C. App. 223, 225, 522 S.E.2d 798, 800 (1999) (parties may " 'bind themselves as they see fit' by a contract, unless the contract would violate the law or is contrary to public policy") (quoting *Hall v. Refining Co.*, 242 N.C. 707, 709-10, 89 S.E.2d 396, 397-98 (1955)), *disc. review denied*, 351 N.C. 642, —— S.E.2d —— (2000). When custody of a child is determined pursuant to a custody agreement, any degree of control over or measure of responsibility for the child's best interests

must be found in the specific language of the agreement[1] or, in the case of an ambiguous agreement, when extrinsic evidence shows the parties intended some degree of control or responsibility to apply. *See White v. Graham*, 72 N.C. App. 436, 438, 325 S.E.2d 497, 499 (1985) (a separation agreement is a contract and is construed in accordance with the laws governing contracts).

In this case, the parties stated in their agreement that custody was to be vested "jointly in the parties." Because the agreement is ambiguous as to the meaning of the joint custody language, I would remand this case to the trial court for the taking of extrinsic evidence regarding the parties' intended meaning of this language. The meaning of the language, however, must be construed based solely on the intent of the parties.

WESTMINSTER HOMES, INC.; JOHN AND SUSAN EVANS; BAKULESH AND VANDANA NAIK, PETITIONERS V. TOWN OF CARY ZONING BOARD OF ADJUSTMENT, RESPONDENT, AND JEFF THORNE AND LEIGH THORNE, INTERVENORS/RESPONDENTS

No. COA99-973

(Filed 19 September 2000)

Zoning— conditional use ordinance—de novo review—prohibiting installation of gates in fence serving as buffer between subdivisions

The trial court erred in its de novo review of the Cary Board of Adjustment's (Board) interpretation of a conditional use ordinance by concluding the Board's construction of the conditional use to prohibit the installation of gates by petitioners in a fence serving as a buffer along the tract of land between two subdivisions was a manifest error of law, even though the fence blocks homeowners from accessing part of their property, because: (1) the Board was not required to construe the conditional use consistent with any interpretation of any provision in the Cary

1. I acknowledge the general rule that when construing contracts, ordinary words are given their ordinary meaning unless an alternative meaning is provided. *Biggers v. Evangelist*, 71 N.C. App. 35, 42, 321 S.E.2d 524, 529 (1984), *disc. review denied*, 313 N.C. 327, 329 S.E.2d 384 (1985). This rule, however, has no application to the agreement in this case, as no ordinary meaning for the joint custody language used in the agreement exists. Indeed, if an ordinary meaning existed for the joint custody language used in the agreement, then the agreement would not be ambiguous.

Ordinance based on the fact that the Cary Ordinance indicates that conflicting terms contained in a conditional use zoning provision shall not be compromised by the Cary Ordinance provisions; and (2) the primary goal underlying the conditional use, which was to create a barrier between the respective tracts of land, would be subverted by allowing gates as desired in the fence.

Appeal by intervenor respondents from order entered 24 March 1999 by Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 29 March 2000.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr. and Kathleen M. Thornton, for the petitioners-appellees.

Rosenthal & Putterman, by Charles M. Putterman, for the intervenor/respondents-appellants.

LEWIS, Judge.

Intervenor/respondents Jeff and Leigh Thorne appeal the trial court's 24 March 1999 order reversing the Cary Board of Adjustment's determination that petitioners were in violation of a City zoning ordinance. We reverse the trial court's order and remand for entry of a new order consistent with this opinion.

Petitioners John and Susan Evans and Bakulesh and Vandana Naik own tracts of land in the Sherborne subdivision in Cary, North Carolina. They purchased the properties and their homes in December 1997 and June 1998, respectively, from petitioner Westminster Homes, Inc. ("Westminster"), which developed the Sherborne subdivision.

On 24 June 1998, a Zoning Code Enforcement Officer for the Town of Cary Division of Planning and Zoning issued violation notices to petitioners. The cited violation was that "a seven foot high fence located 45 feet off [the Evanses' and Naiks'] property line for protecting natural vegetation from damage, required by zoning condition Z-664-92-PUD, has been disturbed [as a result of installing gates in the fence]. No gates will be allowed in the fence."

Petitioners appealed from the notice of violation and on 10 August 1998, a hearing was held before the Town of Cary Zoning Board of Adjustment ("the Board"). At the hearing, evidence sur-

rounding the enactment and provisions of conditional use zoning permit Z-664-92-PUD ("the conditional use") was presented. The evidence indicated that the circumstances surrounding the conditional use originated in 1992, when Westminster petitioned the Town of Cary to have the Sherborne subdivision property rezoned to a higher density residential subdivision. Homeowners in Harmony Hills, an adjacent neighborhood, protested Westminster's rezoning request. After negotiations, the parties reached an agreement whereby Harmony Hills agreed not to contest the rezoning if Westminster and Sherborne subdivision residents agreed to certain restrictions set forth in the conditional use. In February 1993, the provisions of the conditional use were enacted by the Cary Town Council.

The conditional use requires a "fifty-foot [wide] undisturbed buffer" along the tract of land between Sherborne subdivision and Harmony Hills. Marking this undisturbed buffer is a "seven-foot [high] treated wood fence" required to be placed five feet into the buffer zone. The remaining forty-five feet of land behind the fence is part of petitioners Evanses' and Naiks' lots. Despite their awareness of the conditional use provisions requiring that the buffer zone behind the fence remain "undisturbed," both the Evanses and Naiks constructed gates in the seven-foot fence in order to access the forty-five foot portion of their lots. These gates are the subject of the violation notices issued by the Zoning Code Enforcement Officer. The conditional use contains several provisions relevant to the fence in which these gates were constructed:

> The fence shall be the same architecturally and of the same materials as the fence currently existing between Preston Woods and the McLaurin Tract . . . . The fence shall be installed with the minimum of disturbance to the buffer environment. The fence shall be connected at each end to the fences to be constructed under the respective agreements with Hester and McLaurin in order to preserve continuity and integrity. The fence will always be 45 [feet] from the boundary line or any property corner, and shall intersect at right angles . . . . The integrity and maintenance of this fence will be the responsibility of the developer [of Sherborne subdivision] or new owner. A deed disclosure and recorded plat shall be made by the developer so as to inform all new residents of the placement, integrity and maintenance of the new fence.

The conditional use requires the buffer zone to "remain in its present natural and undisturbed condition." Only one gate located at a sewer easement is specifically denoted as part of the conditional use; how-

ever, its location does not provide the Evanses and Naiks access to the back portion of their lots.

Based upon its interpretation of the language contained in the conditional use, the Board affirmed the decision of the Zoning Code Enforcement Officer, concluding the conditional use ordinance does not permit additional gates to be installed in the fence.

Petitioners sought review by filing a writ of certiorari on 20 October 1998. Before the case was heard, the trial court granted a motion to intervene filed by Jeffrey and Leigh Thorne, owners of a lot immediately adjacent to the petitioners' properties on the other side of the fence. On 15 March 1999, a hearing was conducted by the trial court, which entered a judgment reversing the decision of the Board and concluding petitioners are permitted to install gates in the subject fence. Intervenor/respondents now appeal.

When reviewing the decision of a board of adjustment, the trial court sits in the posture of an appellate court and is responsible for the following:

(1) Reviewing the record for errors in law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

In re Appeal of Willis, 129 N.C. 499, 500, 500 S.E.2d 723, 725, (1998). If a petitioner contends the Board's decision was based on an error of law, *de novo* review is proper. *JWL Invs., Inc. v. Guilford County Bd. of Adjust.*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717, *disc. review denied*, 351 N.C. 357, —— S.E.2d —— (1999). However, if a 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. *Id.* The role of appellate courts is to review the trial court's order for errors of law. *Willis*, 129 N.C. App. at 502, 500 S.E.2d at 726. "The process has been described as a two-fold 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.*

Accordingly, we first decide whether the trial court exercised the appropriate scope of review. The issues presented for review at each stage of these proceedings relate to the proper interpretation of an ordinance, which presents a question of law. *Ayers v. Bd. of Adjust. for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994). As such, *de novo* review is proper, requiring the court "to consider a question anew." *Willis*, 129 N.C. App. at 501, 500 S.E.2d at 725. We find the trial court applied the appropriate standard of review; thus, we now determine whether the trial court exercised *de novo* review properly. *Id.*

When a decision of a board of adjustment is reviewed *de novo*, it must be taken into consideration that

> one of the functions of a Board of Adjustment is to interpret local zoning ordinances, and . . . [such interpretation] is given deference. Therefore, our task on appeal is not to decide whether another interpretation of the ordinance might reasonably have been reached by the board, but to decide if the board acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law in interpreting the ordinance.

Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust., 132 N.C. App. 465, 470, 513 S.E.2d 70, 74 (1999) (citations omitted). Upon *de novo* review of the record, we do not believe the Board's construction of the conditional use to prohibit the installation of gates by petitioners was a manifest error of law and conclude the trial court erred in reversing the Board's decision.

Intervenor/respondents first contest the trial court's conclusion that the conditions set forth in the conditional use are part of the general Cary Zoning Ordinance ("Cary Ordinance") and as a result, must be interpreted in a "consistent fashion" with the definitions set forth in the Cary Ordinance. The trial court reasoned because the term "fence" in the Cary Ordinance may be interpreted to include gates, the conditional use should also be construed to allow gates. Although intervenor/respondents concede the conditional use is part of the Cary Ordinance, they argue the Board was not required to define the term "fence" in a manner consistent with the Cary Ordinance. We agree.

Intervenor/respondents point out that the purpose of conditional use zoning is to enable municipalities to impose more specific restrictions on particular land than provided in general ordinances, such as the Cary Ordinance. *See, e.g., Chrismon v. Guilford County*, 322 N.C. 611, 618, 370 S.E.2d 579, 584 (1988) ("[C]onditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning . . . [I]t permits . . . greater flexibility in balancing conflicting demands.") (citations omitted). The construction imposed by the trial court, they argue, contravenes the purpose of conditional use zoning. Although the stated purpose of conditional use zoning is helpful in establishing a backdrop for interpreting the conditional use, we are to construe municipal ordinances "according to the same rules as statutes enacted by the legislature." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). "The basic rule is to ascertain and effectuate the intent of the legislative body. . . . The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." *Id.* (citations omitted). Accordingly, we turn to the plain language of the Cary Ordinance in order to adequately review the trial court's conclusion.

Although the conditional use makes no reference to the Cary Ordinance, several provisions within the Cary Ordinance make clear conflicting terms contained in a conditional use zoning provision shall not be compromised by the Cary Ordinance provisions. In the section entitled "Definitions and Rules of Construction," the Cary Ordinance states, "In the event of any conflict between the limitations, requirements, or standards contained in different provisions of this Ordinance and applying to an individual use or structure, the more restrictive provision shall apply." This provision clearly contemplates the case where a later-adopted conditional use made part of the ordinance imposes more restrictive limitations which may even conflict with the general ordinance provisions. Furthermore, the section entitled "Special Provisions for Conditional Use Districts" provides that "[n]o condition shall be made part of the application which states that the use of the property will be subject to regulations or restrictions set forth in this Ordinance which would apply to the property in any event." This provision clearly indicates the purpose of a conditional use district is to impose alternate regulations not applying under the general provisions. The Cary Ordinance clearly does not

establishment a *requirement* that later-adopted conditional use provisions adopt identical interpretations for the terms used in the Cary Ordinance. Accordingly, the Board was not required to construe the conditional use consistent with any interpretation of any provision in the Cary Ordinance. We conclude the trial court's construction of the conditional use in this respect was error.

Next, intervenor/respondents argue the trial court erred in concluding that by enacting the conditional use the Town of Cary did not intend to prohibit gates in the fence. In order to ascertain the intent behind the conditional use, we turn first to its language as we would for any other ordinance provision. *Concrete Co.*, 299 N.C. at 629, 265 S.E.2d at 385. Although the conditional use does not provide its own definition of the term "fence," its provisions make clear that the requisite fence does not allow gates. The conditional use requires the fence to be "connected at each end to the fences to be constructed under the respective agreements with Hester and McLaurin in order to *preserve continuity and integrity*," as well as "the same architecturally and of the same materials as the fence currently existing between Preston Woods and the McLaurin tract." The fence between Preston Woods and the McLaurin tract does not have gates. The language of the conditional use clearly refers to a contiguous fence constructed on an undisturbed buffer. It makes no indication that any new gates could or would be constructed; the only gate mentioned is a previously existing gate at the sewer easement. These provisions must be viewed in light of the goal of compromise surrounding enactment of the conditional use; namely, higher density zoning in Sherborne subdivision in exchange for the requisite buffer zone and fence for Harmony Hills residents.

The trial court also concluded prohibiting gates in the fence produces absurd and illogical results, since it blocks homeowners from accessing their property. *See, e.g., Ayers v. Bd. of Adjust. for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994) (holding courts must avoid statutory interpretations that "create absurd or illogical results"). More important, however, is that the primary goal underlying the conditional use, which was to create a barrier between the respective tracts of land, would be subverted by allowing gates as desired in the fence. With this goal in mind, it is easily concluded that *permitting* gates would create an absurd and illogical result. The trial court also concluded this provision must be construed in favor of the landowner and free use of the property. We note that in reaching an agreement as to the conditional use, the par-

ties of Sherborne subdivision willingly gave up certain of their rights in exchange for a restricted rezoning. Petitioners concede they were made aware of these provisions upon purchase of their property.

Based upon the language contained in the conditional use, the backdrop surrounding its enactment and the substantial discretion on the part of the Board, the Board's conclusion that gates are not permitted under the terms of the conditional use was not a manifest error of law. Thus, we conclude the trial court improperly exercised its scope of review in reversing the Board's decision.

Because of our disposition, we need not address the remaining assignments of error. We note, however, there may be alternative means for petitioners to attain permission to install gates in the requisite fence. For instance, the parties may attempt to seek a variance if they can demonstrate practical difficulty or unnecessary hardship as a result of application of the Cary Ordinance provisions. Nonetheless, the Board did not commit an error of law when interpreting the ordinance, and as such, the trial court erred in reversing the Board's decision. The order of the trial court is reversed and this matter remanded to that court for entry of a new order in accordance with our opinion.

Reversed and remanded.

Judges MARTIN and WALKER concur.

NATIONSBANK OF NORTH CAROLINA, N.A., PLAINTIFF V.
TIMOTHY PARKER, DEFENDANT

No. COA99-812

(Filed 19 September 2000)

1. Notaries Public— attorney—negligent representation of signature's authenticity—no allegations of malice or corruption—no liability under third-party beneficiary doctrine

The trial court did not err by granting a motion for summary judgment in favor of defendant attorney on all claims that allege the attorney was deficient in performing his duties as a notary public on loan documents where two signatures were later determined to be forgeries, because: (1) plaintiff bank did not

plead any facts that allege the attorney performed his duties with malice or corruption; and (2) the attorney is immune from liability under the third-party beneficiary doctrine based on the fact that he made the negligent representation in his capacity as a notary.

2. Attorneys— malpractice—notarized forged signatures—barred by statute of repose

Plaintiff bank's claims based on the legal malpractice of defendant attorney who was deficient in performing his duties as a notary public on loan documents where two signatures were later determined to be forgeries are barred by the statute of repose under N.C.G.S. § 1-15(c), because: (1) the attorney closed the loan transaction more than six years before the amended complaint was filed; and (2) there are no allegations of an ongoing attorney-client relationship between plaintiff bank and defendant attorney.

3. Fraud— constructive—breach of fiduciary duty—attorney notarized forged signatures

Although plaintiff bank's claim of constructive fraud based upon an alleged breach of fiduciary duty by defendant attorney who notarized loan documents that contained forged signatures is not barred on statute of limitations grounds since it falls under the ten-year statute of limitations contained in N.C.G.S. § 1-56, this claim is insufficient to withstand a summary judgment motion, because: (1) there must be an allegation that the attorney sought to benefit himself, and payment of a fee to the attorney for work done by him does not by itself constitute sufficient evidence that he sought his own advantage in the transaction; and (2) there was no evidence that the amount paid to the attorney for notarizing and witnessing the loan documents would have been any different if the documents had not been forged.

Appeal by plaintiff from order entered 16 February 1999 by Judge Howard E. Manning, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 8 May 2000.

Kenneth N. Barnes, and Holt, Longest, Wall & Blaetz, P.L.L.C., by Frank A. Longest, Jr., for plaintiff-appellant.

Wilson & Iseman, L.L.P., by Urs R. Gsteiger, for defendant-appellee.

EDMUNDS, Judge.

Plaintiff NationsBank appeals the trial court's grant of defendant's motion for summary judgment. We affirm.

In 1992, plaintiff agreed to make a loan to Shamrock Country Club, Inc. (Shamrock), which operated a golf course in Alamance County. The golf course was situated on land owned by the parents of Shamrock's president, Steven Walker (Walker). The loan was conditioned upon the signing of a guaranty by Walker's parents (the Walkers). At the closing on 25 March 1992, defendant Timothy Parker, who was Walker's attorney, notarized several of the signatures on the loan documents and witnessed others. The loan funds were then distributed to Walker.

After Walker's death on 26 November 1996, the Shamrock loan went into default. Plaintiff initiated a collection effort by writing demand letters to the Walkers and to the executor of Walker's estate. The Walkers responded through counsel as early as 10 January 1997 that their signatures on the guaranty agreement were forgeries. In letters dated 3 February 1997 and 10 February 1997, the Walkers again advised plaintiff that their signatures had been forged. These letters referred plaintiff to a report prepared by a handwriting expert, which was contained in the court filing of a companion case.

Plaintiff filed suit on 6 June 1997, naming as defendants the estate of Steven Walker, Shamrock, and the Walkers. When neither Steven Walker's estate nor Shamrock answered, default judgment was entered against them. At a mediation conference on 12 March 1998, the Walkers provided plaintiff with an expert handwriting analysis supporting their claim that their signatures were forgeries. Plaintiff then amended its complaint to add Parker as a defendant under various theories of liability including negligence, breach of fiduciary duty, negligence as a notary public, legal malpractice, negligent misrepresentation, and constructive fraud. The Walkers later moved for summary judgment in their favor, which was granted without opposition from plaintiff. Defendant Parker moved for summary judgment, and the trial court dismissed all of plaintiff's claims against him in an order dated 16 February 1999. Plaintiff appeals.

Summary judgment is appropriate when "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 that any party is entitled to a judgment as a matter

of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). On appeal, the standard of review is (1) whether there is a genuine issue of material fact and (2) whether 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). The evidence presented is viewed in the light most favorable to the non-movant. *See Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975).

The trial court's order granting defendant's summary judgment motion contained findings of fact and conclusions of law. In *Mosley v. Finance Co.*, this Court stated:

> A trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper. However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment.

36 N.C. App. 109, 111, 243 S.E.2d 145, 147 (1978) (citations omitted).

The order states that plaintiff's various claims could not survive summary judgment because either they are barred by the applicable statute of limitations or defendant is immune from liability for negligence in performing his duties as a notary public.

A. Claims Against Defendant in his Capacity as Notary Public

[1] We begin by considering plaintiff's claims based upon defendant's acts or failures to act in his capacity as a notary public at the closing. In North Carolina a notary public is a public officer. *See Nelson v. Comer and Willoughby v. Adams*, 21 N.C. App. 636, 205 S.E.2d 537 (1974). "Absent allegations of malice or corruption a notary may not be held liable for acts within her scope of duties." *McGee v. Eubanks*, 77 N.C. App. 369, 374, 335 S.E.2d 178, 182 (1985) (citation omitted). This rule applies even when the notary is also an attorney. *See Nelson*, 21 N.C. App. 636, 205 S.E.2d 537. Plaintiff did not plead any facts that allege defendant performed his duties with malice or corruption. Accordingly, we affirm the trial court's grant of summary judgment on all claims that allege defendant was deficient in performing his duties as a notary public.

Plaintiff contends that its amended complaint "contains sufficient facts for a jury to determine whether the Defendant Parker is liable to the Plaintfiff under the third party beneficiary doctrine." Defendant contests this assertion. However, even assuming that this issue was properly pled, the allegedly negligent representation underlying plaintiff's claim was defendant's representation that the Walkers had signed the loan documents. Because defendant made the representation in his capacity as a notary, he is immune from liability. *See id.*

B. Claims Against Defendant in his Capacity as an Attorney

[2] Plaintiff's amended complaint alleged an attorney-client relationship between plaintiff and defendant. The trial court's order stated that summary judgment was granted because claims based on defendant's role as an attorney were barred by N.C. Gen. Stat. § 1-15(c) (1999). This statute governs legal malpractice claims, *see Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784 (1994); *McGahren v. Saenger*, 118 N.C. App. 649, 456 S.E.2d 852 (1995); *Sharp v. Teague*, 113 N.C. App. 589, 439 S.E.2d 792 (1994), and reads in pertinent part:

> (c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

N.C. Gen. Stat. § 1-15(c).

This statute creates a statute of limitations and a statute of repose, both of which are based upon the date of the " 'last act of the defendant giving rise to the cause of action.' " *Sharp*, 113 N.C. App. at

593, 439 S.E.2d at 795 (citation omitted). Our Supreme Court has stated:

> Statutes of limitation are generally seen as running from the time of injury, or discovery of the injury in cases where that is difficult to detect. They serve to limit the time within which an action may be commenced after the cause of action has accrued. Statutes of repose, on the other hand, create time limitations which are not measured from the date of injury. These time limitations often run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant.

Trustees of Rowan Tech. v. Hammond Assoc., 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985). A statute of repose "serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue." *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985). Therefore, if the statute of repose has run, plaintiff's action is barred.

Under section 1-15(c), we must determine defendant's last act giving rise to a cause of action. Particularly pertinent to this analysis is our Supreme Court's holding in *Hargett*, 337 N.C. 651, 447 S.E.2d 784. In *Hargett*, the plaintiffs sued an attorney for negligently drafting a will. In reversing this Court's ruling that "defendant's last act occurred immediately before testator's death, the last act being defendant's failure to fulfill a continuing duty to prepare a will properly reflecting the testator's testamentary intent," *id.* at 655, 447 S.E.2d at 788, the Supreme Court stated:

> We hold that under the arrangement alleged in the complaint, which was a contract to prepare a will after which defendant was an attesting witness to the will, defendant's duty was simply to prepare and supervise the execution of the will. This arrangement did not impose on defendant a continuing duty thereafter to review or correct the will or to prepare another will.

Id.

In the case at bar, defendant closed the loan transaction on 25 March 1992, more than six years before the amended complaint was filed. There are no allegations of an ongoing attorney-client relationship between plaintiff and defendant. Therefore, in accordance with the holding in *Hargett*, any of plaintiff's claims based on legal malpractice are barred by the statute of repose set forth in N.C. Gen. Stat. § 1-15(c).

The applicable allegations in the amended complaint read:

> 18. The Plaintiff justifiably relied on the representations, acts of witnessing and notarial acts of Defendant Parker which indicated that Defendants Shamrock, Charles C. Walker, Earle W. Walker and Steven C. Walker (now deceased and represented in this action by his personal representative) did in fact sign the loan documents. The acts and conduct of Parker in communicating with the Plaintiff, arranging for the execution of the loan documents, witnessing, reviewing, completing, preparing and delivering the loan documents, all constitute and exhibit an attorney-client relationship between Parker and the Plaintiff. Defendant Parker knew or should have known that the Plaintiff would rely on him in his capacity as an attorney at law to see to it that the loan documents were properly executed in a manner that would protect the interests of the Plaintiff and that same would be genuine and enforceable in accordance with their respective terms.
>
> 19. If it is determined by the finder of fact in this matter that any of the Defendants other than Parker did not in fact sign the loan documents, then the Plaintiff hereby alleges that Defendant Parker was negligent in that he failed to properly witness and notarize the loan documents in a way which would provide the Plaintiff with legally enforceable documents, including more particularly as against Defendants Charles C. Walker and Earle W. Walker, and that said negligence was the proximate cause of the damages described in this complaint suffered by the Plaintiff.
>
> 20. At the time of the execution of the loan documents, Plaintiff and Defendant Parker had an attorney-client relationship. If it is determined by the finder of fact in this matter that any of the Defendants other than Parker did not in fact sign the loan documents, then the Plaintiff hereby alleges that Defendant Parker negligently breached his fiduciary duty to the Plaintiff in that he failed to properly complete, witness and notarize the loan documents in a way which would provide the Plaintiff with legally enforceable documents, including more particularly as against Defendants Charles C. Walker and Earle W. Walker, and that said breach of fiduciary duty was the proximate cause of the damages described in this complaint suffered by the Plaintiff.

In its second amended complaint, plaintiff added a claim for constructive fraud alleging:

> 21. Defendant Parker, in his capacities as an attorney and notary public handling the closing of the loan transactions as described above in this Complaint, assumed with the Plaintiff a position of trust and confidence which created a fiduciary duty owing to the Plaintiff from Defendant Parker. The Plaintiff justifiably relied on Defendant Parker to properly complete, witness and notarize the loan documents in a way which would provide the Plaintiff with legally enforceable documents. If it is determined by the finder of fact in this matter that any of the Defendants other than Parker did not in fact sign the loan documents, then Defendant Parker in his position of an attorney and notary public failed to fulfill his fiduciary obligations to the Plaintiff. The Plaintiff further alleges that Defendant Parker breached his fiduciary duty to the Plaintiff, said breach of fiduciary duty constitutes a constructive fraud, and said breach of fiduciary duty was the proximate cause of the damages described in this complaint suffered by the Plaintiff. Upon information and belief, Defendant Parker took advantage of his position of trust and benefit[t]ed from his actions in that he was paid for his services in closing the subject loan transaction.

With one exception, these pleadings fail because of defendant's status as a notary or because they are claims for legal malpractice barred by N.C. Gen. Stat. § 1-15(c). *See, e.g., Sharp*, 113 N.C. App. at 592, 439 S.E.2d at 794 (noting "claims 'arising out of the performance of or failure to perform professional services' based on negligence or breach of contract are in the nature of 'malpractice' claims, [and] are governed by N.C. Gen. Stat. § 1-15(c)"). Similarly, any claim based on defendant's breach of a fiduciary duty is time barred. *See Heath v. Craighill, Rendleman, Ingle & Blythe*, 97 N.C. App. 236, 244, 388 S.E.2d 178, 183 (1990) ("Breach of fiduciary duty is a species of negligence or professional malpractice."); *Childers v. Hayes*, 77 N.C. App. 792, 795, 336 S.E.2d 146, 148 (1985) (holding breach of fiduciary duty claim is essentially a negligence or professional malpractice claim).

[3] The exception is plaintiff's only remaining claim alleging constructive fraud. A claim of constructive fraud based upon a breach of a fiduciary duty falls under the ten-year statute of limitations contained in N.C. Gen. Stat. § 1-56 (1999). *See Barger v. McCoy Hillard & Parks*, 120 N.C. App. 326, 336, 462 S.E.2d 252, 259 (1995), *modified*, 122 N.C. App. 391, 469 S.E.2d 593 (1996), *affirmed in part, reversed on other grounds in part*, 346 N.C. 650, 488 S.E.2d 215 (1997).

Therefore, this claim is not barred on statute of limitations grounds. However, to maintain a claim of constructive fraud, there must be an allegation that defendant sought to benefit himself. *See Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997). In *Barger*, the defendants were an accounting firm and individual accountants in the firm employed by plaintiffs. *See id.* at 654, 488 S.E.2d at 217. The Supreme Court held:

> Plaintiffs contend that their forecast of evidence shows that defendants did benefit from their alleged misrepresentations regarding TFH's financial status because they obtained the benefit of their continued relationship with plaintiffs. This is insufficient to establish the benefit required for a claim of constructive fraud, however. Presumably, defendants would have obtained the benefit of a continued relationship with plaintiffs equally by providing accurate information about TFH's financial health. Moreover, plaintiffs have alleged no facts tending to show that defendants gained anything by negligently misrepresenting the corporation's true financial condition.

Id. at 667, 488 S.E.2d at 224.

Implicit in this holding is a finding that payment of a fee to a defendant for work done by that defendant does not by itself constitute sufficient evidence that the defendant sought his own advantage in the transaction. Allegations in the case at bar, similar to those made in *Barger*, are that defendant "took advantage of his position of trust and benefit[t]ed from his actions in that he was paid for his services in closing the subject loan transaction." There was no evidence that the amount paid defendant for notarizing and witnessing the loan documents would have been any different if the documents had not been forged. We do not believe that this allegation, taken as true, is sufficient to withstand defendant's summary judgment motion. Consequently, we conclude that the trial court properly granted summary judgment as to this charge.

The trial court's order granting defendant's summary judgment motion is affirmed.

Affirmed.

Chief Judge EAGLES and Judge LEWIS concur.

ALFRED LEE THOMPSON, PLAINTIFF v. NORFOLK SOUTHERN RAILWAY COMPANY AND CITY OF SALISBURY, DEFENDANTS

No. COA99-1141

(Filed 19 September 2000)

1. Appeal and Error— appealability—denial of motion to compel arbitration

The question of whether the trial court erred by denying a motion to compel arbitration was considered on appeal even though the trial court had not reached a final judgment because it involved a substantial right which might be lost if appeal is delayed.

2. Arbitration and Mediation— insurance policy provision—not an agreement to arbitrate

The trial court did not err by denying plaintiff's motion to compel arbitration in an action arising from a collision between an automobile and a train at a crossing in Salisbury where plaintiff contended that he was a third-party beneficiary to an arbitration agreement in Salisbury's insurance policy, but the policy section upon which plaintiff relies states only that the definition of "suit" under the policy includes arbitration and does not establish an agreement to arbitrate claims.

3. Appeal and Error— appealability—denial of motion to dismiss statute of limitations counterclaim

A trial court order denying plaintiff's motion to dismiss a counterclaim as being beyond the statute of limitations was not appealable where plaintiff did not assert that the order affected his substantial rights. The court will not construct arguments as to why the order is appealable; moreover, the North Carolina Supreme Court has previously found that an order denying a motion to dismiss based upon a statute of limitations does not affect a substantial right.

4. Appeal and Error— appealability—denial of change of venue

An order denying a motion to move a case from Mecklenburg County to Rowan County was interlocutory but appealable because it affected a substantial right.

5. Venue— action against municipality

The trial court erred by denying defendant Salisbury's motion to remove a railroad crossing case from Mecklenburg County to Rowan County because an action against a municipality is an action against a public officer for purposes of determining proper venue and must be tried in the county where the cause arose. The court lacks discretion after a defendant makes a timely motion requesting a change of venue and, upon appropriate findings, must transfer the case to the place of proper venue. However, plaintiff is not precluded from later filing a motion to return venue to Mecklenburg County for the convenience of witnesses and to promote the ends of justice.

6. Venue— railroad crossing accident—municipality as codefendant

The county of proper venue for an action arising from a collision between a train and an automobile at a crossing in Salisbury was Rowan County. Although plaintiff contended that the case was properly filed in Mecklenburg County pursuant to N.C.G.S. § 1-81, that statute is only applicable when the railroad is the sole defendant and plaintiff here sued both the railroad and a municipality.

Judge JOHN concurred prior to 31 August 2000.

Appeal by plaintiff from orders entered 20 July 1999 and 3 August 1999, and cross-appeal by defendant city of Salisbury from order entered 3 August 1999 by Judge James L. Baker in Superior Court, Mecklenburg County. Heard in the Court of Appeals 8 June 2000.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III, Harvey L. Kennedy, and Willie M. Kennedy, for plaintiff-appellant/cross-appellee.

Jones, Hewson & Woolard, by Kenneth H. Boyer, for Norfolk Southern Railway Company, defendant-appellee.

Brinkley Walser, A Professional Limited Liability Company, by G. Thompson Miller, for City of Salisbury, defendant-appellee/cross-appellant.

TIMMONS-GOODSON, Judge.

Plaintiff, Alfred Lee Thompson, appeals from orders of the trial court denying his motions to compel arbitration and to dismiss the

counterclaim raised by defendant Norfolk Southern Railway Company ("Norfolk Southern") against plaintiff for property damage. Defendant City of Salisbury ("Salisbury") cross-appeals from an order denying its motion for removal asserting that venue was improper. Based upon our examination of the record, we affirm the court's order denying plaintiff's motion to compel arbitration and reverse the court's order denying Salisbury's motion for removal. We further dismiss plaintiff's appeal of the court's order denying its motion to dismiss.

The pertinent factual and procedural background is as follows: On 17 February 1999, plaintiff, a resident of Mecklenburg County, filed an action for damages against Norfolk Southern and Salisbury in Superior Court, Mecklenburg County. Plaintiff alleged that on 19 February 1996, a Norfolk Southern train collided with his vehicle as he attempted to cross a negligently maintained railway crossing in Salisbury. Salisbury is located in Rowan County, North Carolina. Plaintiff stated that as a result of the collision, he suffered bodily injury, loss of earnings and earning capacity, and pain and suffering.

Norfolk Southern moved for an extension of time to file an answer, which was granted by the trial court on 15 April 1999. Norfolk Southern subsequently answered on 17 May 1999 and included a counterclaim alleging that it had suffered property damage due to plaintiff's negligence.

In response, plaintiff filed a motion to dismiss Norfolk Southern's counterclaim, asserting that the claim was filed beyond the three-year statute of limitations. The trial court summarily denied plaintiff's motion on 20 July 1999.

On 1 April 1999, Salisbury filed a separate answer and motion for removal, pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure, arguing that venue was improper in Mecklenburg County. Salisbury further requested that the court remove the case from Mecklenburg County to the county in which it alleged venue was proper, Rowan County.

Plaintiff responded and asserted that venue was proper in Mecklenburg County under sections 1-83(2) and 1-81 of the General Statutes. *See* N.C. Gen. Stat. §§ 1-81 & 1-83(2) (1999). Primarily, plaintiff argued that removing the case to Rowan County would pose an undue burden on him and his caregiver. Plaintiff explained that he

was a paraplegic as a result of the collision and both he and his caregiver would be inconvenienced if the court transferred the case to Rowan County. Plaintiff also noted that his many doctors were in Charlotte, Mecklenburg County, and that it would be cost prohibitive to require them to travel to Rowan County to testify.

Following a hearing, the court denied Salisbury's motion to remove. In pertinent part, the court's order provided the following:

> And it appearing to the Court, and the Court so finding, that the convenience of witnesses and the ends of justice would be promoted pursuant to N.C.G.S. 1-83(2) and that the proviso to N.C.G.S. 1-77(2) gives the Court the power to change the place of trial from the county where the cause of action arose, the Court is of the opinion that defendant City of Salisbury's motion to remove should, in the Court's discretion, be denied[.]

Salisbury provided plaintiff with a "Commercial General Liability Coverage" insurance policy, issued by the Interlocal Risk Financing Fund of North Carolina ("IRFFNC"). Salisbury's IRFFNC policy provided insurance coverage for those situations in which the city had waived its governmental immunity.

Under the IRFFNC policy, the IRFFNC agreed to "pay those sums that [Salisbury] becomes legally obligated to pay as compensatory damages because of 'bodily injury' . . . to which [the] coverage appli[ed]." The policy further provided that the IRFFNC had "the right and duty to defend any 'suit' seeking those damages."

The "**DEFINITIONS**" section of the IRFFNC policy stated the following:

> "**Suit**" means a civil proceeding in which damages because of "bodily injury," "property damage," "personal injury" or "advertising injury" to which this coverage applies are alleged. "Suit" includes:
>
> a An arbitration proceeding in which such damages are claimed and to which you must submit or do submit with our consent; or
>
> b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which you submit with our consent.

Plaintiff filed a motion to compel arbitration based upon Salisbury's IRFFNC policy. Plaintiff claimed that the above IRFFNC definitions section required Salisbury to arbitrate any suit for bodily injury and that as a third party beneficiary to the insurance policy, he had a right to have his claim against Salisbury submitted to arbitration.

The trial court found that the IRFFNC policy did not contain an agreement to arbitrate as required by the Uniform Arbitration Act. Therefore, the court concluded, Salisbury could not be compelled to arbitrate plaintiff's claim against the city.

Plaintiff appeals from the orders denying his motions to compel arbitration and to dismiss Norfolk Southern's counterclaim. Further, Salisbury cross-appeals from the order denying its motion for removal.

Plaintiff's Appeal

[1] By his first assignment of error, plaintiff contends that the court erred in denying his motion to compel arbitration. Plaintiff argues that he was a third party beneficiary to Salisbury's agreement with the IRFFNC to arbitrate all claims filed against Salisbury for bodily injury and that as a beneficiary to that agreement, he is entitled to have his claim against the city resolved through arbitration. We disagree.

Initially, we must examine whether an appeal lies from the court's order denying plaintiff's motion to compel arbitration. Because the trial court has yet to reach a final judgment below, plaintiff's appeal from the court's order denying his motion is interlocutory. *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) (citation omitted). Generally, interlocutory orders are not appealable. However, an "order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Burke v. Wilkins*, 131 N.C. App. 687, 688, 507 S.E.2d 913, 914 (1998) (citation omitted); N.C. Gen. Stat. §§ 1-277, 7A-27(d)(1) (1999). Because the appeal involves an order denying the substantial right of arbitration, we will examine the merits of plaintiff's contentions.

[2] The Uniform Arbitration Act, as adopted by this state, provides in pertinent part:

> Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agree-

> ment, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof.

N.C. Gen. Stat. § 1-567.2 (1999).

> On application of a party showing an agreement described in [N.C.]G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

N.C. Gen. Stat. § 1-567.3 (1999).

While public policy favors arbitration, parties may not be compelled to arbitrate their claims unless there exists a valid agreement to arbitrate as specified by section 1-567.2 of the General Statutes. *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 423 S.E.2d 791 (1992). The party seeking to compel arbitration must prove the existence of a mutual agreement to arbitrate. *Id.* at 271-72, 423 S.E.2d at 794.

The IRFFNC policy section upon which plaintiff relies did not establish an agreement to arbitrate claims, but states only that the definition of "suit" under the policy included "[a]n arbitration proceeding in which such damages are claimed and to which [Salisbury] must submit or do[es] submit with [the IRFFNC's] consent." Clearly, Salisbury and the IRFFNC did not agree to submit to arbitration "any controversy existing between them at the time of the agreement," nor did they agree to arbitrate "any controversy thereafter arising between them relating to [their] contract or the failure or refusal to perform the whole or any part thereof." N.C.G.S. § 1-567.2.

We conclude that the trial court was correct in finding that Salisbury's policy with the IRFFNC did not include an agreement to arbitrate. Because no arbitration agreement existed between the IRFFNC and Salisbury, plaintiff's argument that he was a third-party beneficiary to the IRFFNC policy must fail. Accordingly, plaintiff's first assignment of error is overruled.

[3] By his next assignment of error, plaintiff asserts that the trial court erred in denying his motion to dismiss Norfolk Southern's coun-

terclaim because it was filed beyond the three-year statute of limitations. Because the record reflects that the order denying plaintiff's motion to dismiss is interlocutory and not appealable, we are precluded from reviewing the order and plaintiff's appeal of the order denying his motion to dismiss must therefore be dismissed.

Generally, an order denying a motion to dismiss is not appealable. *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 519 S.E.2d 540 (1999), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000). Nonetheless, an appeal lies from the order if it effects plaintiff's substantial rights. N.C.G.S. §§ 1-277, 7A-27(d)(1). " '[I]t is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal,' . . . and 'not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]' " *Country Club of Johnston County*, 135 N.C. App. at 162, 519 S.E.2d at 543 (quoting *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379-80, 444 S.E.2d 252, 253-54 (1994)).

In the instant case, plaintiff does not assert that the order appealed effected his substantial rights. As such, the court will not construct arguments as to why the order denying the motion to dismiss is appealable. Furthermore, our Supreme Court has previously found that an order denying a party's motion to dismiss based on a statute of limitation does not effect a substantial right and is therefore not appealable. *Johnson v. Insurance Co.*, 215 N.C. 120, 1 S.E.2d 381 (1939). Accordingly, the interlocutory order is not appealable, and we are therefore precluded from reviewing its merits.

Defendant Salisbury's Appeal

[4] By its appeal, Salisbury contends that the court erred in denying its Rule 12(b)(3) motion and request to remove the case from Mecklenburg County to Rowan County. We agree.

Although the court's order denying Salisbury's motion to remove is interlocutory, it is appealable. "Where a defendant makes a Motion to Dismiss for Lack of Venue and indicates that venue is proper elsewhere, and venue is indeed proper elsewhere, the trial court should treat the Motion to Dismiss as a Motion for a Change of Venue." *McClure Estimating Co. v. H.G. Reynolds Co.*, 136 N.C. App. 176, 183, 523 S.E.2d 144, 149 (1999) (citation omitted). This Court has previously announced that an order denying a motion for change of venue affects a substantial right because it "would work an injury to

the aggrieved party which could not be corrected if no appeal was allowed before the final judgment." *DesMarais v. Dimmette*, 70 N.C. App. 134, 136, 318 S.E.2d 887, 889 (1984); *see McClure Estimating Co.*, 136 N.C. App. at 178-79, 523 S.E.2d at 146 (applying *DesMarais* to motion to dismiss for improper venue indicating venue is proper elsewhere). Accordingly, the order is properly before this court.

[5] Under North Carolina's venue statutes, actions against public officers "must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law[.]" N.C. Gen. Stat. § 1-77(2) (1999). For the purposes of determining proper venue, an action against a municipality "is an action against 'a public officer' within the meaning of [N.C.]G.S. 1-77." *Jarrell v. Town of Topsail Beach*, 105 N.C. App. 331, 332, 412 S.E.2d 680, 680 (1992) (citations omitted).

"If the county designated for [the purpose of venue] is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county[.]" N.C.G.S. § 1-83. Under section 1-83(1), the court is given the authority to change the place of trial if "the county designated for that purpose is not the proper one." N.C.G.S. § 1-83(1). However, that authority is not discretionary. Once defendant has made a timely motion requesting a change of venue, upon making the appropriate findings, the court lacks discretion to resolve the issue and must transfer the case to the place of proper venue. *Cheek v. Higgins*, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

In the case at bar, plaintiff sued both the city of Salisbury and Norfolk Southern in Mecklenburg County. Because Salisbury is a municipality, the action should have been filed in Rowan County. Once Salisbury timely moved to have the action removed to Rowan County, pursuant to section 1-83, the court was required to change the county of proper venue to Mecklenburg County. *See Jarrell*, 105 N.C. App. at 333, 412 S.E.2d at 681 ("if an action is instituted in some other county, the municipality has the right to have the action removed to the proper county").

We recognize that Salisbury's right to remove the case to Rowan County (the county of proper venue) does not preclude plaintiff from later filing a motion to return venue to Mecklenburg County for the convenience of witnesses and to promote the ends of justice. *See King v. Buck*, 21 N.C. App. 221, 203 S.E.2d 643 (1974); N.C.G.S. § 1-83

("The court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change"). However, the trial court below did not have the authority to grant such a motion at this juncture.

[6] Plaintiff argues that this case was properly filed in Mecklenburg County pursuant to section 1-81 of the North Carolina General Statutes. We disagree.

Section 1-81 provides the following:

> [A]ll actions against railroads . . . must be tried either in the county where the cause of action arose or where the plaintiff resided at that time or in some county adjoining that in which the cause of action arose, subject to the power of the court to change the place of trial as provided by statute.

N.C.G.S. § 1-81. Section 1-81 is only applicable when the railroad is the sole defendant. *Smith v. Patterson*, 159 N.C. 138, 74 S.E. 923 (1912) (examining a preceding venue proviso which has since been enacted as section 1-81). Because plaintiff sued both a railroad and a municipality, we find no merit in plaintiff's argument. Therefore, we conclude that the only county of proper venue for this action was Rowan County and that the trial court should have transferred the case accordingly.

For the foregoing reasons, we affirm the court's order denying plaintiff's motion to compel arbitration. We further reverse the order of the court denying Salisbury's motion to remove. Finally, we dismiss plaintiff's appeal of the court's order denying plaintiff's motion to dismiss.

Affirmed in part, reversed in part, and dismissed in part.

Judges JOHN and WALKER concur.

Judge JOHN concurred prior to 31 August 2000.

YVONNE BASON, WIDOW OF DOUGLAS BASON, DECEASED, EMPLOYEE, PLAINTIFF v. KRAFT FOOD SERVICE, INC., EMPLOYER; HARTFORD ACCIDENT AND INDEMNITY COMPANY, INC., CARRIER; DEFENDANTS

No. COA99-1181

(Filed 19 September 2000)

Workers' Compensation— injury by accident—delivery driver found dead—heart attack—presumption that death work related—rebuttal

The findings of fact in a workers' compensation action arising from the death of a delivery driver support the conclusions that decedent did not sustain an injury by accident and that defendant-employer successfully rebutted the presumption that death within the course of employment was work related. Decedent's death was caused by cardiac arrhythmia; there was nothing unusual about his route, his hours, or the type or amount of the deliveries, and being called into work as a substitute driver was a normal activity.

Appeal by plaintiff from opinion and award filed 2 July 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 August 2000.

Gray, Newell, Johnson & Blackmon, LLP, by Angela Newell Gray and S. Camille Payton, for plaintiff-appellant.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., for defendant-appellee.

GREENE, Judge.

Yvonne Bason (Plaintiff), widow of Douglas Bason, deceased, appeals an opinion and award of the Full Commission of the North Carolina Industrial Commission (Full Commission) filed on 2 July 1999, in favor of Kraft Food Services, Inc. (Defendant).

The evidence shows that in February of 1994, Douglas Bason (Decedent) was working as a delivery driver for Defendant, where he had been employed for approximately twenty-two years. As part of his employment duties, Decedent delivered items such as frozen foods and dry goods to various companies. At a delivery location, Decedent would use a hand truck to unload delivery orders from his delivery truck. Although Decedent had an assigned route, he also

worked as a substitute driver for other routes when the drivers of the other routes were either ill or on vacation. On days that Decedent was "on call" as a substitute driver, he would receive a telephone call from a supervisor if he was needed to drive another driver's route.

At approximately 6:50 a.m. on the morning of 22 February 1994, Decedent received a telephone call at home from one of his supervisors. The supervisor notified Decedent he was needed as a substitute driver for the High Point/Thomasville route. Decedent therefore reported to work, and at approximately 7:30 a.m. he began driving the High Point/Thomasville route. Brad Thomas (Thomas), a supervisor at Defendant, testified the regularly scheduled "time out" for this route was 4:30 a.m.; however, a substitute driver would not be expected to make deliveries according to the regular schedule because it would be difficult after starting the route behind schedule to get back on schedule. Thomas stated the High Point/Thomasville route did not have more stops than other routes and the deliveries did not weigh more than deliveries on other routes. Decedent had never complained to Thomas about the High Point/Thomasville route being more difficult than other routes.

Thomas testified that on the evening of 22 February 1994, he was notified by an employee of Defendant that Decedent had not returned to Defendant's depot with the delivery truck. Thomas, therefore, notified Decedent's wife and local law enforcement agencies that Decedent was missing. The following day, Decedent's body was found in his delivery truck, which was parked behind a building where Decedent had been scheduled to make a delivery.

Deborah L. Radisch, M.D. (Dr. Radisch), testified in her deposition that she was present at Decedent's autopsy and was familiar with the autopsy report. Dr. Radish testified the autopsy revealed Decedent suffered from "coronary atherosclerotic disease of a severe nature." This condition, which develops over time, is "commonly referred to as hardening of the arteries." The autopsy also stated Decedent suffered from "atherosclerotic disease of cerebral blood vessels." Cerebral blood vessels "are the blood vessels that actually take blood to and from the brain," and this condition also relates to "hardening of the arteries." The autopsy revealed Decedent's cause of death to be a cardiac arrhythmia caused by "ischemic heart disease," which means the heart is "not getting enough oxygenated blood." Dr. Radisch stated that nothing in the autopsy would indicate Decedent's death was caused by overexertion, and "people who are not exerting

themselves could suddenly die of an arrhythmia as well as people who are exerting themselves." The autopsy also revealed no signs of trauma.

In an opinion and award filed on 30 September 1997, the deputy commissioner of the North Carolina Industrial Commission concluded Plaintiff's claim was not compensable under the North Carolina Workers' Compensation Act. Plaintiff appealed the opinion and award of the deputy commissioner to the Full Commission.

In an opinion and award filed on 2 July 1999, the Full Commission entered findings of fact consistent with the facts stated above, including the following pertinent findings of fact:

> 4. . . . [D]ecedent was not scheduled to work on February 22, 1994, but was "on call.". . . This was a normal activity and something that . . . [D]ecedent had done in a regular manner during his many years of service to . . . [Defendant].
>
> 5. There was nothing unusual about the route, the hours, or the amount or type of deliveries required of . . . [D]ecedent on [the day of his death].
>
> . . . .
>
> 7. . . . The cause of . . . [D]ecedent's death was cardiac arrhythmia, which was a sudden, fatal irregular heart beat, precipitated by the severe ischemic heart disease. . . .
>
> 8. The autopsy revealed no evidence of trauma . . . .

The Full Commission then made the following pertinent conclusions of law:

> 2. Where circumstances bearing on work-relatedness are unknown and where the death occurs within the course of employment, plaintiff should be able to rely on a presumption that death was work-related and therefore compensable, whether the medical reason for death is known or unknown. *Melton v. City of Rocky Mount*, 118 N.C. App. 249, 254-255 (1995), citing *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 370 (1988). This presumption of compensability then requires the defendant to come forward with some evidence that the death occurred as a result of a non-compensable cause. Otherwise, the plaintiff prevails. *Pickrell*, 322 N.C. at 371. In the presence of sufficient competent evidence that the death was not compensable, the presumption is

successfully rebutted. The Industrial Commission should then find the facts based on all the evidence adduced, drawing such reasonable inferences from the competent, credible, and convincing evidence as may be permissible, the burden of persuasion remaining with the plaintiff. *Id.*

3. In the case at hand, . . . [D]efendant[] ha[s] successfully rebutted the presumption of compensability by presenting competent, credible, and convincing evidence that the cause of . . . [D]ecedent's death was severe heart disease which caused a fatal irregular heartbeat. *Id.* There was no convincing evidence of any unusual or extraordinary exertion by . . . [D]ecedent. See *Bellamy v. Morace Stevedoring Co.*, 258 N.C. 327 (1962). According to the facts adduced from the evidence and reasonable inferences drawn therefrom, . . . [D]ecedent, thus, did not sustain an injury by accident arising out of his employment with . . . [Defendant]. N.C. Gen. Stat. Section 97-2(6).

The Full Commission, therefore, denied Plaintiff's claim.

The dispositive issue is whether Defendant rebutted the presumption, under *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 368 S.E.2d 582 (1988), that Decedent sustained an injury by accident and, if so, whether Plaintiff met her burden of proving Decedent sustained an injury by accident.

Plaintiff argues Defendant did not present sufficient evidence to rebut the presumption under *Pickrell* that Decedent sustained an injury by accident. We disagree.

Appellate review of a decision of the Full Commission is limited to whether the record contains competent evidence to support the Full Commission's findings of fact, and whether the findings of fact support the Full Commission's conclusions of law. *Hemric v. Manufacturing Co.*, 54 N.C. App. 314, 316, 283 S.E.2d 436, 437-38 (1981), *disc. review denied*, 304 N.C. 726, 288 S.E.2d 806 (1982).

"In order for a claimant to recover workers' compensation benefits for death, he must prove that death resulted from an injury (1) by accident; (2) arising out of his employment; and (3) in the course of the employment." *Pickrell*, 322 N.C. at 366, 368 S.E.2d at 584. Where the evidence shows an employee died within the course and scope of his employment and there is no evidence regarding whether the cause of death was an injury by accident arising out of employment, the

claimant is entitled to a presumption that the death was a result of an injury by accident arising out of employment. *Id.* at 367-68, 368 S.E.2d at 584-85. Once this presumption is established, the defendant has the burden of producing credible evidence that the death was not accidental or did not arise out of employment. *Id.* at 371, 368 S.E.2d at 586; *Melton v. City of Rocky Mount*, 118 N.C. App. 249, 256, 454 S.E.2d 704, 709 (to rebut presumption the defendant must produce "sufficient, credible evidence that the death is non-compensable"), *disc. review denied*, 340 N.C. 568, 460 S.E.2d 319 (1995). If the defendant meets this burden of production, "the Industrial Commission should find the facts based on all the evidence adduced, taking into account its credibility, and drawing such reasonable inferences from the credible evidence as may be permissible, the burden of persuasion remaining with the claimant." *Pickrell*, 322 N.C. at 371, 368 S.E.2d at 586.

In this case, the Full Commission found Plaintiff was entitled to the presumption under *Pickrell* that Decedent's cause of death was an injury by accident arising out of employment.[1] Defendant, however, presented evidence and the Full Commission found as fact that "[t]here was nothing unusual about the route, the hours, or the amount or type of deliveries required of . . . [D]ecedent" on the day of his death. Defendant also presented evidence and the Full Commission found as fact that "[t]he cause of . . . [D]ecedent's death was cardiac arrhythmia, which was a sudden, fatal irregular heart beat, precipitated by the severe ischemic heart disease," and "[t]he autopsy revealed no evidence of trauma." Plaintiff does not argue these findings of fact are not supported by competent evidence, and we are therefore bound by these findings of fact. *See* N.C.R. App. P. 28(b)(5); *Hemric*, 54 N.C. App. at 316, 283 S.E.2d at 437-38. Further, these findings of fact support the Full Commission's conclusion of law that Defendant "successfully rebutted the presumption of compensability" under *Pickrell*. *See Cody v. Snider Lumber Co.*, 328 N.C. 67, 71, 399 S.E.2d 104, 106 (1991) (heart attack is not an "accident" within the meaning of the workers' compensation statute when it occurs while the employee is "conducting his work in the usual way" and the heart attack is not caused by *"unusual or extraordinary*

1. Defendant argues in its brief to this Court that the *Pickrell* presumption does not apply in this case because "the medical evidence establishes . . . that [Decedent] died of a result of cardiac arrhythmia brought on by ischemic heart disease." The Full Commission, however, concluded the *Pickrell* presumption did apply and, because Defendant did not cross-assign error to this conclusion, Defendant may not now argue before this Court that the Full Commission erred by applying this presumption. *See* N.C.R. App. P. 10(d).

exertion or extreme conditions" (citation omitted)). Accordingly, Plaintiff had the burden of proving Decedent's death resulted from an accident.

Plaintiff also argues the evidence shows Decedent's death resulted from an accident because Decedent was not scheduled to work on the day of his death and Decedent started his route on that day at least three hours late, causing Decedent's work to be "unusually strenuous." We disagree.

In this case, the Full Commission made findings of fact that being called into work as a substitute driver "was a normal activity and something that . . . [D]ecedent had done in a regular manner during his many years of service to . . . [Defendant]" and "[t]here was nothing unusual about the route, the hours, or the amount or type of deliveries required of . . . [D]ecedent" on the day of his death. Plaintiff does not argue these findings of fact are not supported by competent evidence, and we are therefore bound by these findings of fact. *See* N.C.R. App. P. 28(b)(5); *Hemric*, 54 N.C. App. at 316, 283 S.E.2d at 437-38. Further, these findings of fact, considered with the Full Commission's findings of fact that "[t]he cause of . . . [D]ecedent's death was cardiac arrhythmia" and "[t]he autopsy revealed no evidence of trauma," support the Full Commission's conclusion of law that Decedent "did not sustain an injury by accident." *See Cody*, 328 N.C. at 71, 399 S.E.2d at 106. Accordingly, the Full Commission properly denied Plaintiff's workers' compensation claim.[2]

Affirmed.

Judges EDMUNDS and SMITH concur.

2. Because the Full Commission properly concluded Decedent did not sustain an injury by accident, we need not address the issue of whether the Full Commission properly concluded Decedent's injury did not arise out of employment. *See Pickrell*, 322 N.C. at 366, 368 S.E.2d at 584 (claimant must prove all three elements of workers' compensation claim).

DAVID GOFF, EMPLOYEE, PLAINTIFF v. FOSTER FORBES GLASS DIVISION, EMPLOYER; GALLAGHER BASSETT SERVICES, INCORPORATED, CARRIER; DEFENDANTS

No. COA99-717

(Filed 19 September 2000)

1. Workers' Compensation— causation—work-related accident

There was competent evidence to support the Industrial Commission's findings and conclusions in a workers' compensation case that plaintiff employee's tinnitus and headaches arose out of an injury by accident entitling plaintiff to temporary total benefits and temporary partial disability, including evidence that: (1) plaintiff testified he had not had problems with headaches or ringing in his ears prior to the work-related injury; (2) plaintiff's neurologist testified plaintiff's complaints were consistent with a post-traumatic injury; and (3) other doctors testified it is possible that these injuries stemmed from plaintiff's work-related injury.

2. Workers' Compensation— witnesses—right to cross-examine

The Industrial Commission abused its discretion in a workers' compensation case by allowing significant new evidence to be admitted from a doctor's report but denying defendants an opportunity to question the witness doctor, because: (1) the evidence was completely different from any other evidence admitted up to that point in the case, and therefore, the Commission should have allowed defendants the opportunity to attack the probative value of the opinion testimony; and (2) where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence.

Appeal by defendants from opinion and award for the Full Commission filed 25 August 1998 and from the amended opinion and award for the Full Commission filed 5 March 1999. Heard in the Court of Appeals 14 August 2000.

Thomas & Farris, by Eliot F. Smith, for plaintiff-appellee.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for defendant-appellants.

EAGLES, Chief Judge.

Foster Forbes Glass Division and Gallagher Bassett Services, Inc. (collectively "defendants") appeal from an amended opinion and award of the North Carolina Industrial Commission ("Commission") awarding David Goff ("plaintiff") workers' compensation benefits for his tinnitus, headaches, and depression. Because we conclude that the Commission denied defendants their right to examine Dr. Whitt, upon whose additional report the Commission based its decision, we reverse in part, and remand the case to the Industrial Commission.

Plaintiff began working for defendant in January 1979. At the time of the work-related injury, plaintiff worked as a cold end shift supervisor, and had been so employed for six years. As a shift supervisor, plaintiff was responsible for the equipment on each of six lines, inspecting all production, and supervising the forty employees who run the six production lines. Plaintiff's work area was very noisy and busy at all times.

On 17 May 1995, an automatic palletizer machine experienced problems. Plaintiff climbed the stairs on top of the machine about twenty feet off the ground, lay down on top of the plate and hung his head and shoulders off to reach down. As he did this, he received an electrical shock. He became stunned and "probably lost consciousness." Subsequently he reported to the nurse's office. He remembered having "black vision" and a lack of balance. On 11 July 1995, plaintiff was seen by his family physician for headaches. The family physician referred plaintiff to a psychiatrist for depression. On 12 July 1995, Dr. Whitt, a psychiatrist, saw plaintiff, diagnosed him with depression, and prescribed various medications for him. On 28 July 1995, plaintiff was "written out of work" by Dr. Whitt. Plaintiff remained out of work until 30 September 1995, when Dr. Whitt released him for work. Plaintiff began to receive short-term disability benefits, for his depression, on 27 July 1995 and continued to receive them until he returned to work on 30 September 1995.

Plaintiff continued to experience headaches though August 1995 and was referred to a neurologist, who diagnosed plaintiff with headache syndrome and tinnitus of the left ear. Tinnitus is characterized by continuous ringing in the ears. Still complaining of the headaches and ringing in his ears, plaintiff was further referred to an otorhinolaryngologist. By 22 November 1995, plaintiff could no longer perform his duties because of the increased headaches and tinnitus.

At that time plaintiff began again to receive short-term disability payments and continued to receive them until 8 April 1996, when he began receiving long-term disability.

On 29 January 1998, Deputy Commissioner Taylor filed an opinion and award, determining that plaintiff's depression was not the result of a work related injury, and awarding plaintiff temporary partial disability compensation at a rate of $476.81 per week.

Defendants filed a notice of appeal to the Full Commission on 13 February 1998. The Full Commission filed its opinion and award 25 August 1998, refusing to alter the Deputy Commissioner's opinion and award except for the findings regarding plaintiff's depression. The Full Commission ordered that additional medical evidence was required before a final determination on that issue could be made. The Commission gave the parties sixty days to obtain additional psychological and neurological evaluations of the plaintiff and to submit those records directly to the Commission. Plaintiff was reevaluated by Dr. Whitt on 13 and 14 October 1998, and Dr. Whitt's report, dated 5 November 1998, was submitted directly to the Commission. By letter to the Commission, defendants objected to the 5 November 1998 report on the grounds of hearsay, and requested, in the alternative, that if the Commission found the report to be admissible, the Commission grant the defendants an additional 30 days to submit contentions.

The Commission amended its opinion and award on 5 March 1998 based on Dr. Whitt's report of 5 November 1998, stating:

> 24. Pursuant to the Full Commission's August 25, 1998 Opinion and Award, Dr. Whitt re-evaluated plaintiff on October 13 and 14, 1998. Following this re-evaluation, Dr. Whitt opined that plaintiff's May 17, 1995 work related injury was a significant contributing factor in the exacerbation of plaintiff's depression.
>
> 25. Based upon the credible medical evidence of record, plaintiff's depression was significantly exacerbated by his May 17, 1995 injury by accident.

Defendant's objection was never addressed by the Commission.

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

ings justify its conclusions of law. *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997). This is true even when there is evidence that would support contrary findings. *Ross v. Mark's Inc.*, 120 N.C. App. 607, 610, 463 S.E.2d 302, 304 (1995), *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982), *Gilliam v. Perdue Farms*, 112 N.C. App. 535, 536, 435 S.E.2d 780, 781 (1993).

[1] Defendants first challenge the Commission's findings and conclusions that plaintiff's tinnitus and headaches arose out of an injury by accident. In order for plaintiff to recover benefits under the Act, he must show that his injuries resulted from (1) an accident, (2) arising out of his employment, and (3) within the course of his employment. *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 366, 368 S.E.2d 582, 584 (1988).

Appellants argue that there was no competent evidence presented that the plaintiff's tinnitus and headaches were proximately caused by the 17 May 1995 injury. Defendants contend that the tinnitus and headaches might be the result of an occupational disease, a claim for relief never asserted by the plaintiff. The Full Commission found:

> 19. As a direct and proximate cause of his injury by accident arising out of and in the course of his employment on May 17, 1995, plaintiff suffered severe headaches and severe tinnitus of the left ear.

The plaintiff testified that he had not had problems with headaches or ringing in his ears prior to the 17 May 1995 injury. The plaintiff's neurologist testified that plaintiff's complaints were consistent with a post-traumatic injury. Further, other doctors testified that it is possible that these injuries stemmed from plaintiff's work related injury. We hold that this evidence is sufficient to support the Commission's findings of fact. We also hold the findings of fact support the Commission's holding that plaintiff was entitled to temporary total benefits for the period of 22 November 1995 to 1 November 1996, and temporary partial disability from 1 November 1996.

[2] The defendant also challenges the admissibility of Dr. Whitt's report dated 5 November 1998. The Commission, relying on this report, determined that plaintiff's depression was significantly exacerbated by the electrical shock. The Commission based its award of temporary partial disability benefits on this finding.

We addressed a similar situation in *Allen v. K-Mart*, 137 N.C. App. 298, 528 S.E.2d 60 (2000). There the Commission admitted medical examiners' reports, over objection, without allowing defendants to cross-examine the medical examiners. We held:

> Our courts have long held that "[s]trictly speaking, the rules of evidence applicable in our general courts do not govern the Commission's own administrative fact-finding. . . ." However, the Commission must "conform to court procedure [where] required by statute or to preserve justice and due process." *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 97, 360 S.E.2d 109, 110 (1987) (citations omitted). It has long been the law in North Carolina that:
>
> > a party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation.
>
> *State ex rel. Everett v. Hardy*, 65 N.C. App. 350, 352, 309 S.E.2d 280, 282 (1983) (*quoting State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 903 (1954). Furthermore, Cross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party.

Allen, 137 N.C. App. at 303-04, 528 S.E.2d at 64 (citations omitted). In that case, the evidence offered by the additional doctors was completely different from any other evidence admitted up to then. *Id.* Therefore, upon admission of the reports, the "Commission necessarily should have allowed defendants the opportunity to 'attack the probative value of [the] opinion testimony . . . .' " *Thompson v. Lenoir Transfer Co.*, 72 N.C. App. 348, 350, 324 S.E.2d 619, 621 (1985), *Allen v. K-Mart*, 137 N.C. App. at 304, 528 S.E.2d at 64.

Here, the defendants objected to the subsequent report of Dr. Whitt being admitted without the opportunity to question the witness. The Commission, in its finding number 24, clearly states the report dated 5 November 1998, is the sole basis for the Commission's finding of exacerbation. The defense timely objected and requested an opportunity to examine Dr. Whitt with regard to this report. Where the Commission allows a party to introduce new evidence which

becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence.

For the foregoing reasons we affirm the opinion and award of the Industrial Commission with regard to plaintiff's headaches and tinnitus. As to the issue of plaintiff's depression, we reverse and remand to the Full Commission for further proceedings consistent with this opinion.

Affirmed in part, reversed and remanded in part.

Judges MARTIN and HORTON concur.

CHEMIMETALS PROCESSING, INC., PLAINTIFF v. FRANK L. SCHRIMSHER, ROBERT L. LINDSEY, JR. AND HOWARD H. BRADSHAW, JR., DEFENDANTS AND THIRD-PARTY PLAINTIFFS; AND JAMES R. MIDDLESWARTH, EDWARD BOWERS AND MIDDLESWARTH, BOWERS & COMPANY, L.L.P., DEFENDANTS v. JEFFREY W. MCENENY AND VIBRA-CHEM COMPANY, THIRD-PARTY DEFENDANTS

No. COA99-880

(Filed 19 September 2000)

Release— breach of duty of care—breach of fiduciary duty—diversion of profits and labor by former president—release bars subsequent claims—same injury

Even though the plain terms of the release previously executed by plaintiff corporation and its former president and a second corporation in a prior action seeking damages for monetary loss due to the purported diversion of profits and labor from plaintiff corporation by its former president does not bar plaintiff's second action for breach of duty of care and breach of fiduciary duty against defendants, the board of directors of plaintiff corporation and CPAs employed to conduct independent audits of the company, the trial court properly entered summary judgment in favor of defendants because the release bars plaintiff's claims in any subsequent actions against the remaining defendants arising out of the same injury.

Appeal by plaintiff from order entered 21 April 1999 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 April 2000.

Arthurs & Foltz, by Douglas P. Arthurs, and Whitesides & Kenny, by Henry M. Whitesides, for the plaintiff-appellant.

John A. Mraz, P.A., by John A. Mraz, for defendants and third-party plaintiff-appellees Frank L. Schrimsher, Robert L. Lindsey, Jr. and Howard H. Bradshaw, Jr.

Carruthers & Roth, P.A., by Michael J. Allen, for defendant-appellees James R. Middleswarth, Edward Bowers and Middleswarth, Bowers & Company, L.L.P.

James, McElroy & Diehl, P.A., by Bruce M. Simpson, for third-party defendant-appellees Jeffrey W. McEneny and Vibra-Chem Company.

LEWIS, Judge.

In this appeal, our sole task is to determine whether a release executed between plaintiff Chemimetals Processing, Inc. and third-party defendants in this action, Jeffrey W. McEneny and Vibra-Chem Company, bars plaintiff's claims in a subsequent action against the remaining defendants in this appeal.

The significant course of events leading up to this appeal are as follows. In 1986, the owner of Chemimetals Processing, Inc. ("Chemimetals") entered into an agreement with Jeffrey W. McEneny ("McEneny"), the president of Vibra-Chem Company ("Vibra-Chem"), and Vibra-Chem to market a product developed and sold by Chemimetals. At the time, both companies were engaged in the manufacture and marketing of chemical compounds used for the accelerated removal of metals in chemical milling processes. In 1988, while McEneny was president of Vibra-Chem, he entered into an agreement with Chemimetals to become its president. Under this arrangement, Chemimetals would manufacture the product and Vibra-Chem would distribute it exclusively. Profits from the sale of this product were to be divided fifty-five percent (55%) to Chemimetals and forty-five percent (45%) to Vibra-Chem. McEneny would supervise the manufacture and distribution under both. McEneny was president of both Chemimetals and Vibra-Chem until July 1995, when he was relieved of his duties as president of Chemimetals.

In August 1995, Chemimetals instituted an action against Vibra-Chem and McEneny seeking to recover actual and treble damages for alleged breach of contract, breach of fiduciary duty and unfair and deceptive trade practices ("first action"). The factual allega-

tions underlying these claims included: McEneny failed to pay Chemimetals a share of its proceeds from product sales at least in the amount of $190,786.33, McEneny collected compensation under certain agreements between Chemimetals and Vibra-Chem before he was entitled to do so, McEneny caused Chemimetals to pay him for services for which he was not entitled to collect and McEneny utilized equipment and personnel of Chemimetals for the benefit of Vibra-Chem without compensating Chemimetals.

On 14 July 1997, before the case proceeded to trial, Chemimetals entered into a "Settlement Agreement and Mutual Release" ("the release") with Vibra-Chem and McEneny in the amount of $600,000. The release provides that Chemimetals and its officers:

> Release[d] and discharge[d] [Vibra-Chem and McEneny], their respective attorneys, agents, employees, representatives, officers, directors, affiliated entities, subsidiaries, parent companies, successors and assigns, from any and all claims or causes of action, legal or equitable, know or unknown, arising out of [the course of dealing between Chemimetals and Vibra-Chem from 1986 to 1995] and acknowledge that all claims that have been brought, or could have been brought, by [Chemimetals] are satisfied, discharged and settled.

In further consideration for this settlement amount, Chemimetals agreed to dismiss the first action with prejudice.

In June 1998, Chemimetals instituted an action against Frank L. Schrimsher, Robert L. Lindsey, Jr., Howard H. Bradshaw, Jr. ("board of directors") and James R. Middleswarth, Edward Bowers and Middleswarth, Bowers & Company, L.L.P. ("CPAs"), who were employed by Chemimetals' board of directors in 1991 to conduct audits of Chemimetals ("second action"). In this second action, Chemimetals sought actual damages for theories of negligence, including breach of duty of care and breach of fiduciary duty. The factual allegations underlying these claims are nearly identical to those alleged in the first action. However, in the second action, Chemimetals essentially asserts the board of directors and CPAs breached their respective duties by ultimately failing to "appreciate" Chemimetals' declining economic value due to the improper actions of McEneny. Defendant CPAs were employed by Chemimetals to conduct an independent audit of the company for the fiscal years ending in 1991, 1992, 1993, 1994 and 1995. Chemimetals asserted the board of directors and CPAs conspired to present misleading audited financial

statements overstating the assets on the balance sheet for the fiscal years ending 30 April 1992, 1993 and 1994.

On 3 December 1998 and 1 April 1999, respectively, the board of directors and CPAs moved for summary judgment, pleading the previous settlement agreement between Chemimetals, Vibra-Chem and McEneny as a bar to the action against them. On 21 April 1999, the court granted their motions for summary judgment, and also concluded in its order that the summary judgment ruling rendered moot the claims against third-party defendants Vibra-Chem and McEneny. Chemimetals appeals from that order.

On appeal, Chemimetals argues the language of the release clearly limits the scope of the release to the claims asserted by Chemimetals against McEneny and Vibra-Chem in the first action, and does not bar them from asserting the second action against the board of directors and CPAs. Releases are contractual in nature and their interpretation is governed by the same rules governing interpretation of contracts. *Hotel Corp. v. Taylor and Fletcher v. Foremans Inc.*, 45 N.C. App. 229, 234, 262 S.E.2d 869, 873, *rev'd on other grounds*, 301 N.C. 200, 271 S.E.2d 54 (1980). The scope and extent of the release should be governed by the intention of the parties, which must be determined by reference to the language, subject matter and purpose of the release. *Id.* The release provisions here only bar Chemimetals from asserting future claims or causes of action arising out of the factual allegations in the first action against Vibra-Chem and McEneny. Further, defendants in the second action do not fall within any of those persons or entities denominated within the release. Thus, the plain terms of the release indicate its scope does not bar the second action. *Cf. Sykes v. Keiltex Industries, Inc.*, 123 N.C. App. 482, 485, 473 S.E.2d 341, 343 (1996) (holding a valid *general* release where plaintiff surrendered all claims or causes of action against "all other persons, firms, corporations, associations or partnerships" barred all claims against *any* future defendants arising out of the same subject matter).

However, Chemimetals' reliance on the plain language of the release in this case does not end our inquiry. It is well-settled that although Chemimetals is entitled to full recovery for its damages, Chemimetals is not entitled to a "double recovery" for the same loss or injury. *Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 455, 481 S.E.2d 349, 357, *disc. review denied*, 346 N.C. 281, 487 S.E.2d 551 (1997). Although the rule preventing more than one recovery for the same injury has been cited most commonly in cases

involving joint tortfeasors, *see, e.g., Simpson v. Plyler*, 258 N.C. 390, 394-95, 128 S.E.2d 843, 846-47 (1963); *Ottinger v. Chronister*, 13 N.C. App. 91, 95-96, 185 S.E.2d 292, 295 (1971), it has been cited in cases which do not involve joint tortfeasors, *see, e.g., Knight Publ'g Co. v. Chase Manhattan Bank, N.A.*, 137 N.C. App. 27, 34, 527 S.E.2d 80, 85 (2000) (Wynn, J., dissenting); *Markham*, 125 N.C. App. at 455, 481 S.E.2d at 357; *Duke University v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 681, 384 S.E.2d 36, 47 (1989).

Chemimetals has suffered but one injury in this case—monetary loss due to the purported diversion of profits and labor from Chemimetals by McEneny. Under the facts as alleged by Chemimetals, all actions in the course of events leading to financial demise of Chemimetals were concurrent. Chemimetals' monetary loss, which was the injury created by McEneny's scheme, is the same injury caused by the alleged failure of the board of directors and CPAs to notice McEneny's unlawful acts. That only one injury occurred is in no way altered by the fact that the board of directors and CPAs may have been guilty of separate wrongdoing. Moreover, in its second complaint against the board of directors and CPAs, Chemimetals seeks recovery for its *actual* losses resulting from the company's decline in income. By entering the $600,000 settlement Chemimetals was compensated for those same losses in the first action, where they were alleged to total $190,786.33. Chemimetals may not assert a second action seeking to collect for those losses against the board of directors and CPAs. *Cf. Knight Publ'g Co.*, 137 N.C. App. at 35, 527 S.E.2d at 85 (Wynn, J., dissenting). Accordingly, the trial court properly entered summary judgment in favor of all defendants.

Given our disposition and in light of the release executed expressly in favor of Vibra-Chem and McEneny, we conclude the trial court properly dismissed the second action as to third-party defendants Vibra-Chem and McEneny.

Our disposition in this case renders it unnecessary to address the remaining arguments. The trial court properly entered summary judgment in favor of defendants.

Affirmed.

Judges MARTIN and WALKER concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v. CARL R. PERKINSON, EXECUTOR OF THE ESTATE OF MILTON PERKINSON, CARL R. PERKINSON, EXECUTOR OF THE ESTATE OF MARY PERKINSON, LEON PERKINSON, BESS PERKINSON, LINDA ROBERTS, ADMINISTRATRIX OF THE ESTATE OF TOMMY ROBERTS, AUTO OWNERS MUTUAL INSURANCE COMPANY, KEMPER INSURANCE COMPANY, AKA LUMBERMEN'S MUTUAL CASUALTY COMPANY, STATE CAPITAL INSURANCE COMPANY, MARY BREEDEN AND BILLY BREEDEN, DEFENDANTS

No. COA99-1097

(Filed 19 September 2000)

Insurance— automobile—UIM coverage—relatives of the named insured—not residents of the same household

The trial court did not err by granting summary judgment in favor of defendant insurance company that issued an automobile liability insurance policy regarding UIM coverage of the estates of two of the named insured's relatives who were passengers in a vehicle driven by the named insured when they were struck by another automobile, because: (1) the relatives were not residents of the household of the insured at the time of the accident, and therefore, the express terms of the pertinent insurance policy reveal that they do not qualify as insureds as a "family member"; (2) the pertinent policy provision allowing UIM coverage to persons occupying the covered automobile is not applicable since the vehicle insured under the policy was not involved in the accident; (3) N.C.G.S. § 20-279.21(b)(3) provides that the relative of the named insured must reside in the same household in order to be entitled to first class UIM coverage; (4) it would be erroneous to resort to the Motor Vehicle Safety Responsibility Act's purpose to determine UIM coverage when the language employed in the statute is unambiguous; and (5) this case is not similar to prior cases where the Court of Appeals invalidated exclusions in the insurance policies which precluded coverage by persons qualifying as first class insured persons under N.C.G.S. § 20-279.21(b)(3) and that provided less coverage than is required under the statute.

Appeal by plaintiff from order entered 6 July 1999 by Judge Carl L. Tilghman in Durham County Superior Court. Heard in the Court of Appeals 16 August 2000.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by R. Scott Brown and Michael J. Byrne, for defendant-appellee Kemper Insurance Company, aka Lumbermen's Mutual Casualty Company.

LEWIS, Judge.

On 20 July 1997, an automobile driven by defendant Billy Breeden struck an automobile owned by defendant Bess Perkinson and being driven by her husband, defendant Leon Perkinson. At the time of the accident there were three other passengers in the automobile driven by defendant Leon Perkinson: (1) Bess Perkinson, (2) Milton Perkinson and his wife, (3) Mary. Milton and Mary Perkinson died in the accident; their respective estates are named as defendants in this action. For the purpose of summary judgment, the parties stipulated that defendant Billy Breeden's negligence was the sole proximate cause of the accident.

Defendant Billy Breeden was insured by plaintiff North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau"). The policy relevant to this appeal, however, is an automobile liability insurance policy issued by defendant Kemper Insurance Company aka Lumbermen's Mutual Casualty Company ("Kemper") to defendant Leon Perkinson ("Kemper policy"). The vehicle insured under this policy was not involved in the accident. On 2 July 1998, Farm Bureau filed an action alleging, among other things, that UIM coverage under the Kemper policy extended to Leon and Bess Perkinson as well as Milton and Mary Perkinson. Kemper answered, denying that the Kemper policy provided UIM coverage in favor of the estates of Milton and Mary Perkinson and counterclaimed seeking a declaratory judgment concerning UIM coverage of their estates. On 15 June 1999, Kemper moved for summary judgment on all issues regarding UIM coverage of the estates of Milton and Mary Perkinson. The parties stipulated to all relevant facts, leaving only the legal question of UIM coverage under the Kemper policy. On 6 July 1999, the trial court granted summary judgment in favor of Kemper. Farm Bureau appeals.

In determining whether the trial court properly concluded UIM coverage under the Kemper policy did not extend to the estates of Milton and Mary Perkinson, we examine first the relevant language of the Kemper policy. The UIM section of that policy allows an "insured" 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.*" (Emphasis added).

Under the "Exclusions" in the UIM coverage section, the Kemper policy provides:

> A. We do not provide coverage for "property damage" or "bodily injury" caused by an "uninsured motor vehicle" and sustained by any "insured":
>
> 7. While "occupying" or when struck by, any motor vehicle owned by you or any "family member" which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.
>
> However, this exclusion does not apply to you or any "family member."

The parties here stipulated for purposes of summary judgment that Milton and Mary Perkinson were not residents of the household of Leon and Bess Perkinson at the time of the accident. Under the express terms of the Kemper policy, they do not qualify as "insureds" via the definition of a "family member," who must be a resident of the household of the named insured. We emphasize the Kemper policy provision allowing UIM coverage to persons occupying "your covered auto" is not applicable, as the vehicle insured under the Kemper policy was not involved in the accident. Accordingly, the Kemper policy does not entitle either Milton or Mary Perkinson to UIM coverage.

Farm Bureau contends, however, the Kemper policy provisions denying Milton and Mary Perkinson UIM coverage are void as incon-

sistent with provisions of the Motor Vehicle Safety-Responsibility Act of 1953, N.C. Gen. Stat. §§ 20-279.1 to -279.39 ("the Act") setting forth the minimum requirements for automobile liability coverage as a matter of law. *Wilmoth v. State Farm Mut. Auto Ins. Co.*, 127 N.C. App. 260, 262, 488 S.E.2d 628, 630, *disc. review denied*, 347 N.C. 410, 494 S.E.2d 601 (1997); *see also Insurance Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977) (stating when the terms of the statute and the policy conflict, the statute prevails). Specifically, Farm Bureau asserts our courts have never decided whether an insurer can validly exclude UIM coverage from "relatives" of the named insured who are not members of the same household of the named insured. The specific provision relevant to UIM coverage under the Act is N.C. Gen. Stat. § 20-279.21(b)(4), which requires UIM coverage in accordance with the provisions of G.S. 20-279.21(b)(3).

At the time of the accident, N.C. Gen. Stat. § 20-279.21(b)(3) provided in relevant part:

> For purposes of this section "persons insured" means 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, express or implied, of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicles to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of the motor vehicle.

(Emphasis added.) Under this statute there are 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.

(Emphasis added). *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). Members of the first class are "persons insured" for the purposes of UIM coverage regardless of whether the insured vehicle is involved in the insured's injuries. *Id.* Members of the second class are "persons insured" only when the insured vehicle is involved in their injuries. *Id.* The parties here concede that because the vehicle

insured under the Kemper policy was not the vehicle involved in the collision, only the first class of "persons insured" is relevant to this appeal. As to the required first class of insureds, the UIM provisions under the Kemper policy provide identical coverage as mandated by G.S. 20-279.21(b)(3). In both, one must be a "relative" of the named insured *residing in the same household* in order to be entitled to first class UIM coverage. Pursuant to the parties' stipulations in this case, neither Milton nor Mary Perkinson resided in the household of Leon Perkinson at the time of the accident and accordingly, are not entitled to UIM coverage.

Despite the unambiguous language in the Act, Farm Bureau asserts the trial court's refusal to extend UIM coverage to Milton and Mary Perkinson violates the Act's purpose, which is to compensate innocent victims of financially irresponsible drivers, citing *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989). To the contrary, defendant Kemper argues that because the language employed in the statute is unambiguous, it would be erroneous for the court to resort to the Act's purpose to determine UIM coverage. We agree. Where "[t]he meaning of the statute is clear, and where there is no ambiguity, there is no room for construction, and the intention must be gathered from the words employed." *Battle v. Rocky Mount*, 156 N.C. 330, 333-34, 72 S.E. 354, 355 (1911); *see also Mazda Motors v. Southwestern Motors*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) ("If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls.")

Farm Bureau also asserts the court's refusal to extend UIM coverage to Milton and Mary is contrary to our Supreme Court's decisions in *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996), and *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 462 S.E.2d 650 (1995). In these cases, however, the court invalidated exclusions in the insurance policies which precluded coverage by persons qualifying as first class "insured persons" under G.S. 20-279.21(b)(3). *Mabe*, 342 N.C. at 496, 467 S.E.2d at 43 (policy exclusion prevented wife and daughter of named insured from UIM coverage where insured vehicle was not involved in accident); *Bray*, 341 N.C. at 682-83, 462 S.E.2d at 654 (policy exclusion prevented wife of named insured from UM coverage where insured vehicle was not involved in accident). Unlike the Kemper policy here, the applicable insurance policies in *Mabe* and *Bray* provided *less* coverage than is

required under G.S. 20-279.21(b)(3). *Id.* Further, the court in both cases reinforced that a "family member" under the Act must reside in the same household as the named insured. *Mabe*, 342 N.C. at 497, 467 S.E.2d at 42; *Bray*, 341 N.C. at 683, 462 S.E.2d at 652.

Accordingly, the trial court properly granted defendant Kemper's motion for summary judgment.

Affirmed.

Judges WALKER and HUNTER concur.

JANICE HARDING, PETITIONER v. NORTH CAROLINA DEPARTMENT OF CORRECTION, RESPONDENT

No. COA99-1134

(Filed 19 September 2000)

Public Officers and Employees— reinstated employee—calculation of back pay

The State Personnel Commission (SPC) did not abuse its discretion in arriving at a figure for partial back pay for a correctional officer who was dismissed and reinstated. A statement in an earlier appellate decision remanding the case dealt with the right to receive back pay and did not mandate a particular amount. Although it would have been better practice for the SPC to offer some evidentiary basis for the figure awarded, the Administrative Code provides little guidance where partial back pay is premised solely on failure to mitigate and the SPC is therefore required to use its wisdom and discretion in calculating the amount.

Appeal by both parties from judgment entered 14 June 1999 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 16 August 2000.

Marvin Schiller and David G. Schiller for petitioner-cross-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Neil Dalton, for respondent-appellant.

LEWIS, Judge.

This appeal marks the fourth time that this case has come before the appellate courts of North Carolina. The North Carolina Correctional Institution for Women ("CIW") dismissed Janice Harding from her position as a correctional officer after Ms. Harding took extended leave without pay due to a pre-existing hip condition. After undergoing hip replacement surgery, Ms. Harding's doctor cleared her for light duty work. Respondent North Carolina Department of Correction ("DOC") refused to reinstate her. Ms. Harding then had a hearing before the Office of Administrative Hearings ("OAH"). The Administrative Law Judge ("ALJ") recommended Ms. Harding's reinstatement at the CIW. He also recommended that she receive back pay. The State Personnel Commission ("SPC") refused to adopt the ALJ's recommendation and upheld the dismissal. Ms. Harding appealed the decision to the superior court. The trial judge reversed the SPC and ordered Ms. Harding's reinstatement; in addition, he concluded that she was entitled to back pay. This Court in *Harding v. N.C. Dept. of Correction*, 106 N.C. App. 350, 416 S.E.2d 587, *disc. review denied*, 332 N.C. 147, 419 S.E.2d 567 (1992) (*Harding I*), affirmed the superior court's decision. Thereafter, DOC reinstated Ms. Harding but did not give her back pay.

Ms. Harding then brought an action against the DOC to recover the back pay that was authorized by *Harding I*. The superior court determined that the DOC should pay Ms. Harding $86,806.01. In *Harding v. N.C. Dept. of Correction*, 334 N.C. 414, 432 S.E.2d 298 (1993) (*Harding II*), the Supreme Court remanded the case to the SPC to determine the amount of back pay, articulating that the SPC's regulations governing back pay make it better suited than the superior court in matters regarding the determination of back pay. On remand, the SPC determined that Ms. Harding was due $86,806.01. In doing so, however, the SPC based its determination on an internal memo that was not a part of the administrative record. In *N.C. Dept. of Correction v. Harding*, 120 N.C. App. 451, 462 S.E.2d 671 (1995), *aff'd per curiam*, 344 N.C. 625, 476 S.E.2d 105 (1996) (*Harding III*), this Court concluded that the SPC did not have the authority to hear or admit new evidence into the record. The case was then remanded to the SPC with instructions to remand to the OAH for a full evidentiary hearing regarding back pay.

Following that hearing, the ALJ issued its Recommended Decision. In it, the ALJ first found that Ms. Harding would have earned $86,806.01 during the period of her wrongful termination. The

ALJ then determined that respondent had recently paid $16,435.21 of that amount to Ms. Harding. Next, the ALJ found that Ms. Harding only "made minimal efforts to find suitable employment during the relevant period" and therefore did not mitigate her damages. The ALJ concluded Ms. Harding was not entitled to the full amount she would have earned, i.e. $86,806.01. Instead, the ALJ recommended partial back pay in the amount of $25,000, exclusive of the $16,435.21 Ms. Harding had already received. However, the ALJ made no findings as to how it derived this amount.

On its review, the SPC adopted the ALJ's findings and recommendations, including the $25,000 partial back pay award. Ms. Harding again petitioned for judicial review, and the superior court remanded the case on the ground that the findings were insufficient to support the $25,000 figure awarded. Both parties now appeal. Ms. Harding claims she is entitled to the full $86,806.01 based on this Court's decision in *Harding I*, less the $16,435.21 she already received. Respondent counters that the SPC's partial award of $25,000 was correct and that the findings were sufficient to support this figure.

In *Harding II*, our Supreme Court emphasized that the SPC is vested with broad discretion in determining *whether* to award back pay. *Harding II*, 334 N.C. at 420, 432 S.E.2d at 302. So long as the SPC follows its own rules for calculating back pay, this discretion would extend to determinations of the *amount* of back pay to be awarded as well. Petitioner contends that *Harding I* removed the SPC's discretion here and mandated an award of full back pay. Specifically, she points to the following language from *Harding I*: "[Petitioner] would, of course, be entitled to compensation for the time during which she was wrongfully terminated." *Harding I*, 106 N.C. App. at 356, 416 S.E.2d at 590. We do not believe this statement in any way mandates an award of full back pay or otherwise abrogates the SPC's traditional discretionary role. At best, this isolated statement only deals with petitioner's right to receive back pay. In no way does it mandate a particular amount that she must be paid.

Next, we address whether the SPC's findings were sufficiently specific to support its partial back pay award of $25,000. We note that there is a paucity of case law discussing how specific agency findings must be in the context of calculating partial back pay awards. Some guidance is found in the North Carolina Administrative Code ("the Code"), which sets out the guidelines to be used by the SPC in making back pay determinations. According to those rules:

(a) The Personnel Commission has the authority to award full or partial back pay in all cases in which back pay is a requested or possible remedy.

. . . .

(*l*) One component of the decision to award back pay shall be evidence, if any, of the grievant's efforts to obtain available, suitable employment following separation from state government.

N.C. Admin. Code tit. 25, r. 1B.0421 (June 2000).

It is clear that the Code authorizes partial awards of back pay and states that evidence of mitigation is to be considered in back pay determinations. Here, the SPC followed those guidelines; petitioner's "minimal efforts" to find employment provided the basis for awarding only partial back pay. The Code, however, sets forth no specific formula or other guidance for calculating the amount of partial back pay. We will not attempt to do so here, as *Harding II* reminds us that the SPC is better suited than our courts for calculating back pay. *Harding II*, 334 N.C. at 420, 432 S.E.2d at 302. As stated earlier, such calculations necessarily involve some element of discretion by the SPC.

In this case, although it might have been better practice for the SPC to offer some evidentiary basis for its award of $25,000, we cannot say the SPC abused its discretion in arriving at this figure. Like a jury, the SPC may believe all, part, or none of the evidence put before it. Admittedly, requiring the SPC to provide a specific basis for its decisions would be theoretically appealing. In practice, however, such a requirement would be both unduly burdensome, as it may require a remand to the OAH for the introduction of further evidence, and unrealistic, as specific evidence likely would not even exist. We therefore conclude that the SPC's findings regarding Ms. Harding's failure to mitigate, coupled with its findings as to how much she would have earned during the period of her wrongful termination, provided sufficient support to justify its award of $25,000 in partial back pay.

We wish to emphasize that, in some situations, partial back pay can be easily calculated, such as when the grievant actually becomes employed elsewhere during the period of wrongful termination. In those instances, the SPC's discretion is necessarily limited, as the Code mandates that the grievant's interim wages be subtracted from

the full amount she would have received. N.C. Admin. Code tit. 25, r. 1B.0421(c). In situations like the present one, where partial back pay is premised solely upon the grievant's failure to mitigate, with no figures to calculate, the Code provides little guidance, thereby requiring the SPC to exercise its wisdom and discretion in calculating the amount of partial back pay to be awarded.

We reverse the order of the trial court and remand for entry of an order affirming the SPC's partial back pay award of $25,000.

Reversed and remanded.

Judges WALKER and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 SEPTEMBER 2000

IN RE LONG No. 99-846	Mecklenburg (92J658) (92J659)	Affirmed
JOHN E. DAVENPORT, P.A. v. O'NEAL No. 00-163	Nash (98CVD1501)	Appeal Dismissed
LENOIR CTY. EX REL. RANEY v. RANEY No. 99-1601	Lenoir (97CVD547)	Remanded
STATE v. CLEMENTS No. 99-1558	Guilford (95CRS41986) (95CRS20499) (95CRS20500) (95CRS42530)	No Error
STATE v. COCHRAN No. 00-203	Rockingham (99CRS6609)	No Error
STATE v. DOWNING No. 00-114	Cumberland (99CRS18287)	No Error
STATE v. HARRIS No. 99-1455	Robeson (97CRS13819)	No Error
STATE v. MISHOE No. 00-186	Randolph (98CRS12907)	No Error
STATE v. PAYNE No. 00-10	Gaston (98CRS31739)	No Error
STATE v. SCHLAEPFER No. 99-740	Transylvania (97CRS1421) (97CRS2008)	Reversed in part, no error in part

FILED 19 SEPTEMBER 2000

HAMRICK v. BUTNER No. 99-963	Catawba (95CVS1131)	Reversed and Remanded
HAYES v. BREWSTER No. 00-204	Gaston (98CVS3456)	Affirmed
HOGAN OUTDOOR, INC. v. TOLSON No. 99-1075	Wake (98CVS013035)	Affirmed

IN RE ANDERSON No. 99-1573	Alamance (99J50)	Affirmed
IN RE MERRITT No. 99-1155	Durham (97J17)	Dismissed
STATE v. AMAYA No. 00-328	Mecklenburg (98CRS37864)	No Error
STATE v. ATKINS No. 99-1560	Granville (96CRS658)	No Error
STATE v. BROTHERS No. 99-756	Pasquotank (96CRS1891)	New Trial
STATE v. ETHERIDGE No. 99-1461	Guilford (98CRS58991)	No Error
STATE v. EVANS No. 00-157	Durham (94CRS6601)	Affirmed
STATE v. GIBSON No. 99-949	Robeson (96CRS10996)	Reversed and Remanded
STATE v. GODWIN No. 00-172	Hoke (98CRS5126)	Reversed and Remanded
STATE v. HOLDER No. 99-836	Wake (97CVS31513)	No Error
STATE v. McCROREY No. 99-966	Mecklenburg (98CRS103800) (98CRS103801)	No Error
STATE v. PITTMAN No. 99-1493	Cumberland (95CRS54197) (96CRS24481) (96CRS8540) (96CRS8536)	No Error
STATE v. ROBINSON No. 99-1497	Durham (98CRS29605)	No Error
STATE v. SAAFIR No. 99-1302	Durham (98CRS12136)	No Error
STATE v. SCOTT No. 00-146	Moore (98CRS5323)	No Error
STATE v. UMBEHANT No. 99-1548	Orange (98CRS12071) (98CRS12072)	No Error

STITES v. LITTLE RIVER ASSOCS. No. 99-1151	Moore (97CVS681)	Affirmed
THOMPSON v. ROBERTS No. 99-1185	Chatham (97CVS00438)	Reversed
WADE v. N.C. REAL ESTATE COMM'N No. 99-1129	Wake (98CVS08676)	Reversed and Remanded
WEDGEWOOD HOMEOWNERS ASS'N v. SPRINGS No. 99-1133	Mecklenburg (97CVD8873)	Affirmed

STATE OF NORTH CAROLINA v. RONNIE LEE KIMBLE, DEFENDANT

No. COA99-981

(Filed 3 October 2000)

1. Evidence— hearsay—statements against interest—accomplice's self-inculpatory statements—statements implicating defendant already admitted

The trial court did not err in a first-degree murder case by allowing into evidence under N.C.G.S. § 8C-1, Rule 804(b)(3) a nontestifying accomplice's statements against the accomplice's penal interest, and statements both against the accomplice's penal interest and inculpating defendant, because: (1) testimony of only self-inculpatory statements by the accomplice are classic statements against interest that fall within a firmly-rooted hearsay exception; (2) even assuming the testimony of both the accomplice's self-inculpatory statements and statements that implicated defendant was error, such error was not prejudicial when the State presented overwhelming evidence that defendant committed the murder and that the evidence was properly admitted through other witnesses; and (3) collateral remarks inculpating defendant are not required to be redacted from an out-of-court statement that also contains self-inculpating remarks in order to admit the statement under N.C.G.S. § 8C-1, Rule 804(b)(3).

2. Evidence— hearsay—not offered for truth of matter asserted

The trial court did not err in a first-degree murder case by admitting various statements of the victim inquiring why the agent for an insurance company needed health information for a cancer insurance policy, and inquiring about the value of the policy once the victim found out that it was a life insurance policy, because: (1) the statements were offered to establish that the victim's husband had submitted the victim's life insurance application without her knowledge; and (2) the statements were not offered for the truth of the matters asserted.

3. Evidence— hearsay—state of mind exception

Even though the victim's statements contained descriptions of factual events, the trial court did not err in a first-degree murder case by admitting her statements under N.C.G.S. § 8C-1, Rule

803(3) that the victim's husband took out a life insurance policy without her knowledge, that her husband was not the man she married and had been acting differently, and that she was afraid she would not wake up in the morning since her husband slept with a gun underneath his pillow, because: (1) the statements were admissible to show the victim's state of mind; and (2) it was not necessary for the victim to state explicitly to each witness that she was afraid as long as the scope of the conversation related directly to her existing state of mind and emotional condition.

4. Evidence— exclusion—not preserved for review—objectionable questions

The trial court did not commit prejudicial error in a first-degree murder case by sustaining the State's objections to various questions during defendant's cross-examination of a detective, because: (1) the record fails to demonstrate what the detective's answers would have been had he been permitted to respond to defendant's questions; and (2) the questions were objectionable based on the fact that they were repetitive, argumentative, or called for speculation and conjecture.

5. Evidence— direct examination—leading questions

The trial court did not abuse its discretion in a first-degree murder case by sustaining the State's objections to various questions put to defendant on direct examination on the grounds that the questions were leading, because: (1) defendant had an opportunity to deny the charges against him; and (2) the questions were repetitious.

6. Evidence— cross-examination—collateral matter—no prejudicial error

The trial court did not commit prejudicial error in a first-degree murder case even though it allowed the State to question defendant during cross-examination on a collateral matter regarding three photographs of a woman found in defendant's cell to contradict defendant's statement that he holds nothing secret from his wife, because: (1) the subject was collateral to the issues before the jury and any error was thus unlikely to have impacted the outcome of the trial; (2) the inquiry by the State was extremely brief and was terminated by a sustained objection and an instruction to disregard the question; and (3) defendant had already testified that his wife had filed for divorce, significantly

decreasing the potential for prejudice resulting from any implication of defendant's interest in another woman.

7. Evidence— allegations of prior insurance fraud—probative of truthfulness

The trial court did not abuse its discretion in a first-degree murder case by allowing the State to question defendant regarding allegations that his brother and his parents had committed insurance fraud, because: (1) the possibility that defendant was aware of, and therefore conspired in, an insurance fraud scam undertaken by his brother and parents is arguably probative of defendant's truthfulness under N.C.G.S. § 8C-1, Rule 608(b); and (2) defendant failed to show an abuse of discretion.

Appeal by defendant from judgment entered 3 September 1998 by Judge C. Preston Cornelius in Guilford County Criminal Superior Court. Heard in the Court of Appeals 15 August 2000.

Michael F. Easley, Attorney General, by James C. Gulick, Special Deputy Attorney General, for the State.

W. David Lloyd and John B. Hatfield, Jr., for defendant-appellant.

SMITH, Judge.

Patricia Kimble (Patricia) was found dead in her home on 9 October 1995. An autopsy determined the cause of death was a gunshot wound to the side of her head. Patricia's body and the area of the house in which she was found had been burned. Investigators concluded the fire had been caused by arson.

Defendant is the brother of Patricia's husband, Ted Kimble (Ted). At trial, the State espoused the theory that Ted had decided to kill Patricia in order to collect the proceeds from her life insurance. The State further contended that Ted had recruited defendant to murder Patricia. The jury found defendant guilty of first-degree murder, conspiracy to commit murder, and first-degree arson.

I.

[1] Defendant first asserts the trial court erroneously allowed in evidence statements by Ted, a co-defendant in the crime who was tried separately. Defendant asserts the admission of these statements violated both North Carolina law, as well as defendant's Sixth

Amendment right to confront and cross-examine an adverse witness. Defendant's argument is without merit.

During defendant's trial, Ted invoked his Fifth Amendment privilege not to testify. Statements Ted made were then offered in evidence through the testimony of two witnesses, both of whom had been involved with Ted in a theft ring. All of the statements implicated Ted in the murder; some of the statements also implicated defendant in the murder. After conducting a *voir dire* hearing, the trial court admitted the statements pursuant to N.C.G.S. § 8C-1, Rule 804(b)(3) (1999) (statements against interest) (Rule 804(b)(3)) and N.C.G.S. § 8C-1, Rule 801(d)(E) (1999) (statement by co-conspirator in furtherance of conspiracy).

The first of these two witnesses, Robert Nicholes (Nicholes), testified that Ted told Nicholes the following: (1) Ted had been involved in Patricia's death but had not killed her; (2) Ted had attempted to take out a life insurance policy on Patricia and had forged her signature on the application; and (3) Ted was angry because the life insurance policy was not valid because Patricia had not taken a required physical examination. Notably, Nicholes did not testify that Ted had stated that defendant had been involved in the murder; Nicholes testified only to self-inculpatory statements made by Ted.

The second of these two witnesses, Patrick Pardee (Pardee), testified that Ted had told him the following: (1) defendant had gone to Ted's house, had shot Patricia in the head with Ted's pistol, and had then poured gasoline on her body and set it afire; (2) Ted had taken a second job to establish an alibi for himself; (3) the murder was committed to collect life insurance proceeds; (4) Ted realized he would be unable to collect on the life insurance policy because it was not in effect; and (5) Ted believed the police were closing in on him.

The State properly concedes "there is little basis for arguing that the statements were made during the course and in furtherance of the defendant's conspiracy with Ted to murder Patricia for her life insurance" as the conspiracy had ended. The issue on appeal, then, is limited to whether the statements were properly admitted under Rule 804(b)(3).

A.

An out-of-court statement by an unavailable witness may be admissible if the statement satisfies the definition of a "statement against interest," which is defined by Rule 804(b)(3) as

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

G.S. § 8C-1, Rule 804(b)(3).

Our Supreme Court has held that Rule 804(b)(3) requires a two-pronged analysis. *See State v. Wilson*, 322 N.C. 117, 134, 367 S.E.2d 589, 599 (1988). First, the statement must be "deemed to be against the declarant's penal interest." *Id.* Second, "the trial judge must be satisfied that corroborating circumstances clearly indicate the trustworthiness of the statement if it exposes the declarant to criminal liability." *Id.* The corroborating circumstances required by the second prong may include other evidence presented at trial. *See id.* (corroborating circumstances properly included fact that statement by unavailable witness accurately identified location of stolen items).

However, the analysis required in the case at bar is further complicated by a second hurdle. In addition to satisfying Rule 804(b)(3), the evidence also must satisfy the requirements of the Confrontation Clause of the Sixth Amendment. U.S. Const. amend. VI. In the recent case of *Lilly v. Virginia*, 527 U.S. 116, 144 L. Ed. 2d 117 (1999), the United States Supreme Court considered the issue of whether a criminal defendant's Sixth Amendment rights are violated by admitting in evidence a non-testifying accomplice's statement which contains both statements against the accomplice's penal interest and statements inculpating the defendant.

The four-Justice plurality in *Lilly* began by setting forth the fundamental principle that when the government seeks to offer an unavailable declarant's out-of-court statements against a criminal defendant, the court must decide whether the Confrontation Clause permits the government to deny the defendant an opportunity to cross-examine the declarant. *Id.* at 124, 144 L. Ed. 2d at 126. The plurality then reiterated the holding in *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980), that such statements may be admissible when

(1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability.

Lilly, 527 U.S. at 124-25, 144 L. Ed. 2d at 127 (quoting *Roberts*, 448 U.S. at 66, 65 L. Ed. 2d at 608).

The plurality then explained that the categorization of an out-of-court statement as a "statement against penal interest" does not necessarily place the statement within a "firmly rooted hearsay exception" under the *Roberts* test because the label "statement against penal interest" defines too broad a class. *Id.* at 127, 144 L. Ed. 2d at 128. The plurality then defined three different categories of "statements against penal interest," *id.*, only one of which is pertinent here. The third category (statements offered as evidence by the prosecution to establish the guilt of an accomplice) encompasses the kind of "statements against interest" found in *Lilly*, i.e., those statements that inculpate both a declarant and a defendant. *Id.* at 130, 144 L. Ed. 2d at 130. Such dual-inculpatory statements are inherently unreliable and untrustworthy as the accomplice often stands to gain by inculpating another defendant. *Id.* at 131, 144 L. Ed. 2d at 131. The plurality concluded by stating: "[t]he decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule." *Id.* at 134, 144 L. Ed. 2d at 133.

B.

In light of this framework, the substantive differences between the testimony of Pardee and of Nicholes become extremely significant. While Pardee testified as to a conversation in which Ted made both self-inculpatory statements and statements that implicated defendant, Nicholes testified only to self-inculpatory statements by Ted. Such purely self-inculpatory statements, unlike the dual-inculpatory statements in *Lilly*, are classic "statements against interest" and thus fall within a firmly-rooted hearsay exception. *See id.* at 131-32, 144 L. Ed. 2d at 131-32.

Having concluded that the admission of Nicholes' testimony did not violate defendant's Sixth Amendment rights, we now proceed to analyze Nicholes' testimony to determine whether it was properly admitted under Rule 804(b)(3). Applying the two-part test set forth in *Wilson*, we first note that the challenged statements unquestionably

were against Ted's penal interests at the time they were made, and, thus, "a reasonable man in his position would not have made the statement[s] unless he believed [them] to be true." G.S. § 8C-1, Rule 804(b)(3). The statements, therefore, satisfy the first prong of the analysis.

Furthermore, sufficient corroborating evidence was admitted at trial to indicate the trustworthiness of the statements. Such evidence included: (1) Ted's efforts to take out additional life insurance policies on Patricia shortly before her murder, without her knowledge; (2) Patricia's statements to various friends shortly before her murder, conveying her fear, based on Ted's conduct and behavior, that Ted might be planning on killing her; and (3) testimony of Mitch Whidden (Whidden) regarding defendant's statements that provided the same portrayal of Ted's involvement in the murder as Ted's own statements. Thus, the second prong of the analysis is also satisfied. The trial court, therefore, did not err in admitting Nicholes' testimony.

C.

Pardee's testimony, however, presents precisely the kind of situation addressed in *Lilly*, in which the prosecution offers in evidence statements of an accomplice that inculpate both the accomplice and the criminal defendant. Because such dual-inculpatory statements are inherently unreliable, in that the declarant often stands to gain by inculpating another, *Lilly*, 527 U.S. at 131, 144 L. Ed. 2d at 131, such statements do not fall within a firmly-rooted exception to the hearsay rule, *id.* at 134, 144 L. Ed. 2d at 133. Thus, as to Pardee's testimony, the constitutional issue becomes whether the statements contain "particularized guarantees of trustworthiness." *Id.* at 135, 144 L. Ed. 2d at 133-34 (quoting *Roberts*, 448 U.S. at 66, 65 L. Ed. 2d at 608).

Whether the statements at issue satisfy this standard requires an analysis for which only a few guidelines have been set by the Supreme Court. For example, the reliability of the statements must be established by the inherent trustworthiness of the statements themselves and cannot be established by an effort to "bootstrap on" the trustworthiness of other evidence at trial. *Id.* at 138, 144 L. Ed. 2d at 135.

In the instant case, we find it unnecessary to determine whether the statements offered through the testimony of Pardee contain "particularized guarantees of trustworthiness." Assuming *arguendo* that

the statements fail to meet this constitutional standard, and that admission of such statements was error, we believe such error was not prejudicial.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b) (1999). In the case at bar, we believe the State has successfully met this burden for two reasons. First, the State presented overwhelming evidence that defendant committed the murder even without the admission of Pardee's testimony. Second, the facts established through Pardee's testimony were properly admitted in evidence through other witnesses.

Whidden, an ordained Baptist minister and a personal friend of defendant, testified that in 1997 defendant visited Whidden at his home and stayed with Whidden and his family overnight. Whidden testified that during this visit defendant confessed to Whidden that he had killed Patricia at Ted's request and that he was to receive payment from Ted in return. Whidden testified that after defendant left his home, Whidden spoke with the Reverend Jerry Falwell (Falwell) to ask his advice about defendant's confession. After meeting with Falwell and Falwell's son, an attorney, Whidden checked into a hotel with his family because he was afraid that defendant might return to his home.

Thereafter, Whidden went to see defendant in an attempt to persuade him to turn himself in. When defendant refused to do so, Whidden returned home, met with another attorney, Frank Yeatts (Yeatts), and gave a statement to the State Bureau of Investigation (SBI). He then left his job and moved himself and his family out of state for six months until defendant was in prison because he feared for the safety of his family. Various elements of Whidden's testimony were corroborated by the testimony of Falwell, Yeatts, Whidden's wife, and an agent with the SBI.

Whidden's testimony demonstrates the strength of the State's case against defendant. In addition, much of the evidence established through Pardee's testimony was properly admitted through Whidden's testimony. Where evidence is properly admitted through one witness, the defendant will not be heard to complain that the same evidence, improperly admitted through a different witness, was prejudicial error. *See, e.g., State v. Washington*, 131 N.C. App. 156, 163-64, 506 S.E.2d 283, 288 (1998) (trial court's error was harmless beyond a rea-

sonable doubt where improperly admitted hearsay testimony was almost entirely repetitive of the properly admitted testimony of other witnesses at trial). Given these considerations, we conclude any constitutional error was harmless beyond all doubt.

As for the Rule 804(b)(3) analysis, our Supreme Court does not require that collateral remarks inculpating the defendant be redacted from an out-of-court statement that also contains self-inculpating remarks in order to admit the statement under Rule 804(b)(3). *See Wilson*, 322 N.C. at 133, 367 S.E.2d at 598 ("The fact that [the challenged statements] have dual inculpatory aspects does not take the statements outside the range of Rule 804(b)(3)."). The statements offered by Pardee contain the same self-inculpatory remarks as the statements offered by Nicholes. Accordingly, the statements offered by Pardee satisfy Rule 804(b)(3) for the same reasons as the statements offered by Nicholes, and the collateral remarks that inculpate defendant need not be redacted from the statements in order for the statements to be admissible. This assignment of error is overruled.

II.

[2] Defendant next alleges the trial court erred in admitting in evidence various statements by the victim, Patricia. The State called five witnesses to offer testimony regarding statements Patricia made at various times prior to her death. We find no error in the admission of these statements.

The first of these five witnesses, William Jarrell (Jarrell), an agent for a life insurance company, testified that: (1) Ted requested a $200,000 life insurance policy for Patricia; (2) Ted provided Jarrell with an insurance application allegedly signed by Patricia; (3) Jarrell called Patricia in order to obtain required health information; (4) during this phone call, when Patricia inquired as to why such information was necessary for a cancer insurance policy, Jarrell informed her the policy was for life insurance; and (5) when she further inquired about the value of the life insurance policy, Jarrell informed her it was for $200,000, at which point Patricia "slammed the phone down."

Defendant contends such statements constitute hearsay and were improperly admitted. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1999). We find no error in the admission of Jarrell's testimony,

as the statements made by Patricia ("Why do you need this information for a cancer insurance?" and "How much life insurance?") were offered merely to establish that Ted had submitted Patricia's life insurance application to Jarrell without Patricia's knowledge. The statements were not offered for the truth of the matters asserted and, therefore, do not constitute hearsay.

[3] The second of the five witnesses was Linda Cherry (Cherry), a friend of Patricia. Cherry testified that Patricia told her the following shortly before her death: (1) she was concerned about the state of her marriage, and she believed Ted did not want to spend time with her anymore; (2) Ted had been acting differently, he had been getting agitated easily, and he had started to use profanity; (3) she did not like the fact that Ted had gotten a second job because she felt that they did not need the extra money.

The third of the five witnesses was Cara Dudley (Dudley), a close friend of Patricia. Dudley testified that Patricia told her the following shortly before her death: (1) in case anything strange ever happened to her, she wanted Dudley to know that she had discovered by accident that Ted had taken out a large insurance policy on her; (2) she did not know why Ted wanted so much additional life insurance because she already had one life insurance policy; and (3) Ted must have signed her name on the application because she had not signed her own name. Dudley also testified that Patricia was very upset, her voice was shaky during this conversation, and she was trying not to cry.

The fourth of these five witnesses was Rose Lyles (Rose), another friend of Patricia. Rose testified that Patricia told her: (1) she had found a life insurance application on which Ted had forged her signature; (2) Ted was not the man she married; (3) Ted slept with a gun underneath his pillow and when she went to sleep she feared that she might not wake up in the morning. Rose also testified that Patricia cried during the conversation and that Rose had never heard so much fear in anybody's voice.

The final of these five witnesses was Gary Lyles (Gary), Rose's husband and also a friend of Patricia. Gary testified that Patricia told him: (1) she had found a life insurance policy that Ted had taken out without her knowledge; (2) Ted had forged her signature on the application; (3) Ted was not the man she married; and (4) Ted slept with a gun underneath his pillow.

Defendant contends these statements were erroneously admitted under the hearsay exception provided by N.C.G.S. § 8C-1, Rule 803(3) (1999) (Rule 803(3)). Rule 803(3) allows the admission of hearsay testimony in evidence if it tends to show the victim's then existing state of mind or "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." G.S. § 8C-1, Rule 803(3).

This Court was recently faced with a strikingly similar set of facts in *State v. Wilds*, 133 N.C. App. 195, 515 S.E.2d 466 (1999). In *Wilds*, the defendant Curtis Wilds was accused of the first-degree murder of his wife, Tonya Wilds (Tonya). At trial, the State offered testimony from multiple witnesses regarding statements made by Tonya within a few weeks before her murder. *Id.* at 203-04, 515 S.E.2d at 473-74. Testimony offered by the witnesses included the following statements by Tonya: (1) her husband had attempted to change her life insurance policy to designate himself as the named beneficiary; (2) she had once woken up in her bed during the night to discover her husband pouring gasoline on her nightgown; (3) she had an unhappy marriage filled with physical and emotional abuse; and (4) she was afraid her husband would try to kill her. *Id.* Many of the witnesses specifically testified that Tonya was shaking and tearful when she made such statements. *Id.*

The *Wilds* Court stated:

> [a]lthough statements that relate only factual events do not fall within the Rule 803(3) exception, statements relating factual events which tend to show the victim's state of mind, emotion, sensation, or physical condition when the victim made the statements are not excluded if the facts related by the victim serve to demonstrate the basis for the victim's state of mind, emotions, sensations, or physical condition.

Id. at 204-05, 515 S.E.2d at 474 (citations omitted).

The Court in *Wilds* therefore held that the statements were admissible to show Tonya's state of mind, despite the fact that the statements also contained descriptions of factual events. *Id.* at 205, 515 S.E.2d at 475. Similarly, we hold in the instant case that Patricia's prior statements were properly admitted to show her state of mind. Furthermore, as in *Wilds*, "it was not necessary for [Patricia] to state explicitly to each witness that she was afraid, as long as the 'scope of the conversation . . . related directly to [her] existing state of mind

and emotional condition.' " *Id.* at 206, 515 S.E.2d at 475 (quoting *State v. Mixion*, 110 N.C. App. 138, 148, 429 S.E.2d 363, 368, *disc. review denied*, 334 N.C. 437, 433 S.E.2d 183 (1993)).

Defendant argues that the case of *State v. Hardy*, 339 N.C. 207, 451 S.E.2d 600 (1994), "is directly on point" with the case at bar, and cites to *Hardy* for the proposition that "[s]tatements of fact, even those which might explain why the declarant was frightened or angry are not admissible." One searches in vain for such a proposition in *Hardy*.

In *Hardy*, our Supreme Court held that statements from the victim's diary describing the defendant's violent conduct, which "expresse[d] no emotion and seem[ed] to have been written in a calm and detached manner," *id.* at 229, 451 S.E.2d at 613, were not admissible under Rule 803(3) because they did not constitute statements of the victim's state of mind, and merely amounted to "a recitation of facts which describe various events," *id.* at 228, 451 S.E.2d at 612. The notion that the result in *Hardy* may be expanded beyond the particular facts in that case has previously been foreclosed by this Court. As we stated in *Wilds*,

> [t]his case is distinguishable from *Hardy* in that the statements in *Hardy* were taken from the victim's diary and contained descriptions of assaults and threats against the victim before she died but *did not reveal the victim's state of mind* or contain statements of the victim's fear of defendant.

Wilds, 133 N.C. App. at 205, 515 S.E.2d at 475 (emphasis added). This assignment of error is overruled.

III.

[4] Defendant next contends the trial court erred in sustaining the State's objections to various questions put to Detective James Church (Detective Church) during cross-examination by defendant. "It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985).

It is undisputed that the record fails to demonstrate what Detective Church's answers would have been had he been permitted to respond to defendant's questions. "By failing to preserve evidence

for review, defendant deprives the Court of the necessary record from which to ascertain if the alleged error is prejudicial." *State v. Locklear*, 349 N.C. 118, 150, 505 S.E.2d 277, 296 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). Thus, defendant cannot show that the trial court's ruling with respect to the exclusion of this testimony was prejudicial.

Furthermore, even if we assume *arguendo* that the assignment of error is properly before us on appeal, and even if we assume, as defendant asks of us, that "Detective Church would have answered as the questions led," we find no error in the exclusion of this testimony. We agree with the State that the questions were objectionable because they were repetitive, argumentative, or called for speculation and conjecture. *See Wilson*, 322 N.C. at 135, 367 S.E.2d at 600. This assignment of error is overruled.

IV.

[5] Defendant next contends the trial court erred in sustaining the State's objections, on the grounds of leading, to six specific questions put to defendant on direct examination. The most significant of these questions was the following:

> Q: Did your brother, Ted, ever tell you that he would pay you money if you would assist him in eliminating [Patricia]?

"A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no." *State v. Britt*, 291 N.C. 528, 539, 231 S.E.2d 644, 652 (1977) (citations omitted). "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." N.C.G.S. § 8C-1, Rule 611(c) (1999).

Defendant argues that in sustaining the State's objections, the trial court deprived defendant of an opportunity to "deny to the jury the fundamental charge against him—that his brother offered him money to kill his wife." Defendant is correct in asserting that each of the six questions at issue, to varying degrees, were efforts at rebutting the State's underlying theory that defendant conspired with Ted to murder Patricia. However, at the time of the sustained objections, defendant had already been provided ample opportunity to deny the State's charges against him. For example, a portion of the direct examination of defendant transpired as follows:

Q: Mr Kimble, last night, right before we broke, I asked you if you killed Patricia, and you said you did not.

A: Yes, sir.

Q: Did your brother ever ask you to do anything like that?

A: No.

Q: Did Ted ever tell you he was looking for a hit man?

A: No.

Q: Did you have any knowledge whatsoever of Ted's and Patricia's life insurance arrangements?

A: No.

"Rulings by the trial judge on the use of leading questions are discretionary and reversible only for an abuse of discretion." *State v. Smith*, 290 N.C. 148, 160, 226 S.E.2d 10, 18, *cert. denied*, 429 U.S. 932, 50 L. Ed. 2d 301 (1976) (citations omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its [ruling was] manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Because defendant had had an opportunity to deny the charges against him, it was unnecessary to employ leading questions during the direct examination. Furthermore, the questions were repetitious. We find no abuse of discretion by the trial court in sustaining the State's objections. This assignment of error is overruled.

V.

[6] Defendant next asserts the trial court erred in allowing the State to question defendant during cross-examination regarding three photographs of a woman named Janet Smith. We find no prejudicial error.

The State elicited the following statement from defendant on cross-examination: "I don't know of many things that my wife—I don't know of anything that I—that my wife does not know today, that I hold in secret from her in any way. I think she knows everything there is to know about me." The State then sought to impeach defendant using three photographs of Janet Smith that had been seized from defendant's cell. Defendant objected, but after a *voir dire* hearing on the matter the trial court allowed the following inquiry by the State:

Q: And showing you then State's Exhibit 139-A, B and C, what are those?

A: These are pictures of Janet Smith.

Q: Were those in the book at the time it was taken?

A: I don't know if they were or not.

Q: Were those pictures in your possession on that day?

A: Yes.

Q: Did you tell your wife about those pictures?

MR. LLOYD: Well, objection, Your Honor.

A: Yes, I—

THE COURT: Sustained. Don't answer it.

MR. LLOYD: Move to strike, Your Honor.

THE COURT: Disregard the question, members of the jury.

The credibility of a witness may be impeached on cross-examination by questioning the witness regarding evidence that appears to be inconsistent with the testimony of the witness. *See* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 47 (3d ed. 1988). "However, contradiction of collateral facts by other evidence is not permitted, as its only effect would be to show that the witness is capable of error on immaterial points, and to allow it would confuse the issues and unduly prolong the trial." *Id.*

As a general rule, "collateral matters" are those that are irrelevant to the issues in the case. *See State v. Najewicz*, 112 N.C. App. 280, 289, 436 S.E.2d 132, 138 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994). In the case at bar, whether defendant told his wife about photographs of another woman found in his cell is clearly a collateral matter to the murder of his brother's wife. In seeking to contradict defendant's statement that he holds nothing secret from his wife, the State should have been limited to asking defendant to acknowledge the existence of the photographs, and then asking defendant whether he had told his wife about the photographs. Defendant's answers would have been conclusive on the matter, and the State would have been prohibited from offering extrinsic evidence to contradict the defendant.

However, we conclude the error does not require reversal. Reversible error exists where "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1999). Here, the subject was collateral to the issues before the jury and any error was thus unlikely to have impacted the outcome of the trial. Furthermore, the inquiry by the State was extremely brief, and was terminated by a sustained objection and an instruction to disregard the question. In addition, the defendant had already testified that his wife had filed for divorce, significantly decreasing the potential for prejudice resulting from any implication of defendant's interest in another woman. This assignment of error is overruled.

VI.

[7] Defendant lastly asserts the trial court erred in allowing the State to question defendant regarding allegations that his brother and his parents had committed insurance fraud. Over defendant's objection, the trial court allowed the State to briefly inquire into the matter. In response to the State's questions, defendant stated that no fraud had been committed and that until he read the discovery documents in the case he had no knowledge that such allegations even existed.

It is well-established that a defendant may be cross-examined, for impeachment purposes, concerning prior acts of misconduct, if such prior acts are probative of truthfulness or untruthfulness. N.C.G.S. § 8C-1, Rule 608(b) (1999). The possibility that defendant was aware of, and therefore conspired in, an insurance fraud scam undertaken by his brother and his parents is arguably probative of defendant's truthfulness. The propriety or unfairness of cross-examination rests largely in the trial judge's discretion, and "[h]is ruling thereon will not be disturbed without a showing of gross abuse of discretion." *State v. Foster*, 293 N.C. 674, 685, 239 S.E.2d 449, 457 (1977) (citations omitted). Defendant has shown no abuse of discretion here. We hold there was no error in allowing the State to briefly cross-examine defendant concerning allegations of insurance fraud. This assignment of error is overruled.

No error.

Judges GREENE and EDMUNDS concur.

STATE OF NORTH CAROLINA v. MAURICE ILVENTO PARKER, DEFENDANT

No. COA99-759

(Filed 3 October 2000)

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

The short-form indictment for first-degree murder is constitutional.

2. Evidence— other acts of misconduct—admissible

Admission of other acts of misconduct was not erroneous in a first-degree murder prosecution where the evidence was relevant to the circumstances of the crime, formed a natural part of the State's account of the motive, completed the story of the crime, and the probative value was not outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 404(b).

3. Discovery— criminal—other act of misconduct

The denial of pretrial disclosure of N.C.G.S. § 8C-1, Rule 404(b) evidence did not deprive a first-degree murder defendant of a fair trial. Under N.C.G.S. § 15A-903(f)(1), no statement made by a State's witness or prospective witness is required to be disclosed until after that witness has testified on direct examination.

4. Discovery— criminal—open files

There was no abuse of discretion in a first-degree murder prosecution where an assistant district attorney stated that everything had been turned over to defendant; the State disclosed its investigative file pursuant to an open file policy; the investigative file included officers' interview notes but not interviews conducted by counsel in preparation for trial; and the court allowed the specific testimony at issue, but ordered a recess before cross-examination.

5. Evidence— hearsay—victim's conversation with defendant—deceased witness's statement

The trial court did not err in a first-degree murder prosecution (and any error was harmless) in the admission of an officer's testimony relating the statement of an unavailable witness concerning a conversation between the victim and defendant before the murder. The victim's initial statement was admissible under N.C.G.S. § 8C-1, Rule 803(3) as showing the victim's state of mind

and the statement to the officer was admissible under N.C.G.S. § 8C-1, Rule 804(b)(5), the residual exception, because the witness was dead and the trial court properly considered each of the trustworthiness elements. There was no prejudice even if the witness's statement was inadmissible because it was nearly identical to prior testimony.

6. Appeal and Error— general objection—appellate review waived

Defendant waived appellate review of the overruling of his objections to testimony by two witnesses in a first-degree murder prosecution by making only a general objection.

7. Witnesses— cross-examination—discretion of trial judge

The trial court did not abuse its discretion in a first-degree murder prosecution by limiting the cross-examination of two witnesses.

Appeal by defendant from judgment entered 13 October 1998 by Judge D. Jack Hooks, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 10 May 2000.

Michael F. Easley, Attorney General, by H. Alan Pell, Special Deputy Attorney General, for the State.

Paul M. Green for defendant-appellant.

SMITH, Judge.

Defendant appeals a judgment imposing a life sentence following conviction by a jury of first-degree murder. We find no prejudicial error.

On 21 January 1993, shortly before 1:00 a.m., the Cumberland County Sheriff's department dispatched Deputy Regina Robinson-Hart (Deputy Robinson-Hart) to Hall Motor Company (HMC) in response to a reported shooting. HMC consisted of a car sales business and junkyard. Deputy Robinson-Hart found Vonnie Hall (victim), owner of HMC, dead in the driver's seat of his vehicle. Mike Hall (Hall), HMC sales manager, was seated in a company wrecker with his wife when the deputy arrived. A pathologist later determined victim died as a result of three gunshot wounds to the head.

Defendant, a trooper with the North Carolina Highway Patrol, met victim in 1992, made frequent visits to HMC, and had numerous

encounters with victim, Hall, and other HMC employees. When a break-in occurred at HMC on 10 January 1993, defendant joined victim, police investigators, and others at the scene. Police and HMC employees discovered that sales contracts, a receipt book, around 150 motor vehicle titles, and a shotgun had been taken from the building. Without the stolen contracts, receipt book, and titles, victim could not determine whether vehicles were missing from the premises.

After a three-year homicide investigation, defendant was indicted for first-degree murder on 25 March 1996 and tried during the 29 September 1998 Criminal Session of Cumberland County Superior Court. The State's evidence indicated that defendant killed victim after victim threatened to alert authorities that defendant used forged signatures, false identities, and improperly notarized documents to sell cars defendant did not legally possess or own. Witnesses also related that defendant sold cars without a dealer's license and violated highway patrol policy prohibiting secondary employment.

Following a verdict of guilty on the charge of first-degree murder, the trial court imposed a sentence of life imprisonment. Defendant appeals.

[1] Defendant first contends the short-form indictment used in this case and authorized by N.C. Gen. Stat. § 15-144 (1983) is unconstitutional in light of *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), because it failed to allege all essential elements of first-degree murder. We disagree.

In *Jones*, the United States Supreme Court was interpreting the federal carjacking statute, 18 U.S.C. § 2119 (1993), which provides for three levels of punishment depending on whether the victim was uninjured or slightly injured, seriously injured, or killed during the carjacking. According to the majority, this statute could be interpreted as one offense with three possible penalties or three separate offenses. The Court held: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6, 143 L. Ed. 2d at 326. To prevent trial courts from imposing a greater punishment without charging all of the essential elements in the indictment, the Court held the statute created three

separate offenses that must be charged from the outset. *Id.* at 252, 143 L. Ed. 2d at 331.

In the instant case, the indictment provided:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 21st day of January, 1993, in the County named above the defendant named above unlawfully, willfully and feloniously did of malice aforethought kill and murder Vonnie Lee Hall. This act was in violation of North Carolina General Statutes Section 14-17.

Defendant argues this indictment failed to allege either the essential elements of first-degree murder or the facts relied upon to increase the permissible range of punishment. In *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000), the North Carolina Supreme Court reviewed an indictment containing nearly identical language to that of the indictment *sub judice*, and the Court, considering the United States Supreme Court's ruling in *Jones*, held the indictment was sufficient to charge first-degree murder. The *Wallace* Court noted it had "consistently held indictments based on [G.S. § 15-144 to be] in compliance with both the North Carolina and United States Constitutions." *Id.* at 504-05, 528 S.E.2d at 341 (citations omitted). "In light of our overwhelming case law approving the use of short-form indictments and the lack of a federal mandate to change that determination, we decline to do so." *Id.* at 508, 528 S.E.2d at 343; *see, e.g., State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996) (holding a short-form indictment authorized by N.C. Gen. Stat. § 15-144 sufficient to charge first-degree murder on the basis of premeditation and deliberation). Because "it is not [the Court of Appeals'] prerogative to overrule or ignore . . . written decisions of our Supreme Court," *Kinlaw v. Long Mfg.*, 40 N.C. App. 641, 643, 253 S.E.2d 629, 630, *rev'd on other grounds*, 298 N.C. 494, 259 S.E.2d 552 (1979), we are bound to follow the Supreme Court's decision in *Wallace*. This assignment of error is overruled.

[2] Defendant next contends evidence of defendant's alleged crimes, wrongs, and acts was admitted in violation of the Rules of Evidence and defendant's due process rights. Under Rule 404(b) of the North Carolina Rules of Evidence,

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other

> purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). "[E]vidence 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) (citation omitted) (emphasis added). Relevant evidence is "evidence having any tendency to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1999) (emphasis added). Thus, 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).

Defendant contends the State failed to show that defendant's alleged wrongful conduct demonstrated and was logically connected to his motive for murder or was otherwise admissible pursuant to Rule 404(b). Quoting *State v. Jones*, 322 N.C. 585, 588, 369 S.E.2d 822, 824 (1988), defendant correctly argues " 'the admissibility of evidence of a prior crime must be closely scrutinized since this type of evidence may put before the jury crimes or bad acts allegedly committed by the defendant for which he has neither been indicted nor convicted.' " While "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice," N.C. Gen. Stat. § 8C-1, Rule 403 (1999), we note exclusion of "evidence under Rule 403 is a matter left to the sound discretion of the trial court. . . . Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree," *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (citations omitted).

We do not believe the probative value of the evidence of misconduct in the case at bar is outweighed by the danger of unfair prejudice. Here, defendant's alleged wrongful acts were part of the chain of events explaining the motive, preparation, planning, and commission of the crime. *See State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (holding evidence of marijuana possession established the chain of circumstances leading up to defendant's arrest for LSD pos-

session, thus Rule 404(b) did not require its exclusion as evidence probative only of defendant's propensity to possess illegal drugs). Evidence describing the chain of events is " 'properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.' " *Id.* (alteration in original) (citation omitted).

In the instant case, defendant contends, in part, that the trial court erroneously admitted evidence of defendant's misconduct or violations of law through the testimony of David Martin (Martin), Joey Gardner (Gardner), Douglas Furmage (Furmage), Charles Maynor (Maynor), Lloyd Goodson (Goodson), William Mitrisin (Mitrisin), and other witnesses. We disagree.

Martin's testimony concerning defendant's activities at the time of victim's murder was admitted to describe the chain of events surrounding the crime. Martin testified that, on the night of the murder, defendant came unexpectedly to Martin's home, told him he (defendant) had something he needed Martin to do, and asked him to ride in the floor of defendant's patrol car so that he would not be seen. Defendant drove to Hope Mills and told Martin to "Get out, sneak through this yard here and go back up to the convenience store and I'll pick you up." After exiting the vehicle, Martin saw defendant's patrol car park next to another vehicle at HMC, heard gunshots from that area, looked again in that direction, and observed defendant's car still parked at HMC. Defendant picked Martin up at a nearby convenience store, suggested Martin's family would be harmed if Martin told others what had happened, and sped away from the scene. This description of defendant's behavior on the night of victim's death was relevant as evidence of the circumstances of the crime.

Likewise, there was no error when the trial court allowed the State's witnesses to testify about defendant's car sales, because such evidence was a vital and natural part of the State's chronicle of the murder. Gardner, a Division of Motor Vehicles (DMV) inspector, described proper title transfer procedures. Furmage, who frequently notarized titles for defendant, testified that he and defendant had violated or circumvented a number of these policies or laws. Maynor provided further evidence of this scheme when he testified that he sold a car to HMC without signing the title, his purported signature actually was signed by someone else, and he had never met defendant or the person (Furmage) who notarized the signature on defendant's behalf. As evidence of defendant's alleged scheme to violate motor

vehicle registration laws and to avoid discovery thereof, such testimony formed an integral and natural part of the State's account of and motive for the murder. Therefore, this evidence was properly admitted.

Finally, the trial court admitted additional evidence of misconduct for the purpose of completing the story of the crime. This evidence included the testimony of Goodson, a State Highway Patrol lieutenant, who testified he had conducted a search of defendant's patrol car and found licenses and registrations that should have been turned over to a magistrate under highway patrol policy. Mitrisin, a Fayetteville Police Department investigator, described his discovery that some information from these documents also appeared in car title transactions involving defendant. Each of these witnesses provided further evidence that defendant was involved in activities that were either illegal or prohibited by the State Highway Patrol, allowing the jury to infer that the possibility of victim informing authorities gave defendant a motive for the murder. Evidence of these details thus provides jurors with a complete understanding of the reason for the murder.

In addition to those witnesses mentioned above, defendant contends eighteen other witnesses were allowed to testify about unrelated misconduct in violation of Rule 404(b). We have reviewed the testimony of each witness, and in each instance, we conclude their statements were properly admitted under Rule 404(b) for purposes other than showing defendant's character and propensity to commit murder. *See State v. Stager*, 329 N.C. 278, 302-03, 406 S.E.2d 876, 890-91 (1991) (holding evidence concerning the death of defendant's first husband is admissible as long as it is also relevant for a purpose other than showing defendant's propensity to commit the offense charged). In fact, most of the witnesses testified to acts of misconduct similar to or duplicative of those already discussed.

[3] Defendant also contends evidence of misconduct the State intended to use at trial should have been disclosed prior to trial, because the lack of pre-trial notice "deprived [defendant] of the right to be informed of the accusation, to the effective assistance of counsel, and to due process of law including a fair opportunity to prepare and present his defense" in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Sections Nineteen and Twenty-three, of the North Carolina Constitution. We disagree.

The extent to which a criminal defendant is entitled to pre-trial disclosure by the United States Constitution is well settled:

> With the exception of evidence falling within the realm of the *Brady* rule, there is no general right to discovery in criminal cases under the United States Constitution, thus a state does not violate the Due Process Clause of the Federal Constitution when it fails to grant pretrial disclosure of material relevant to defense preparation but not exculpatory.

State v. Cunningham, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992) (citations omitted); *see, e.g., Weatherford v. Bursey*, 429 U.S. 545, 549, 51 L. Ed. 2d 30, 42 (1977) (holding "[t]here is no general constitutional right to discovery in a criminal case" and " 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded' "); *U.S. v. LaRouche*, 896 F.2d 815, 826 (4th Cir. 1990) (holding criminal defendants have no general constitutional right to discovery). Further,

> nothing in our statutory discovery provisions would require *the State to compel* its witnesses to submit to any form of interview or questioning by the defense prior to trial; in fact, the State does not [] have to afford the defense pre-trial access to a list of its potential witnesses or copies of any statements they may have made.

State v. Pinch, 306 N.C. 1, 12, 292 S.E.2d 203, 214 (1982) (citations omitted), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988).

The North Carolina Supreme Court has held that Rule 404(b) " 'is not a discovery statute which requires the State to disclose such evidence as [the State] might introduce [under the rule].' " *State v. Ocasio*, 344 N.C. 568, 576, 476 S.E.2d 281, 285 (1996) (quoting *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994)). Instead, North Carolina law provides that "no statement . . . made by a State witness or prospective State witness . . . 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).

There is no support for defendant's contention that further disclosure of Rule 404(b) evidence was required under North Carolina law. Thus, we hold that denial of pre-trial disclosure of Rule 404(b) evidence did not deprive defendant of a fair trial; this assignment of error is overruled.

[4] Defendant also asserts the trial court should have excluded the testimony of HMC service manager Jerry Bell (Bell), because, according to defendant, the State deliberately misrepresented its intent to make its files available to defendant. We disagree.

Under North Carolina law governing sanctions for failure to disclose evidence, the trial court may

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910 (1999). We note "the sanctions it authorizes are not mandatory, but permissive, optional and subject to the sound discretion of the judge." *State v. Hall*, 93 N.C. App. 236, 237, 377 S.E.2d 280, 281 (1989) (citation omitted).

During the 2 September 1998 motions hearing, an assistant district attorney declared, "We've turned over everything that we have to [defendant's attorney]. . . . We have given him everything we have. . . . I don't have any problem representing to the court that we have turned over everything that we do have, whether we are required to or not." Apparently, in this judicial district, pursuant to an open-file policy, the State disclosed its investigative file, which included officers' interview notes but not interviews conducted by counsel in preparation for trial. Thus, Bell's statement to police was disclosed to defendant, while an assistant district attorney's notes concerning Bell's account of an angry victim threatening to turn defendant over to superiors was not submitted for discovery. When the State sought to introduce this evidence at trial, defense counsel objected, protesting that defendant should have been given notice of Bell's expected testimony under the State's open-file policy. The State argued the evidence was work product, garnered in preparation for trial, and was not subject to disclosure under its policy. After considering the parties' assertions regarding their differing interpretations of the State's offer to disclose "everything" it had, the trial court allowed Bell's testimony but ordered a recess

before cross-examination to allow defendant to prepare to question the witness.

As sanctions for discovery are permissive and within the discretion of the trial judge, we must find abuse of discretion in order to reach a different result. *See, e.g., State v. Bearthes*, 329 N.C. 149, 405 S.E.2d 170 (1991) (holding trial court's failure to impose permissive sanctions allowed by section 15A-910 was not abuse of discretion and did not prejudice defendant). Under *Bearthes*, *Hall*, and section 15A-910, the trial court's order was appropriate and did not constitute abuse of discretion. This assignment of error is overruled.

[5] Defendant next argues the trial court should not have admitted the testimony of Mitrisin, a police investigator, relating a statement taken from HMC customer William Hammel (Hammel) before Hammel's death. We disagree.

Before the State called Mitrisin as a witness, Bell described the conversation he overheard at HMC one to two days before the murder. Bell testified he "heard [victim] tell [defendant] that he wanted his titles to his cars or [victim was] going to [defendant's] superior or higher." On 23 July 1993, Hammel gave a similar statement to Mitrisin. Hammel's statement indicated that one or two days before the murder, he heard victim tell a trooper "You better get your act together or I'm going to go to your supervisor." The State sought to introduce Hammel's statement through Mitrisin, because Hammel was unavailable to testify.

Defendant does not contest the trial court's ruling that Bell's testimony was admissible under Rule 803(3) as a statement of the victim's existing state of mind, intent, plan, motive, and design, and we agree that this evidence was properly admitted. Rather, defendant contends that, unlike Bell's testimony, Hammel's statement was impermissible hearsay and should not have been admitted through Mitrisin.

After a lengthy *voir dire*, the trial court held that Hammel's statement was:

> *indicative of the state of mind of the deceased*, Vonnie Hall, and would indicate Vonnie Hall's expression of his intention, plan, etc., to contact the defendant's superiors. It is material and relevant. The Court finds that it is more probative on this issue than other evidence which the proponent has or could procure through reasonable efforts . . . .

> Further, it is more probative in that there was not the long-standing relationship between the witness or the deceased Mr. [Hammel] and the witness Jerry Bell . . . . The Court further concludes that the best interest of justice will be served by the admission, that the probative value exceeds any prejudicial effect and concludes further that the statement should be admitted under [N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (1999) (residual hearsay exception)].

(Emphasis added.)

If we assume *arguendo* that Mitrisin's testimony was offered for the truth of the matter asserted,[1] the trial court was presented with a classic case of "double hearsay." 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). The first declarant was victim, who said "You better get your act together or I'm going to go to your supervisor." The second declarant was Hammel, who overheard victim's comment and relayed victim's words in a statement to police officer Mitrisin. For Mitrisin's testimony of Hammel's statement to be admissible in evidence, both victim's and Hammel's statements must fall within an exception to the rule prohibiting hearsay. As to victim's initial statement, the trial court found, and defendant does not challenge, that it would be admissible under N.C. Gen. Stat. § 8C-1, Rule 803(3) (1999) (victim's state of mind). It is Hammel's statement to Mitrisin that defendant contends was inadmissible hearsay.

The State contends the trial court did not err because it "ruled that the statement was admissible pursuant to Rule 803(3), a ruling upon which the appellant has waived appellate review." While the initial statement by the trial court, *i.e.*, "Mr. [Hammel]'s statement would be indicative of the state of mind of the deceased, Vonnie Hall, and would indicate [victim]'s expression of his intention, plan, etc., to

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1. Although the trial court's language to the parties indicated its intent to admit the evidence as an exception to the rule prohibiting hearsay, prior to Mitrisin taking the stand, the trial court instructed the jury:

> Ladies and gentlemen, this evidence again is being offered and received *solely for the purpose of showing that the defendant had a motive* for the commission of the offense charged in this case. If you believe the evidence, again you may consider it but only for that limited purpose for which it is offered.

(Emphasis added.) Accordingly, it appears from this limiting instruction that the trial court did not intend for the evidence to be admitted for its truth.

contact the defendant's superiors," is susceptible to such an interpretation, a close look at the scenario facing the trial court reveals the court's intent to admit *Hammel's* statement under Rule 804(b)(5) and *victim's* statement under Rule 803(3). The statement introduced related directly to victim's state of mind, but not to Hammel's state of mind. Accordingly, the State's argument must fail.Rule 804 provides in pertinent part:

> (b) *Hearsay Exceptions.*—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5).

Defendant contends (1) the statement was immaterial "because Hammel never identified the person to whom [victim] was speaking as defendant," (2) Mitrisin's testimony of Hammel's statement was "not more probative than other evidence . . . because Jerry Bell gave similar testimony," and (3) there were insufficient "circumstantial guarantees of trustworthiness." After reviewing the record on appeal, we find evidence to support the trial court's assessment as to each of these particular findings, which in turn support the trial court's decision to allow the hearsay statements under the Rule 804(b)(5) catch-

all exception. *See State v. Pretty*, 134 N.C. App. 379, 385, 517 S.E.2d 677, 682, *disc. review denied*, 351 N.C. 117, S.E.2d (1999).

Nonetheless, we further address the issue of whether the admission of Mitrisin's testimony violated defendant's constitutional right of confrontation. The residual or "catch-all" hearsay exception of Rule 804(b)(5) is not a "firmly-rooted" exception. *See Idaho v. Wright*, 497 U.S. 805, 817, 111 L. Ed. 2d 638, 653 (1990); *State v. Jackson*, 348 N.C. 644, 653, 503 S.E.2d 101, 106 (1998). Accordingly, "[t]he Confrontation Clauses in the Sixth Amendment to the United States Constitution and Article I Section 23 of the North Carolina Constitution prohibit the State from introducing hearsay evidence in a criminal trial unless the State: 1) demonstrates the necessity for using such testimony, and 2) establishes 'the inherent trustworthiness of the original declaration.' " *State v. Waddell*, 130 N.C. App. 488, 494, 504 S.E.2d 84, 88 (1998) (citation omitted), *modified on other grounds and aff'd*, 351 N.C. 413, 527 S.E.2d 644 (2000). The trial court's ruling in this regard will not be disturbed on appeal unless the findings of fact are not supported by competent evidence or the law is applied erroneously. *See State v. Hurst*, 127 N.C. App. 54, 59, 487 S.E.2d 846, 851 (1997).

" 'Necessity' in this context is not limited to a showing of unavailability, such as when the declarant is dead, out of the jurisdiction, or insane. It also includes situations in which the court 'cannot expect, again, or at this time, to get *evidence of the same value* from the same or other sources.' " *Jackson*, 348 N.C. at 652-53, 503 S.E.2d at 106 (citations omitted). In the case at bar, not only was Hammel dead, the trial court specifically held that his statement was more trustworthy than Bell's statement (which was practically identical) because of Bell's close relationship with victim. Accordingly, the "necessity" element was met.

As to the trustworthiness element:

> In evaluating whether the hearsay testimony meets the circumstantial guarantees of trustworthiness, the trial court should consider the following factors:
>
> (1) assurances of the declarant's personal knowledge of the underlying event, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaning of cross examination.

Pretty, 134 N.C. App. at 386, 517 S.E.2d at 683 (quoting *State v. Triplett*, 316 N.C. 1, 10-11, 340 S.E.2d 736, 742 (1986) (citation omitted)). In this case, the trial court held:

> [T]here is no evidence that this individual has ever recanted the statement. He has been interviewed one time. That the individual did not seek out Mr. Mitrisin, although he was apparently willing to speak to Mr. Mitrisin when he was contacted.
>
> Further note in finding substantial guarantees of trustworthiness that he made it to Mr. Mitrisin apparently . . . knowing that Mr. Mitrisin was an investigator for the law enforcement agency investigating the death of Vonnie Hall. He has never recanted it. The Court would find that he appeared to be motivated to speak the truth.

The trial court properly considered each of the trustworthiness elements, and the record supports the trial court's findings. Defendant's confrontation rights were not violated.

Furthermore, assuming *arguendo* that Mitrisin's testimony concerning Hammel's statement was inadmissible, we discern no prejudice to defendant. When one witness's testimony is properly admitted, erroneous admission of repetitive or cumulative subsequent testimony is not necessarily prejudicial. In *State v. Washington*, this Court found admission of testimony under the residual hearsay exception violated defendant's Sixth Amendment right of confrontation, because the trial court failed to make particularized findings that the statements possessed circumstantial guarantees of trustworthiness. 131 N.C. App. 156, 164, 506 S.E.2d 283, 288 (1998), *disc. review denied*, 350 N.C. 105, 533 S.E.2d 477 (1999). Nevertheless, we held "the trial court's error could not have prejudiced defendant," because this testimony was "almost entirely repetitive of the testimony of [other witnesses], all of which was properly admitted. For this reason, the admission of the testimony . . . , though error, was harmless beyond a reasonable doubt." *Id.*; *see* N.C. Gen. Stat. § 15A-1443(b) (1999).

In the instant case, Hammel's statement regarding the circumstances and content of Hall's conversation with defendant was nearly identical to Bell's prior testimony. Therefore, we conclude that admission of Hammel's statement, even if error (and we do not believe it was), was harmless beyond a reasonable doubt.

[6] Defendant next contends the trial court erroneously overruled his objections to testimony by Martin and Furmage; however, defendant has waived appellate review with respect to these arguments. Under N.C. R. App. P. 10(b)(1), the party seeking review must have made "a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." Defendant made only general objections to the witnesses' testimony, and this Court has held "a general objection, if overruled, is ordinarily not effective on appeal." *State v. Hamilton*, 77 N.C. App. 506, 509, 335 S.E.2d 506, 508 (1985) (citations omitted).

[7] Defendant's contention that the trial court erred by limiting the cross-examination of two witnesses is without merit. "[T]he scope of cross-examination rests largely within the trial court's discretion and is not ground for reversal unless the cross-examination is shown to have improperly influenced the verdict." *State v. Woods*, 345 N.C. 294, 307, 480 S.E.2d 647, 653 (1997). In light of the evidence presented at trial, defendant has failed to demonstrate the trial court erred. This assignment of error is overruled.

In addition to those assignments of error discussed herein, we have reviewed the remaining assignments of error that were properly assigned as error and preserved in defendant's brief and find them to be without merit.

No prejudicial error.

Judges WYNN and MARTIN concur.

BARBARA D. MEADOWS, EMPLOYEE, PLAINTIFF v. N.C. DEPT. OF TRANSPORTATION, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA99-801

(Filed 3 October 2000)

1. Workers' Compensation— condition of employment— required shoes

In a workers' compensation action brought by a driver's license examiner who had RSD in her feet and who alleged that her required work shoes aggravated her condition, the Industrial

Commission erred by concluding that the shoes issued by defendant were not a condition of employment where the evidence showed that plaintiff was required to wear her DMV uniform, including the shoes, that she was not allowed to purchase and wear her own shoes, and that defendant usually granted a physician's request that an employee be permitted to wear another style of shoe. There was no evidence that plaintiff knew that such an exemption could be had.

2. Workers' Compensation— timeliness of claim—plaintiff not informed that she had an occupational disease

In a workers' compensation action brought by a driver's license examiner who had RSD in her feet and who alleged that her required work shoes aggravated her condition, the Industrial Commission erred by concluding that the claim was barred for untimeliness where the opinion and award did not contain any finding as to when any treating physician informed plaintiff clearly, simply, and directly that she had an occupational disease and that the illness was work-related.

Judge HUNTER dissenting.

Appeal by plaintiff from opinion and award entered 4 March 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 April 2000.

Kellum & Jones, by J. Kevin Jones, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Elisha H. Bunting, Jr., for defendant-appellee.

TIMMONS-GOODSON, Judge.

Barbara D. Meadows ("plaintiff") appeals from adverse rulings by the North Carolina Industrial Commission ("Commission" or "Full Commission") which resulted in the denial of her claim for workers' compensation benefits. After a thorough examination of the record and briefs of the parties, we reverse the Commission's opinion and award.

The relevant factual and procedural history are as follows: In February of 1990, plaintiff began employment with the North Carolina Department of Transportation ("defendant") as a driver's license examiner. Her job responsibilities included administering licensing road, written, and vision tests, accessing the Division of Motor

Vehicles ("DMV") computer database, and photographing driver's license recipients. In the course of her duties, plaintiff spent approximately one-third of the workday on her feet.

At the onset of her employment, plaintiff was issued a standard DMV uniform, which included synthetic leather (Corfam) work shoes. Generally, DMV employees were not permitted to wear any shoes other than those provided by defendant. However, if an employee presented defendant with a written physician's request that she be permitted to wear another style of shoe because of some special medical circumstance, defendant usually granted the request. Plaintiff, who had pre-existing bunions and congenital deformities unrelated to her employment, never sought permission to wear an alternate shoe.

Plaintiff began to experience problems with her work shoes in June of 1990. As she stated, "[her] feet would become very hot, would perspire, and swell up in the shoe, and [she would experience] a lot of pain[,]" particularly in her right foot. Plaintiff's symptoms continued to worsen over the next five years, but she did not inform her supervisor, nor did she consult a physician during that time.

Plaintiff first sought medical attention for her symptoms on 13 November 1995, when she visited Dr. Thomas J. Hagan, a podiatrist. She reported experiencing right foot pain, which she said became increasingly severe throughout the workday while wearing the required Corfam shoes. Dr. Hagan's initial diagnosis was that plaintiff suffered from Morton's Neuroma in her right foot. To treat the condition, he injected plaintiff's foot with Celeston Soluspan and Lidocaine and fitted her with a Berkemann premolded orthotic device.

This treatment, however, proved to be unsuccessful, and on 30 November 1995, plaintiff returned to Dr. Hagan complaining of further foot discomfort. Dr. Hagan performed additional tests and discovered that plaintiff had multiple foot problems including hallux abducto valgus, hallux abductus, hypertrophic bone-fifth toe, plantar declinated fifth metatarsal and Morton's Neuroma-third interspace, all of which were pre-existing, non-occupational deformities. He did not, at that time, advise plaintiff that the malformations of her foot were aggravated or exacerbated by work-related conditions, such as the required Corfam shoes. He recommended that she undergo surgery to correct the problems and filed a request for permission to perform the surgery with plaintiff's regular medical insurance carrier.

On 8 December 1995, Dr. Hagan surgically corrected plaintiff's right foot deformities. Plaintiff's regular health insurance provider approved the operation and paid the medical costs. On 16 February 1996, plaintiff underwent a follow-up procedure to the original surgery, and on 4 March 1996, Dr. Hagan released plaintiff to return to light-duty, indoor work. Plaintiff reported to work the following day, and after contacting the Raleigh office to learn that work commensurate with plaintiff's restrictions was unavailable, plaintiff's supervisor sent her home. Since then, plaintiff has not sought or held other employment.

Presented on 4 April 1996 with plaintiff's complaints of increased pain and a "feeling of fullness" in her right foot, Dr. Hagan referred her to Dr. James M. Tarpley at New Bern Anesthesia Associates for diagnosis and further treatment. Thereafter, Dr. Tarpley examined plaintiff and diagnosed her as having a painful condition known as Reflex Sympathetic Dystrophy ("RSD"), which he attributed to the surgeries performed on plaintiff's right foot. From April to June of 1996, Dr. Tarpley treated plaintiff's condition with lumbar sympathetic blocks, intravenous regional blocks, an intravenous bretyline block, pain medication and physical therapy. Plaintiff's condition, however, has not improved, as the treatments have provided only temporary pain relief. Plaintiff has since developed RSD in her left foot as well, and she experiences chronic, disabling pain. There has been no determination that plaintiff's disability is permanent, nor has plaintiff ever received a disability rating.

Plaintiff filed a claim for workers' compensation benefits on 5 November 1996 alleging that she contracted an occupational disease in that the required Corfam work shoes aggravated her pre-existing, non-work-related foot deformities. The matter came before Deputy Commissioner Mary Moore Hoag, who, on 26 June 1998, entered an opinion and award wherein she concluded that plaintiff's disease was non-occupational and, for that reason, denied her workers' compensation claim. Plaintiff appealed this decision to the Full Commission, and the panel affirmed the deputy commissioner with minor modifications. Plaintiff again appeals.

The primary issue on appeal is whether the record before the Commission contains competent evidence to support its conclusion that plaintiff's RSD is not an occupational disease, as that term is defined in section 97-53(13) of the North Carolina General Statutes. We hold that it does not.

The scope of this Court's review of an opinion and award entered by the Full Commission is well defined. We must first examine the record to determine whether any competent evidence exists therein to support the Commission's findings of fact. *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982). If the findings have any evidentiary basis, we must then look to the Commission's conclusions of law to determine whether they, in turn, are supported by the factual findings. *Id.* The Commission's findings are given great deference, *McAninch v. Buncombe County Schools*, 122 N.C. App. 679, 471 S.E.2d 441 (1996), *rev'd on other grounds*, 347 N.C. 126, 489 S.E.2d 375 (1997), and, when supported by competent evidence, are binding on this Court, *Keel v. H & V Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992). This is true, despite the presence of evidence supporting contrary findings. *Lumley v. Dancy Construction Co.*, 79 N.C. App. 114, 122, 339 S.E.2d 9, 14 (1986). The Commission's conclusions of law, however, are subject to this Court's *de novo* review. *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).

Pursuant to section 97-53 of our General Statutes, an occupational disease is "[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).

> "The requirement that the disease be 'characteristic of or peculiar to' the occupation of the claimant precludes coverage of diseases contracted merely because the employee was on the job. For example, it is clear that the Law was not intended to extend to any employee in a shoe factory who contracts pneumonia simply by standing next to an infected co-worker. In that example, the employee's exposure to the disease would have occurred regardless of the nature of the occupation in which he was employed. To be within the purview of the Law, the disease must be so distinctively associated with the employee's occupation that there is a direct causal connection between the duties of the employment and the disease contracted."

Booker v. Medical Center, 297 N.C. 458, 473-74, 256 S.E.2d 189, 199 (1979) (quoting *Russell v. Camden Community Hospital*, 359 A.2d 607, 611-12 (Me. 1976)). Thus, "[a] disease is an occupational disease compensable under N.C. Gen. Stat. 97-53(13) if claimant's employ-

ment exposed [her] 'to a greater risk of contracting this disease than members of the public generally . . .' and such exposure 'significantly contributed to, or was a significant causal factor in, the disease's development.' " *Gay v. J. P. Stevens & Co.*, 79 N.C. App. 324, 330, 339 S.E.2d 490, 494 (1986) (quoting *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983)). An employee claiming an occupational disease has the burden of proving compensability. *Id.* at 331, 339 S.E.2d at 494.

[1] Regarding the conditions of plaintiff's employment, the Commission made the following relevant findings of fact:

> 4. As a part of her employment with defendant, plaintiff was required to wear at all times a uniform which included synthetic leather (Corfam) work shoes that were provided by defendant to plaintiff. Plaintiff was not allowed to purchase and wear her own work shoes. However, upon request and receipt of a written statement from a doctor, shoes other than the required work shoes would be permitted. Plaintiff never requested permission to wear other than the required work shoes. She did not ask her doctor, Dr. Hagan, for a prescription although he had previously provided such a statement for other DMV workers.
>
> . . . .
>
> 16. The work shoes worn by plaintiff aggravated her pre-existing, non-disabling, non-work related right foot condition. However, the shoes which were issued as part of plaintiff's uniform were not required as a condition of employment, but could have been and were in other cases, replaced by shoes which would not aggravate plaintiff's pre-existing condition.

Based on these findings, the Commission then concluded the following:

> 2. . . . The uncontradicted evidence shows that the shoes which were issued as part of plaintiff's uniform were not a requirement of her employment, but could have been replaced upon her request with shoes which accommodated plaintiff's condition. Plaintiff's decision to continue wearing shoes which aggravated her condition could have occurred in any occupation; therefore, the shoes in question do not constitute a condition of plaintiff's particular trade, occupation or employment. Accordingly, any aggravation of plaintiff's non-disabling, pre-existing condition, the surgery, the resulting RSD, and any subsequent dis-

ability therefrom, are not the result of causes and conditions characteristic of and peculiar to claimant's employment. (Citation omitted).

. . . .

4. Plaintiff has not suffered an occupational disease arising out of and in the course of the employment with defendant-employer. Plaintiff does not have a compensable disability, because any inability to earn wages in her former employment with defendant-employer is the result of surgery for a non-occupational disease and/or subsequent complications arising therefrom. (Citations omitted).

As previously noted, we will not disturb the Commission's findings of fact if the record contains any competent evidence to support them. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986). "Where, however, there is a complete lack of competent evidence in support of the findings they may be set aside." *Id.* at 432-33, 342 S.E.2d at 803. Such action is fitting in this case, since the record lacks any evidence that "the shoes which were issued as part of plaintiff's uniform were not required as a condition of employment."

The evidence indicates and, indeed, the Commission found that plaintiff was required to wear her DMV uniform, including the Corfam shoes, at all times during work hours. The evidence and the findings further show that "[p]laintiff was not allowed to purchase and wear her own work shoes." Still, the Commission found that the Corfam shoes were not a requirement of plaintiff's employment. This finding, it appears, was based on the notion that an employee's ability to be exempted from wearing the shoes due to special medical needs transformed the "requirement" into an election or personal choice. Notwithstanding that we have found nothing in our jurisprudence to support the Commission's reasoning, we find no evidence in the record to show that plaintiff knew such an exemption could be had. Accordingly, the Commission's findings and corresponding conclusions that the Corfam shoes issued by defendant were not a condition of plaintiff's employment cannot stand.

[2] Next, we must consider whether the record supports the Commission's conclusion that plaintiff failed to timely notify defendant of her occupational disease, as required by sections 97-22 and 97-58(b) of the General Statutes. Again, we hold that it does not.

Under section 97-22 of our General Statutes,

> Every injured employee . . . shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, . . . but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

N.C. Gen. Stat. § 97-22 (1999). Section 97-58 of the General Statutes sets forth the time limits for filing claims of occupational disease:

> . . . .
>
> (b) The report and notice to the employer as required by G.S. 97-22 shall apply in all cases of occupational disease except in case of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.
>
> (c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be. . . .

N.C. Gen. Stat. § 97-58(b), (c) (1999). Construing the provisions of section 97-22 and 97-58 in *pari materia*, our Supreme Court has said that an employee claiming an occupational disease must notify the employer of her ailment within thirty days after she is advised by competent medical authority of the nature and work-related cause of the disease, *Booker*, 297 N.C. at 480-81, 256 S.E.2d at 203, and must file a claim for disability within two years of receiving such advice, *Lawson v. Cone Mills Corp.*, 68 N.C. App. 402, 403, 315 S.E.2d 103, 104 (1984). Therefore, to trigger the running of the statutory time limit, the employee first "must be informed clearly, simply and directly that [s]he has an occupational disease and that the illness is work-related." *Id.* at 410, 315 S.E.2d at 107.

The Commission in the instant case concluded that plaintiff notified defendant of her occupational disease in an untimely manner:

> 3. . . . Plaintiff received medical knowledge of her condition as early as 13 November 1995. Although Dr. Hagen [sic] did not tell plaintiff that her problems were related to her shoes, plaintiff testified that she had related her discomfort to the shoes for the previous five years. Even after her surgery, plaintiff failed to inform defendant of the relationship between her shoes and her condition until she filed a claim under the Act in November 1996. By waiting to provide defendant with notice until after she had voluntarily aggravated her condition for five years and an additional year after she had surgery on her foot, plaintiff effectively eliminated defendant's opportunity to alleviate the problem by allowing plaintiff to wear different shoes. Accordingly, defendant was prejudiced by plaintiff's failure to give timely notice, and plaintiff is statutorily barred from claiming compensation under the Act.

We hold that this conclusion is contrary to the findings of fact and the evidence.

The Commission found that although Dr. Hagan diagnosed plaintiff's condition on 30 November 1995, "[he], at that point, did not advise plaintiff she was suffering from an aggravation or exacerbation of her foot deformities due to work-related conditions." The opinion and award does not contain any finding as to when Dr. Hagan, or any other treating physician, "informed [plaintiff] clearly, simply and directly that [s]he ha[d] an occupational disease and that the illness [was] work-related." *Id.* at 410, 315 S.E.2d at 107. Thus, the Commission had no basis to conclude that the statutory notice and filing time periods had triggered, much less expired. The Commission's conclusion that plaintiff's claim was barred for untimeliness then must fail.

For the foregoing reasons, we reverse the opinion and award of the Full Commission and remand this matter for further appropriate proceedings.

Reversed and remanded.

Chief Judge EAGLES concurs.

Judge HUNTER dissents.

Judge HUNTER dissenting.

The majority has chosen to overturn the unanimous decision of the Full Commission (affirming the deputy commissioner's decision) finding for the defendant-employer ("DOT"). For the reasons outlined below, I respectfully dissent.

The majority opinion is based on the fact that because the Commission found that the shoes issued as a part of plaintiff's uniform were not required as a condition of employment and plaintiff was not allowed to purchase and wear her own work shoes, the Commission cannot then "transform[] the 'requirement' into an election or personal choice." However, I do not agree that the Commission did so.

In finding that the shoes were required—DOT having readily admitted it—the Commission simply acknowledged the general rules of employment for that employer. However, DOT stated and the Commission found as fact that "upon request and receipt of a written statement from a doctor, shoes other than the required work shoes would [have] be[en] permitted. Plaintiff does not dispute this finding, but neither does she argue that she ever made the request. Instead, plaintiff alleges that from the beginning of her employment with defendant, she "experienced problems with her feet [above and beyond the already pre-existing conditions] while wearing the required work shoes . . . [and that] her symptoms worsened over [the] five years [she worked for defendant]; [yet] she never complained to her supervisor nor consulted a physician."

It is true that under N.C. Gen. Stat. § 97-22, an employee is required to notify her employer, in writing, that she has an occupational disease "within 30 days after the occurrence." In addition, § 97-58(b) sets out that "[t]he time of notice . . . [to the employer does not begin to run until] the employee *has been advised by competent medical authority*" that he has the occupational disease. N.C. Gen. Stat. § 97-58(b) (1999) (emphasis added). However, even though plaintiff admits that she believed, from the very beginning of the five years she worked for defendant, that her disease was being aggravated by the work shoes, the majority chooses to hold that plaintiff was not required to notify defendant of her occupational disease until a doctor actually attributed the illness to her work *and advised her so*. I do not believe this interpretation bodes well with case law or legislative statutory intent.

When we read N.C. Gen. Stat. § 97-58(c) which deals with occupational disease caused by radiation (an injury which often takes a long time to show itself), we see that our Legislature clearly chose to place responsibility *on the employee* to notify her employer of its possible liability. The pertinent portion of the statute states:

> [T]he right to compensation for radiation injury, disability or death *shall be barred UNLESS* a claim is filed within two years after the date upon which the employee first suffered incapacity from the exposure to radiation and either knew or ***in the exercise of reasonable diligence should have known that the occupational disease was caused by his . . . employment***.

N.C. Gen. Stat. § 97-58(c) (1999) (emphasis added). Thus, I do not believe that our Legislature intended to hold victims of radiation poisoning to a higher standard than employees injured in the workplace by other means.

It has long been held by the courts of this state that:

> Statutes *in pari materia* are to be construed together and where the language is ambiguous, the court must construe it to ascertain the true legislative intent. *And where a strict literal interpretation of the language of a statute would contravene the manifest purpose of the Legislature, the reason and purpose of the law should control*, and the strict letter thereof should be disregarded.

Duncan v. Carpenter, 233 N.C. 422, 426, 64 S.E.2d 410, 413-14 (1951), *overruled on other grounds*, *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980) (emphasis added) (citations omitted). Furthermore, this Court has enunciated the Legislative intent in "holding that time for [latent occupational disease] claims runs from notification of injury is . . . [due to] the peculiar problems of such a disease . . . ." *Taylor*, 300 N.C. at 101, 265 S.E.2d at 148.

> It is clear that our Legislature never intended that the statutory scheme of G.S. 97-58 would be construed to render time for notice and claim absurd. It is equally clear that our Legislature never intended that a claimant for workers' compensation benefits would have to make a correct medical diagnosis of his own condition prior to notification by other medical authority of his disease in order to timely make his claim. . . .

> **[However,]** ***[t]his is not to say that the time of disablement for other statutory provisions is necessarily the date a claimant was informed he was disabled by an occupational disease. . . .***

Id. at 102, 265 S.E.2d at 149 (citation omitted) (emphasis added).

Thus, construing these statutes and our case law *in para materia*, I believe it is evident that where an employee "***in the exercise of reasonable diligence should have known that [her] occupational disease was caused by h[er] . . . employment***[,]" she had a responsibility to timely file her claim so that her employer would be put on notice, N.C. Gen. Stat. § 97-58(c) (emphasis added), *UNLESS* she had a "reasonable excuse." N.C. Gen. Stat. § 97-22 (1999).

> A "reasonable excuse" has been defined by this Court to include "a belief that one's employer is already cognizant of the accident . . ." or "[w]here the employee does not *reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows . . . .*" *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987). The burden is on the employee to show a "reasonable excuse."

Jones v. Lowe's Companies, 103 N.C. App. 73, 75, 404 S.E.2d 165, 166 (1991) (emphasis added). In the case at bar, it is my belief that plaintiff failed to give timely notice—without reasonable excuse—thus the Commission was correct in denying her claim against her employer. N.C. Gen. Stat. § 97-22. Nevertheless, even if plaintiff's notice was timely, I believe the Commission was correct in denying her claim.

In *Jones*, plaintiff-employee was a delivery clerk who injured his leg when he fell while carrying several panels of sheetrock. Plaintiff-employee did not notify his employer the day of the accident and only did so when, more than two months later, "his leg became numb and would no longer support his body." *Jones*, 103 N.C. App. at 76, 404 S.E.2d at 166. Plaintiff-employee argued that his notice to employer was timely because it was not until that point that he knew the nature and seriousness of his injury. *Id.* This Court, agreeing with plaintiff-employee that his notice was timely, opined that timely notice was, however, not enough; the Court reasoned that:

> If prejudice [against employer] is shown, Employee's claim is [still] barred even though he had a reasonable excuse for not giv-

ing notice of the accident within 30 days. . . . Whether prejudice exists requires an evaluation of the evidence in relationship to the purpose of the statutory notice requirement.

"The purpose is dual: First, ***to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury***; and second, to facilitate the earliest possible investigation of the facts surrounding the injury."

2B Larson's Workmen's Compensation Law § 78.10, 15-102; *Booker v. Medical Center*, 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979).

Id. at 76-77, 404 S.E.2d at 167 (citations omitted) (emphasis added).

In the case at bar, the Commission found in its Opinion and Award that:

2. During her employment with defendant-employer, plaintiff has filed at least four workers' compensation claims, only one of which has been found compensable. When questioned about the claims, plaintiff had no memory of them.

. . .

4. As a part of her employment with defendant, plaintiff was required to wear at all times a uniform which included synthetic leather (Corfam) work shoes that were provided by defendant to plaintiff. Plaintiff was not allowed to purchase and wear her own work shoes. However, upon request and receipt of a written statement from a doctor, shoes other than the required work shoes would be permitted. Plaintiff never requested permission to wear other than required work shoes. She did not ask her doctor, Dr. Hagan, for a prescription although he had previously provided such a statement for other DMV workers.

5. Plaintiff had pre-existing non-work related foot problems consisting of bunions and congenital deformities.

6. In June of 1990, at the beginning of her employment with defendant-employer, plaintiff experienced problems with her feet while wearing the required work shoes. Her feet would become hot, they would perspire, swell and plaintiff would experience pain, more in the right foot than the left. According to plaintiff,

her symptoms worsened over five years; however, she never complained to her supervisor nor consulted a physician.

. . .

8. Plaintiff and Dr. Hagan agreed that plaintiff had pre-existing foot deformities and also foot pain and problems for at least the preceding five years.

. . .

11. Plaintiff informed her supervisor of the surgery to take place on 8 December 1995. Plaintiff testified that she told her supervisor that she could not wear the shoes without having surgery, and her supervisor stated that plaintiff informed him she was having foot problems which required surgery. However, plaintiff never informed her supervisor that the condition requiring surgery was caused or otherwise due to the shoes she wore as part of her uniform. Plaintiff never complained to her supervisor about her shoes. She never requested permission during the five years of her employment, to wear shoes other than the Corfam shoes supplied at work. Defendant was prejudiced by plaintiff's failure to inform it of the relationship between her shoes and her increasingly deteriorating foot condition. Had plaintiff informed defendant of the problem, her shoes could have been changed and no aggravation of her condition would have occurred.

12. Plaintiff never asserted that her pre-existing foot deformities were aggravated by her work conditions until more than a year after her surgery, when she was diagnosed with Reflex Sympathetic Dystrophy (RSD) resulting from the surgery.

The Commission then concluded that:

2. . . . The uncontradicted evidence shows that the shoes which were issued as part of plaintiff's uniform were not a requirement of her employment, but could have been replaced upon her request with shoes which accommodated plaintiff's condition. Plaintiff's decision to continue wearing shoes which aggravated her condition could have occurred in any occupation; therefore, the shoes in question do not constitute a condition of plaintiff's particular trade, occupation or employment. Accordingly, any aggravation of plaintiff's non-disabling, pre-existing condition, the surgery, the resulting RSD, and any subsequent disability therefrom, are not the result of causes and conditions character-

istic of and peculiar to claimant's employment. N.C. Gen. Stat. § 97-53(13); *Id.*

3. Plaintiff is responsible for providing employer with notice of her occupational disease in accordance with the mandates of N.C. Gen. Stat. § 97-22[] [and] . . . N.C. Gen. Stat. § 97-58(b). . . .

By waiting to provide defendant with notice until after she had voluntarily aggravated her condition for five years and an additional year after she had surgery on her foot, *plaintiff effectively eliminated defendant's opportunity to alleviate the problem* by allowing plaintiff to wear different shoes. Accordingly, *defendant was prejudiced by plaintiff's failure to give timely notice . . . .*

4. Plaintiff has not suffered an occupational disease arising out of and in the course of the employment with defendant-employer. . . . Plaintiff does not have a compensable disability, because any inability to earn wages in her former employment with defendant-employer is the result of surgery for a non-occupational disease and/or subsequent complications arising therefrom. . . .

(Emphasis added.)

Thus, there is no doubt in my mind that the majority opinion prejudices an unknowing employer by holding it responsible for a situation that could have easily been avoided or certainly mitigated had plaintiff, through reasonable diligence, taken responsibility and done what any reasonable and prudent person would have done—notified her employer of the problem. Because I believe there is competent evidence in the record to support the Commission's findings and conclusions, I vote to affirm the Commission's Opinion and Award.

STATE OF NORTH CAROLINA v. LAURA COTTLE JARMAN

No. COA99-1014

(Filed 3 October 2000)

1. Sentencing— motion to correct judgment—improper credit for time served under house arrest—clerical error

The trial court did not improperly consider the State's motion to correct judgment after the trial court mistakenly granted defendant credit against an active sentence for time served under house arrest after the term of court had expired, because: (1) the trial judge did not exercise any judicial discretion or undertake any judicial reasoning when signing the original order providing credit against service of sentence; (2) the State's motion in the case at bar merely alerted the trial court to its error in awarding defendant excess credit for time served; and (3) the trial court's correction of the clerical error resulting from inaccurate information inadvertently provided by the deputy clerk was proper.

2. Sentencing— pretrial home detention—credit against active sentence not required

N.C.G.S. § 15-196.1 does not require that defendant receive credit against an active sentence for time spent in pretrial home detention prior to her convictions for embezzlement, because house arrest and/or electric monitoring in a defendant's own home while awaiting trial does not constitute confinement in a state or local institution under the statute.

3. Constitutional Law— double jeopardy—pretrial home detention—not multiple punishments

Defendant's pretrial home detention was not punishment for purposes of double jeopardy analysis because: (1) subsequent criminal prosecution of an arrestee who has been regulated but not punished does not expose the arrestee to multiple punishments for the same offense under double jeopardy principles; and (2) the restraints ordered by the trial court in this case were proper regulatory restraints imposed to ensure defendant's presence at the trial and to disable her from committing other offenses.

Appeal by defendant from order entered 18 December 1998 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 15 August 2000.

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

John T. Hall for defendant-appellant.

EDMUNDS, Judge.

Defendant Laura Cottle Jarman appeals a judicial order vacating an earlier order that gave her credit for time served under electronic house arrest prior to conviction. We affirm.

On 23 February 1998, defendant was arrested for obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100 (1993). Her bond initially was set at $500,000, but later was reduced to $50,000 on condition that she be placed under house arrest and electronic surveillance pending disposition of her case. On 27 February 1998, she was released into the monitoring program, and on 18 September 1998, she pled guilty to eight counts of embezzlement. Five counts, which fell under the Structured Sentencing Act, were consolidated for sentencing, and the court imposed an active term of five to six months. The remaining three counts, which fell under the Fair Sentencing Act, also were consolidated for sentencing, and the court imposed a term of nine years. For the latter three counts, the court suspended imposition of the sentence and placed defendant on supervised probation for five years.

Thereafter, defendant was transported to the North Carolina Correctional Institution for Women. She stated during an orientation session that she had not received credit for time served prior to her conviction, and in fact both judgment forms prepared after her sentencing state that she was to be given credit of "0 days spent in confinement prior to the date of [] Judgment." Accordingly, prison personnel prepared, and defendant signed, a Request for Pre-Trial Credit form, which was forwarded to the office of the Wake County Clerk of Superior Court. Although the deputy clerk who received the form had no independent recollection of the incident, she apparently contacted the Wake County Sheriff's Department to determine whether defendant had spent time in custody prior to sentencing. Based on the information she received, the deputy clerk prepared an "Order Providing Credit Against Service of Sentence" crediting

defendant with 211 days for "time spent in custody awaiting trial." This credit included the time defendant spent under house arrest prior to trial. The trial court signed the order on 6 October 1998, and defendant was released shortly thereafter because the time credited exceeded her maximum active sentence.

On or about 30 October 1998, the Wake County District Attorney's Office became aware that defendant was no longer incarcerated. After investigating the circumstances of her release, the district attorney on 5 November 1998 filed with the court a document titled "Motion To Correct Judgment," asserting that defendant was not eligible for credit for time spent under house arrest and electronic monitoring. On 9 December 1998, the trial court held a hearing on the motion and, on 18 December 1998, entered an order in which it vacated its earlier order, gave defendant credit for time actually spent in Wake County jail, struck credit for time spent in home detention, and ordered defendant to return to the Department of Corrections to serve the remainder of her active sentence. In its order, the trial court noted that the State's motion was actually a motion to correct the 6 October 1998 order awarding defendant credit spent in pretrial custody, rather than a motion to correct judgment. The court additionally indicated that when it signed the earlier order, it was unaware that the number of days credited to defendant in the order prepared by the clerk included time spent under house arrest and electronic monitoring. Upon defendant's appeal, the order returning defendant to custody was stayed.

We note initially that the State has filed a motion to dismiss defendant's appeal, asserting that, pursuant to N.C. Gen. Stat. § 15A-1444 (1997), defendant has no statutory right of appeal. Section 15A-1444(a1) and (a2) sets out the circumstances under which a defendant may appeal as a matter of right:

> (a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

(1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;

(2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

(3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a1), (a2). Although we agree with the State that none of these conditions apply, in light of the issues presented, we elect to treat defendant's appeal as a petition for writ of certiorari and grant that petition. *See* N.C. R. App. P. 21; *State v. Linemann*, 135 N.C. App. 734, 522 S.E.2d 781 (1999).

As a second preliminary matter, we observe that the copy of the trial court's 18 December 1998 order contained in the record does not bear the clerk's stamp showing the filing date in accordance with N.C. R. App. P. 9(b)(3). However, because neither party has raised the absence of the stamp as an issue, and because the course of the proceedings is undisputed, we elect to suspend the requirement for the stamp pursuant to the discretionary authority accorded us by N.C. R. App. P. 2.

I.

[1] Defendant first argues that the trial court improperly considered the State's "Motion To Correct Judgment." She contends that the exclusive means of obtaining relief from "errors committed in criminal trials and proceedings and other post-trial relief" are set forth in N.C. Gen. Stat. § 15A-1401 (1999) and that the State's motion was invalid because it was neither a motion for appropriate relief nor an appeal. Defendant additionally argues that, pursuant to N.C. Gen. Stat. § 15A-1416 (1999), the time for filing such a motion had expired when the court stripped defendant of jail credit for her time in home

detention. The State responds that "[t]he trial court had the inherent authority to vacate its earlier order *ex mero motu*" and that its motion was merely a means of bringing to the trial court's attention an error in the 6 October 1998 order. We assume for the purposes of the following analysis that the court's granting of credit for time served under house arrest was a mistake. A detailed consideration of this issue may be found in Part II, below.

Although "a court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein," *State v. Davis*, 123 N.C. App. 240, 242-43, 472 S.E.2d 392, 393 (1996) (citations omitted), it "cannot, under the guise of an amendment of its records, correct a judicial error," *id.* at 243, 472 S.E.2d at 394 (citation omitted). Accordingly, we must determine whether the court's error in granting defendant credit for time served under house arrest was judicial or merely clerical.

"Clerical error" has been defined recently as: "An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." Black's Law Dictionary 563 (7th ed. 1999). Although this definition has not been adopted by our courts, and we do not adopt it now, the concept of "judicial reasoning or determination" as a component of a judicial action has been implicitly recognized in numerous appellate decisions.[1] In reviewing criminal convictions, our courts have found harmless clerical errors to include the inadvertent checking of a box finding an aggravating factor on a judgment form, *see State v. Gell*, 351 N.C. 192, 524 S.E.2d 332 (2000); reference in a bill of particulars to a wrong charge when the indictment indicated the proper charge, *see State v. Parker*, 119 N.C. App. 328, 459 S.E.2d 9 (1995); submission to the jury of a range of drug trafficking amounts differing from the range indicated in the indictment, *see State v. McCoy*, 105 N.C. App. 686, 414 S.E.2d 392 (1992); judgment mistakenly stating that prison term was imposed pursuant to plea agreement, *see State v. Leonard*, 87 N.C. App. 448, 361 S.E.2d 397 (1987); judgment erroneously stating conviction of wrong crime, *see State v. Jamerson*, 64 N.C. App. 301, 307 S.E.2d 436 (1983) (ordering new trial on other grounds, but indicating judgment needed to be corrected to show proper convictions).

1. This Court's holding in *Ammons v. County of Wake*, 127 N.C. App. 426, 490 S.E.2d 569 (1997) that the term "clerical error" applied only to transcription errors was specifically limited to the interpretation of the term as used in N.C. Gen. Stat. § 105-381 (1995) (Taxpayer's remedies).

Where there has been uncertainty in whether an error was "clerical," the appellate courts have opted to "err on the side of caution and resolve [the discrepancy] in the defendant's favor." *State v. Morston*, 336 N.C. 381, 410, 445 S.E.2d 1, 17 (1994). However, in the case at bar, the record demonstrates that the trial judge did not exercise any judicial discretion or undertake any judicial reasoning when signing the original "Order Providing Credit Against Service Of Sentence." The deputy clerk who received defendant's request for credit for time served "in Wake [County]" prepared an order for the judge's signature by filling in the blanks on a standard AOC form, using information provided by the sheriff's records. The completed but unsigned order was presented to the judge, who was required to give defendant credit for "time spent in custody pending trial." N.C. Gen. Stat. § 15-196.1 (1999). Therefore, the judge's action in signing the order giving defendant credit to which he believed she was legally entitled was a mechanical and routine, though mistaken, application of a statutory mandate. Accordingly, we hold that the trial court's order of 18 December 1998 was the correction of a clerical error.

Consequently, the trial court had the power to make the correction even though the term of court had expired.

> It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power 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, and no lapse of time will debar the court of the power to discharge this duty.

State v. Cannon, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956) (citations omitted).

This Court addressed a somewhat analogous situation in *State v. Branch*, 134 N.C. App. 637, 518 S.E.2d 213 (1999), in which the defendant pled guilty to two sets of offenses, the first committed on 19 September 1994, and the second on 4 October 1994. All offenses were combined, and the defendant was sentenced to twelve to fifteen months imprisonment pursuant to the Structured Sentencing Act. Thereafter, the Department of Corrections notified the trial court that offenses committed prior to 1 October 1994 could not be combined with offenses committed after that date. Accordingly, the defendant was resentenced in May 1995 to twelve to fifteen months for the October offenses pursuant to the Structured Sentencing Act and ten

years for the September offenses pursuant to the Fair Sentencing Act. The defendant filed a motion for appropriate relief, which was denied. The defendant appealed, contending that "the letter from the Department of Corrections alerting the trial court of the erroneous sentence was, in essence, a motion for appropriate relief, and this motion was not filed within the statutory period of 10 days." *Id.* at 640, 518 S.E.2d at 215 (citation omitted). We disagreed, noting that the letter was not in the statutory form of a motion for relief, and concluded that:

> This letter was not a motion for appropriate relief. It was a form letter, alerting the trial court to its error in applying the law as to the sentence. Upon learning of its error the trial court vacated its previous unlawful sentence and imposed a sentence using the appropriate applicable law.

Id. at 641, 518 S.E.2d at 215-16.

Similarly, the State's motion in the case at bar alerted the trial court to its error in awarding defendant excess credit for time served. The court's correction of the clerical error resulting from inaccurate information inadvertently provided by the deputy clerk was proper. This assignment of error is overruled.

II.

Defendant next argues that the trial court's December order revoking her credit for time spent under house arrest prior to her entry of plea violated her constitutional right against double jeopardy. She asserts that house arrest as a condition of bond constituted "confinement" under N.C. Gen. Stat. § 15-196.1 and that the trial court was required to reduce her active sentence by time spent in this pretrial custody. The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The United States Supreme Court has interpreted this guarantee to "protect[] against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 665 (1969) (citations omitted), *overruled in part on other grounds* by *Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989). This protection against double jeopardy is applicable to the states through the Fourteenth Amendment, *see Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707 (1969), and our Supreme Court "has interpreted the language of the law of the land clause of our state Constitution as guaranteeing the

common law doctrine of former jeopardy," *State v. Brunson*, 327 N.C. 244, 247, 393 S.E.2d 860, 863 (1990).

[2] We first consider whether the applicable statute requires that defendant receive credit for time spent in pretrial home detention. Section 15-196.1 provides:

> The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, *committed to or in confinement in any State or local correctional, mental or other institution* as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent *in custody* pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

N.C. Gen. Stat. § 15-196.1 (emphasis added). Whether house arrest and electronic monitoring constitute "confinement" as contemplated by this statute is an issue of first impression for this state.

> Criminal statutes must be strictly construed. But, while a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. The intent of the legislature controls the interpretation of a statute. When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

In re Banks, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) (citations omitted). The first sentence of section 15-196.1 expressly requires that a defendant receive credit only for time "spent, committed to or in confinement *in any State or local correctional, mental or other institution.*" N.C. Gen. Stat. § 15-196.1 (emphasis added). Because the requirements for receiving credit under the statute are unambiguous, it is apparent from reading the statute as a whole that the second sentence is a clarification of the first, using the term "in custody" as shorthand to avoid repeating the specific conditions necessary for the credit to be applied while ensuring that defendants

incarcerated at various stages of trial receive due credit. In other words, the second sentence, referring to "the credit" defined in the first sentence, does not extend a greater benefit than that provided in the first sentence. Accordingly, we hold that house arrest (whether or not accompanied by electronic monitoring) in a defendant's own home while awaiting trial does not constitute confinement in a state or local institution and does not qualify as time that can be credited against a defendant's sentence pursuant to section 15-196.1.

Although defendant alerts us to N.C. Gen. Stat. § 20-179 (1999), which formerly provided that a defendant convicted of impaired driving could receive a suspended sentence if special probation including home detention were imposed, this statute does not affect the preceding analysis. We do not believe that a superseded statute limited to a motor vehicle offense controls the case at bar. In addition, as defendant also properly points out, section 20-179 no longer carries that provision. We interpret the General Assembly's action in removing home detention as a sentencing option for impaired driving to be an acknowledgment that home detention is a lesser sanction than incarceration in a state institution.

Other courts construing statutes referring to pretrial custody or detention have reached the same conclusion. *See Fernandez v. State*, 627 So. 2d 1 (Fla. Ct. App. 1993) (defendant not entitled to credit for time served under house arrest, interpreting a statute that gave a defendant credit for "time spent in the county jail" prior to sentencing); *State v. Climer*, 896 P.2d 346 (Idaho Ct. App. 1995) ("The majority of courts interpreting whether the term house arrest constitutes being 'in custody' have held that it does not," interpreting a statute that gave a defendant credit for time spent "in custody" prior to sentencing); *State v. Faulkner*, 657 N.E.2d 602 (Ohio Ct. App. 1995) (interpreting a statute that gave a defendant credit for time spent "incarcerated" prior to sentencing and holding that court-imposed house arrest was not "detention," but rather a "constraint incidental to release on bail" for which no credit is awarded); *State v. Pettis*, 441 N.W.2d 247 (Wis. Ct. App. 1989) (interpreting a statute that gave a defendant credit for time spent "in custody" prior to sentencing and holding that home detention as a condition of bail does not render defendant in custody for purposes of receiving sentencing credit). Similarly, federal courts have denied credit for time spent on house arrest. *See, e.g., U.S. v. Wickman*, 955 F.2d 592 (8th Cir. 1992); *U.S. v. Becak*, 954 F.2d 386 (6th Cir. 1992); *U.S. v. Insley*, 927 F.2d 185 (4th Cir. 1991) (all interpreting the federal statute, which gives a

defendant credit for time spent in "official detention" prior to sentencing).

Because the North Carolina statute is unambiguous, we need not undertake the analysis employed by some other jurisdictions, which compare conditions encountered in jail with the more benign experience of home detention, to conclude that the latter was insufficiently restrictive to qualify for credit. *See People v. Ramos*, 561 N.E.2d 643 (Ill. 1990); *Bailey v. State*, 734 A.2d 684 (Md. 1999); *Bates v. Missouri Dept. of Corrections*, 986 S.W.2d 486 (Mo. Ct. App. 1999); *Com. v. Shartle*, 652 A.2d 874 (Pa. Super. Ct. 1995).

In contrast, several states that have held time in pretrial home detention is to be credited toward time served on a sentence have done so because the applicable statutes specifically awarded credit for time spent in "home detention," *see State v. Speaks*, 829 P.2d 1096 (Wash. 1992), or in a "home detention program," *see People v. LaPaille*, 19 Cal. Rptr. 2d 390 (Cal. Ct. App. 1993). The North Carolina statute contains no such provision.

[3] Having concluded that a defendant is not entitled under N.C. Gen. Stat. § 15-196.1 to credit against an active sentence for time spent in house arrest, we next turn to defendant's constitutional argument. She contends that her pretrial home detention was punishment for purposes of double jeopardy analysis. However, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *United States v. Salerno*, 481 U.S. 739, 746, 95 L. Ed. 2d 697, 708 (1987) (citation omitted). N.C. Gen. Stat. § 15A-534 (1999) provides a number of reasons for limiting the freedom of an individual charged with a crime, including ensuring the safety of others, preventing flight by the defendant, and preserving the integrity of the case. The United States Supreme Court has "recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may." *Bell v. Wolfish*, 441 U.S. 520, 537, 60 L. Ed. 2d 447, 467 (1979). Accordingly, our Supreme Court has held that "[s]ubsequent criminal prosecution of an arrestee who has been regulated, but not punished, does not expose the arrestee to 'multiple punishments' for the same offense under established double-jeopardy principles." *State v. Thompson*, 349 N.C. 483, 496, 508 S.E.2d. 277, 285 (1998). Because the restraints ordered by the trial court upon defendant prior to trial were proper regulatory restraints imposed to ensure defendant's presence at the trial and to disable her from committing

other offenses, defendant's constitutional argument fails. This assignment of error is overruled.

Affirmed.

Judges GREENE and SMITH concur.

STATE OF NORTH CAROLINA v. JIMMIE LEE HARRIS

No. COA99-1081

(Filed 3 October 2000)

1. **Evidence— rape—defendant's past rape convictions—common plan or scheme—lack of consent**

There was no prejudicial error in a prosecution for offenses including rape, kidnapping, and sexual offense in the admission of evidence of two prior rape convictions where the court admitted the evidence to show lack of consent and common plan, but the evidence was properly admissible only for common plan or scheme. Although earlier cases suggested that evidence of prior rapes was admissible to show lack of consent, more recent cases have established that this is not a proper purpose; however, the error was not prejudicial because the same evidence was also admitted for a proper purpose.

2. **Kidnapping— second-degree—restraint—separate from assault**

The trial court did not err in a kidnapping prosecution by submitting second-degree kidnapping even though defendant argued insufficient evidence of restraint where the evidence permits a reasonable inference that defendant fraudulently coerced the victim into remaining with him in a car so that he could drive to a secluded place (a cemetery) and sexually assault her. The requisite restraint was the initial act of coercing her to go to the cemetery, not the subsequent assault.

3. **Kidnapping— indictment—purpose—instruction not plain error**

There was no prejudicial error in a second-degree kidnapping prosecution where the indictment alleged that the kidnapping

was for the purpose of rape but the court instructed the jury that it could convict if it found that defendant kidnapped the victim to commit rape, second-degree sexual offense, or a crime against nature. The State is held to proof of the felonious purpose alleged in the indictment; however, the review in this case is under plain error analysis, and the result would have been the same without the error because the evidence showed that defendant attempted or committed all three offenses, the jury convicted defendant of all three offenses, and the evidence that he intended to commit only one is no weaker or stronger than the evidence that he intended to commit the others.

4. Sexual Offenses— instructions—penetration by object

There was no prejudicial error in a prosecution for offenses including rape and second-degree sexual offense where the court's instruction on second-degree sexual offense was that a sexual act would encompass any penetration by an object. Although an "object" could include defendant's penis, which would allow the jury to base its conviction for second-degree sexual offense on the same act as the conviction for rape, and the trial court should have explicitly excluded vaginal intercourse from its definition of sexual act, there was no prejudice because the court explicitly distinguished between male sex organ and object by defining rape with reference to the male sex organ and sexual offense with reference to an object.

5. Rape; Sexual Offenses— short-form indictment—rape and sexual offense

Short-form indictments for rape and a sexual offense were constitutional.

6. Evidence— rape victim—victim's prior offenses

The trial court did not abuse its discretion in a prosecution for offenses including kidnapping, rape, and sexual offense by refusing to allow defendant to impeach the victim with her prior convictions more than ten years old. In light of all the other facts elicited about the victim's background, the probative value of the stale convictions was slight. N.C.G.S. § 8C-1, Rule 609(b).

Appeal by defendant from judgments entered 22 October 1998 by Judge Beverly Beal in Buncombe County Superior Court. Heard in the Court of Appeals 23 August 2000.

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

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

LEWIS, Judge.

Defendant was indicted on 6 April 1998 for one count of second-degree rape, one count of second-degree kidnapping, one count of second-degree sexual offense, one count of crime against nature, and for being an habitual felon. He was subsequently tried at the 19 October 1998 Criminal Session of Buncombe County Superior Court. On 22 October 1998, the jury returned a verdict of guilty as to all the substantive offenses, except that, as to the crime against nature charge, the jury only found defendant guilty of attempted crime against nature. Defendant thereafter pled guilty to the status of being an habitual felon. The trial judge then sentenced defendant to three consecutive life sentences without the possibility of parole, plus an additional term of 120 days, also to be served consecutively. Defendant now appeals, bringing forth six arguments.

At trial, the State's evidence tended to show the following. On 24 July 1996, while she was visiting a friend's house, the victim asked defendant, who was also there visiting, for a ride to a car she was borrowing. The car was not there when they arrived, so defendant promised the victim they would return later to check on the car after they stopped by his house. After going by his house, defendant retrieved some marijuana from the back of his truck and then stopped off to purchase some beer. The victim told defendant she did not mind if he smoked marijuana when he asked her. Defendant drove to a cemetery and smoked some marijuana, while the victim drank some of the beer.

After smoking the marijuana at the cemetery, defendant became aggressive and began making sexual advances towards the victim, who asked him to stop and tried to push defendant away. Ultimately, however, her efforts were to no avail, as defendant forcibly penetrated the victim, both digitally and with his penis. Having done these acts, defendant "acted like he hadn't done anything" and "went back to the casual attitude that he had before any of it started." (1 Tr. at 53). Defendant told the victim he would take her wherever she wanted to go. She asked to be taken to her friend's house.

The victim's friend convinced her to go to the hospital and report the attack. An Asheville police officer testified a rape kit was taken so that it could be sent to the State Bureau of Investigation laboratory for investigation. A Reserve Deputy from Buncombe County Sheriff's Department later clarified the rape kit was never actually sent to the laboratory because there was no suspect kit for comparison since the defendant could not be located until a year and a half later.

[1] Defendant first contends the trial court improperly admitted evidence of his two prior rape convictions, in violation of Rule 404(b). Specifically, the State presented as witnesses C and I, who each testified to being raped by defendant in 1991 and 1994, respectively. The trial court admitted this testimony to show lack of consent by the victim involved here and to show a common plan or scheme.

Rule 404(b) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show he acted in conformity therewith. N.C.R. Evid. 404(b). However, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation or plan. *Id.* This Court has previously pointed out that "the list of exceptions contained in Rule 404(b) is not exclusive and that extrinsic evidence of conduct is admissible if 'relevant for [*any*] purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried.' " *State v. Pruitt*, 94 N.C. App. 261, 266, 380 S.E.2d 383, 385 (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)), *disc. review denied*, 325 N.C. 435, 384 S.E.2d 545 (1989). Moreover, in cases involving prior sex offenses, including rape, our courts have been markedly liberal in the admission of 404(b) evidence. *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

We first consider whether the evidence of defendant's prior rapes was admissible to show the victim's lack of consent. Earlier cases within our State suggested that evidence of prior rapes was admissible to show the victim's lack of consent. *See, e.g., State v. Parish*, 104 N.C. 679, 690, 10 S.E. 457, 461 (1889) (allowing evidence of prior rape on *same* victim to show lack of consent); *State v. Gainey*, 32 N.C. App. 682, 685, 233 S.E.2d 671, 673 (allowing evidence of prior rape on *another* victim to show, among other things, lack of consent), *disc. review denied*, 292 N.C. 732, 235 S.E.2d 786 (1977). However, more recent cases have established that this is not a proper purpose under Rule 404(b), especially if a different victim was involved in the prior

rape. *See, e.g., State v. Bailey*, 80 N.C. App. 678, 681, 343 S.E.2d 434, 436 (1986) ("[E]vidence of other non-consensual activity would not be relevant on the question of [the victim's] consent."); *State v. Pace*, 51 N.C. App. 79, 83-84, 275 S.E.2d 254, 256-57 (1981) (disallowing evidence of prior rape on another victim to show lack of consent). Pursuant to this more recent authority, the testimonies of C and I were thus inadmissible to show the victim's lack of consent, and the trial court erred by admitting them for that purpose.

We next consider whether this evidence was admissible to show a common plan or scheme. "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), *disc. review denied*, 328 N.C. 574, 403 S.E.2d 516 (1991). Both parts are satisfied here. As to the first requirement, defendant displayed similar behavior here in comparison to his actions in the two prior rape cases. Specifically, in each situation, defendant befriended the women, took them to a secluded place, pinned the women down, became aggressive with them, sexually assaulted and raped them and afterwards acted like nothing had happened. And as to the second requirement, the two- and five-year gaps between the prior rapes and the present one are not so remote in time as to render the evidence inadmissible, especially considering defendant spent some of this time in prison after pleading guilty to these rapes. *See id.* at 20, 398 S.E.2d at 650 (holding ten-year-old conviction not too remote in time when defendant spent majority of this time in prison). We thus conclude the testimonies of C and I were admissible to show a common plan or scheme.

Furthermore, because the evidence was admissible for a proper purpose (to show a common plan or scheme), the trial court's error in admitting that same evidence for an improper purpose (lack of consent) is rendered non-prejudicial. *See State v. Haskins*, 104 N.C. App. 675, 683, 411 S.E.2d 376, 383 (1991) ("Although it is error to admit other crimes evidence for a purpose not supported in the evidence, the error cannot prejudice defendant when the same other crimes evidence is admitted for a purpose which is supported in the evidence."), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992). We thus reject defendant's first argument.

[2] Defendant next argues the trial court erred in submitting the offense of second-degree kidnapping for the jury's consideration because there was insufficient evidence of the element of confinement or restraint. Kidnapping, whether in the first or second degree, requires the unlawful restraint or confinement of a person for the purpose of committing a felony. N.C. Gen. Stat. § 14-39(a)(2) (1999). The unlawful restraint must be an act independent of the intended felony. *State v. Mebane*, 106 N.C. App. 516, 532, 418 S.E.2d 245, 255, *disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992). Thus, here, defendant's restraint of the victim must have been independent of the alleged rape, second-degree sex offense, or crime against nature. The test of the independence of the act is "whether there was substantial evidence that the defendant[] restrained or confined the victim separate and apart from any restraint necessary to accomplish the acts of rape[, statutory sex offense, or crime against nature]." *Id.* We conclude there was sufficient evidence of an independent act here.

Significantly, the requisite restraint need not be accomplished solely by physical force. *State v. Murphy*, 280 N.C. 1, 6, 184 S.E.2d 845, 848 (1971). It may also be accomplished by trickery or by "fraudulent representations amounting substantially to a coercion of the will" of the victim. *Id.* Here, the evidence permitted a reasonable inference that defendant fraudulently coerced the victim into remaining with him in the car so that he could drive to a secluded place (the cemetery), get high on marijuana, and then sexually assault her. In other words, the requisite restraint here was not defendant's subsequent assault of the victim but his initial act of coercing her to go to the cemetery. We therefore conclude the trial court did not err in submitting the second-degree kidnapping charge to the jury. *See also State v. Sexton*, 336 N.C. 321, 364-65, 444 S.E.2d 879, 903-04 (stating element of restraint was satisfied when defendant used trickery in order to get a ride from the victim), *cert. de*nied, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994); *State v. Strudivant*, 304 N.C. 293, 307, 283 S.E.2d 719, 729 (1981) (upholding kidnapping conviction when "defendant's chicanery directly induced the victim to remain in her car in a rural, deserted location").

[3] In another assignment of error, defendant argues the trial court erred in instructing the jury on a theory of guilt of second-degree kidnapping not specifically alleged in the indictment. The State is held to proof of the felonious purpose alleged in the indictment, and the jury cannot convict a defendant on a theory different than the one alleged in the indictment. *State v. Joyner*, 301 N.C. 18, 30, 269 S.E.2d 125, 133

(1980). Here, the indictment alleged defendant kidnapped the victim for the purpose of committing the felony of rape. The trial judge instructed the jury, however, that it could convict defendant if it found defendant kidnapped the victim for the purpose of committing the felonies of rape, second-degree sex offense, or crime against nature. By adding two additional theories of conviction not alleged in the indictment, the trial court's instructions were erroneous. *See id.* (holding instruction was error because it added an additional theory of felonious intent for the jury's consideration).

Nonetheless, we conclude the error was harmless. Significantly, defendant never objected to these instructions at trial. Accordingly, the erroneous instruction is only reviewable for plain error. *State v. Raynor*, 128 N.C. App. 244, 247, 495 S.E.2d 176, 178 (1998). Under that standard, defendant must show that "absent the erroneous instruction, a jury would not have found him guilty of the offense charged." *Id.* Here, defendant has not made the requisite showing. The evidence shows defendant committed or attempted to commit rape, a statutory sex offense, and crime against nature—and the jury convicted him as to all three. "The evidence therefore that he intended to commit [only] one of these crimes [at the time of the kidnapping] is no weaker or stronger than the evidence that he intended to commit the other[s]. . . . Under these circumstances we are satisfied that the result would have been the same on the [kidnapping] charge had the judge limited the jury's consideration on the [felonious purpose] element to [rape] as charged in the indictment." *Joyner*, 301 N.C. at 30, 269 S.E.2d at 133.

[4] Next, defendant contends the trial court erred in its jury instruction on one of the elements of second-degree statutory sex offense, namely the requirement that defendant commit some "sexual act." Under our statutes, "sexual act" does not include the act of vaginal intercourse. N.C. Gen. Stat. § 14-27.1(4) (1999). This is so because vaginal intercourse forms the basis for rape, whereas statutory sex offenses are based upon *other* sexual acts, such as the alleged digital penetration. *See generally State v. Speller*, 102 N.C. App. 697, 705, 404 S.E.2d 15, 19 (pointing out the distinction between statutory sex offenses and rape), *disc. review denied*, 329 N.C. 503, 407 S.E.2d 548 (1991).

Here, the trial court instructed the jury that "sexual act" encompassed "any penetration, however slight, by an object into the genital opening of a person's body." (2 Tr. at 534). Because defendant's penis could serve as the "object" of penetration under this definition,

defendant claims the court's instruction allowed the jury to base its conviction for second-degree sex offense on the same act that it did for rape, i.e. vaginal intercourse. Although we acknowledge that the trial court should have explicitly excluded vaginal intercourse from its definition of "sexual act," we conclude any error did not prejudice defendant.

In fact, we rejected a similar argument in *Speller*. In that case, the trial judge there defined "sexual act" as either "(1) anal intercourse, the penetration of the anus of one person by the *male sexual organ* of another, or (2) the penetration by an *object* into the genital opening of a person's body." *Id.* at 705, 404 S.E.2d at 19-20 (emphasis added). This Court concluded that, because the trial court explicitly distinguished between "male sexual organ" in the first part of the instruction and "object" in the second part, there was "no reasonable possibility that a juror would incorrectly equate the two" as both referring to defendant's penis. *Id.* at 705, 404 S.E.2d at 20.

In the present case, the trial court also explicitly distinguished between "male sex organ" and "object." In its instruction on rape, the trial court defined that offense as "penetration, however slight, of the female sex organ by the male sex organ." (2 Tr. at 533). Immediately following this instruction, the court instructed on the sex offense charge, defining "sexual act" as outlined above. Although technically incomplete, we conclude these instructions were sufficient to differentiate between the two offenses so that the jury understood it was to consider the vaginal intercourse for purposes of the rape charge and the digital penetration for purposes of the sex offense charge.

[5] In another argument, defendant asserts his short-form indictments as to rape and the sex offense were defective because they failed to specifically allege all the elements of each offense. Both our legislature and our courts have endorsed the use of short-form indictments for rape and sex offenses, even though such indictments do not specifically allege each and every element. N.C. Gen. Stat. § 15-144.1 (1999) (outlining requirements for rape indictment); N.C. Gen. Stat. § 15-144.2(a) (outlining requirements for sex offense indictment); *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982) (upholding short-form indictments for sex offenses); *State v. Lowe*, 295 N.C. 596, 604, 247 S.E.2d 878, 883-84 (1978) (upholding short-form indictments for rape).

Nonetheless, defendant counters that the recent United States Supreme Court case of *United States v. Jones*, 526 U.S. 227,

143 L. Ed. 2d 311 (1999), has effectively overruled this precedent by affirmatively requiring all indictments to specifically allege each element of the offense. The North Carolina Supreme Court has recently rejected a similar argument, pointing out that *Jones* only dealt with the federal pleading requirements under the Due Process Clause of the Fifth Amendment; it in no way dealt with the state pleading requirements under the Due Process Clause of the Fourteenth Amendment. *State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343 (2000). The *Jones* Court even stated the limited nature of its holding: "[O]ur decision today does not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century." *Jones*, 526 U.S. at 252 n.11, 143 L. Ed. 2d at 331 n.11. We therefore summarily reject defendant's argument.

[6] Finally, defendant argues the trial court erred by refusing to allow defendant to impeach the State's primary witness, the victim, with her prior convictions. Defendant sought to introduce the victim's prior 1975 and 1976 convictions for interstate transportation of stolen property, interstate transaction of false security, and embezzlement by an employee to show dishonesty and to impeach the victim's credibility. Defendant argues the witness' credibility should have been explored thoroughly because the determination of defendant's guilt was primarily based on the credibility of this one witness.

Our Rules of Evidence provide that any evidence of convictions more than ten years old for the purpose of attacking a witness' credibility is not admissible "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." N.C.R. Evid. 609(b). Rule 609(b) essentially establishes a rebuttable presumption that such convictions are more prejudicial than probative of a witness' character for credibility and therefore should not be admitted into evidence. *State v. Farris*, 93 N.C. App. 757, 761, 379 S.E.2d 283, 285 (1989). This balancing of the probative value and prejudicial effect necessarily involves some exercise of discretion by the trial court, and the trial court's ultimate determination will not be upset absent a manifest abuse of that discretion. *See State v. Moul*, 95 N.C. App. 644, 646, 383 S.E.2d 429, 431 (1989) ("We find that the trial court did not abuse its discretion in refusing to allow the admission of defendant's [fourteen-year-old] conviction at trial."); *see also United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998) (setting

forth abuse of discretion standard for federal counterpart to Rule 609). We find no such abuse here.

In the present case, defendant was repeatedly allowed to attack the victim's credibility during the trial, thereby reducing the probative value of the prior convictions from 1975 and 1976. For example, the jury heard about the victim's earlier conviction and imprisonment for possession of stolen goods, other various larceny offenses, a guilty plea to providing false information to police, her use of various aliases, dates of birth, and social security numbers under different names, and defense counsel's unconfirmed suggestions to the witness that she had a history of cocaine and alcohol abuse. Furthermore, defendant made the jury aware of the victim's past criminal record, focusing repeatedly during cross-examination without objection on multiple supposed inconsistencies in her statements to police and her testimony at trial. In light of all these other facts elicited about the victim's background, the probative value of the stale convictions was slight. We therefore uphold the trial court's determination.

In sum, we conclude the defendant received a fair trial, free from prejudicial error.

No prejudicial error.

Judges WALKER and HUNTER concur.

STATE OF NORTH CAROLINA v. MICHAEL LEE BOWENS

No. COA99-1065

(Filed 3 October 2000)

1. Drugs— knowingly and intentionally maintaining a dwelling for controlled substances—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of knowingly and intentionally maintaining a dwelling used for keeping or selling controlled substances under N.C.G.S. § 90-108(a)(7) because: (1) the State failed to present substantial evidence that defendant was the owner or the lessee of the dwelling, or that he had any responsibility for the payment

of the utilities or the general upkeep of the dwelling; (2) testimony that defendant was present at the dwelling on several occasions and testimony that he lived at the dwelling cannot alone support a conclusion that defendant kept or maintained the dwelling; and (3) although men's clothing was found at the dwelling, there is no evidence the clothes belonged to defendant.

2. Drugs— intent to sell or deliver marijuana—actual possession—constructive possession—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana in violation of N.C.G.S. § 90-95(a)(1), because there was sufficient evidence to support a conclusion that defendant had actual possession of some of the drugs and constructive possession of some of the drugs, including evidence that: (1) defendant was found in the dwelling and was seen there on several other occasions; (2) defendant attempted to flee from the officers; (3) 7.5 grams of marijuana were found on defendant's person; and (4) approximately 72.7 grams of marijuana were found in and about the house.

3. Sentencing— habitual felon—indictment specifically referenced only one felony

The habitual felon indictment was properly submitted to the jury even though defendant was charged with three principal felonies and the habitual felon indictment specifically referenced only the felonious possession of marijuana, because: (1) although the principal felony referenced in the indictment had been dismissed, it is not an essential element of being a habitual felon and is treated as surplusage and ignored; and (2) defendant had notice of the habitual felon charge against him and had the opportunity to present a defense.

Appeal by defendant from judgment dated 7 April 1999 by Judge James D. Llewellyn in Wilson County Superior Court. Heard in the Court of Appeals 22 August 2000.

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

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

GREENE, Judge.

Michael Lee Bowens (Defendant) appeals from a judgment entered following a jury verdict finding him guilty of maintaining a dwelling to keep or sell controlled substances, possession of marijuana with intent to sell and deliver, and having attained an habitual felon status. Defendant was sentenced to a minimum term of 90 months and a maximum term of 117 months.

Defendant was charged on 12 October 1998 with maintaining a dwelling to keep or sell controlled substances, possession with intent to sell or deliver marijuana, and felonious possession of marijuana. The habitual felon indictment alleged, in pertinent part, that Defendant "willfully and feloniously did commit the crime of Felonious Possession of Marijuana . . . while being an habitual felon."

The State presented evidence that on 10 July 1998, at 12:45 p.m., Officers Adolphus McGhee (McGhee), R.L. Branch (Branch), and Brian Brame (Brame), of the Wilson Police Department, executed a search warrant at 1108 Carolina Street. Prior to the execution of the warrant, the officers had observed the Carolina Street location for 2-to-3 days and during that time had seen Defendant enter the residence 8-to-10 times. McGhee testified he did not see anybody, other than Defendant, enter or exit the dwelling during the surveillance. In addition, Branch testified he was familiar with Defendant and Defendant lived "[a]t 1108 Carolina Street." On cross-examination, Branch stated he did not check to see who the dwelling was rented to, the telephone records, the City of Wilson utilities records, or any mail items lying around in the residence to determine who was noted as paying any of the bills. At the time the search warrant was executed, Defendant was the only person inside the dwelling and was found in the kitchen running toward the rear of the residence. McGhee placed Defendant in handcuffs and searched him for weapons. During the search, McGhee detected a bulge and had Brame, the designated evidence officer, check Defendant. From Defendant's right rear pocket, Brame removed two hundred and thirty-three dollars and approximately 7.5 grams of marijuana. Although Brame recalled he did look for pieces of paper with names and addresses on them, he was unable to locate any.

As the search continued, the officers discovered and confiscated a bag of marijuana weighing approximately 61.2 grams. The bag was found hidden in the couch in the living room and contained twenty-

nine individual bags of marijuana, referred to as "dime bags." The officers also found approximately 11.5 grams of marijuana located on a table near a television set in the living room, as well as a police scanner, an electronic scale, a metal smoking pipe, individual baggies used for packaging marijuana, scissors, small scales used for cutting or weighing marijuana, and a shoe box containing marijuana residue.

Branch testified he only saw men's clothing and did not see any women's clothing in the bedroom closet. He also stated that as the officers were placing Defendant in the police vehicle, Angela Williams (Williams) approached him and asked whether Defendant was being arrested. Williams stated she did not live at 1108 Carolina Street, she lived around the corner and she was only visiting.

At the close of the State's evidence, Defendant moved for dismissal of all of the charges, with the exception of the habitual felon charge which had not yet been presented to the jury. The trial court granted the dismissal of the felonious possession of marijuana charge and denied the motion with respect to the other charges.

Williams, who also is the mother of three of Defendant's children, testified for Defendant that she rented the dwelling at 1108 Carolina Street, the lease and utilities were in her name, and she paid for both the rent and utilities. She further testified she lived at 1108 Carolina Street and, on occasion, her children stayed there with her. Williams also stated the furnishings, the male clothing items, and any pictures located in the dwelling all belonged to her. Furthermore, Williams testified Defendant was there to see their children when the search occurred. She stated the marijuana hidden in the couch, the 11.5 grams of marijuana found on the table in front of the television, the police scanner, the smoking pipe, the electronic scale, the scissors, the scales, and the baggies all belonged to her and Defendant had no idea the marijuana was present.

At the close of Defendant's evidence, Defendant again made motions for the dismissal of the charge of possession with intent to sell or deliver marijuana and of the charge of knowingly and intentionally keeping or maintaining a dwelling which was used to keep or sell controlled substances. The trial judge again denied the motions.

After the jury found Defendant guilty of the remaining charges and before the habitual felon indictment was submitted to the jury,

Defendant moved to dismiss that indictment on the ground the principal felony in the indictment had been dismissed. The trial court denied this motion and the jury found Defendant guilty of being an habitual felon.

The issues are whether: (I) the State presented substantial evidence Defendant maintained the dwelling at 1108 Carolina Street; (II) the State presented substantial evidence of Defendant's constructive possession of the marijuana located in the dwelling; and (III) an habitual felon indictment must be dismissed if the principal felony listed in the indictment is dismissed.

I

[1] Defendant was charged with knowingly and intentionally maintaining a dwelling used for keeping or selling controlled substances under N.C. Gen. Stat. § 90-108(a)(7). This statute, in pertinent part, makes it unlawful for any person:

> To knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, . . . which is used for the keeping or selling of [a controlled substance] . . . in violation of this Article.

N.C.G.S. § 90-108(a)(7) (1999). Whether a person "keep[s] or maintain[s]" a dwelling, within the meaning of N.C. Gen. Stat. § 90-108(a)(7), requires the consideration of several factors, none of which are dispositive. *See State v. Allen*, 102 N.C. App. 598, 608, 403 S.E.2d 907, 913-14, *rev'd on other grounds*, 332 N.C. 123, 418 S.E.2d 225 (1992). Those factors include: ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses; payment of repair expenses; and payment of rent. *See id.; see also Black's Law Dictionary* 953 (6th ed. 1990); *State v. Rich*, 87 N.C. App. 380, 384, 361 S.E.2d 321, 324 (1987).

In this case, the State's evidence[1] shows: Defendant was seen in and out of the dwelling 8-to-10 times over the course of 2-to-3 days; nobody else was seen entering the premises during this 2-to-3 day period of time; men's clothing was found in one closet in the dwelling; Branch testified he believed Defendant lived at 1108 Carolina Street, although he offered no basis for that opinion and had not checked to

1. As a general rule, it is only the State's evidence that is to be considered in ruling on a motion to dismiss. *State v. Oldham*, 224 N.C. 415, 30 S.E.2d 318 (1944). A defendant's evidence is "not to be taken into account, unless it tends to explain or make clear that offered by the State." *Id.* at 416, 30 S.E.2d at 319-20.

see who the dwelling was rented to or who paid the utilities and telephone bills. This evidence, considered in the light most favorable to the State, *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998) (motion to dismiss requires evidence be considered in light most favorable to the State), does not constitute substantial evidence Defendant kept or maintained the dwelling at 1108 Carolina Street, *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990) (motion to dismiss should be denied if there is relevant evidence a reasonable juror might accept as adequate to support a conclusion the State has proven all elements of the crime). There is no evidence Defendant was the owner or the lessee of the dwelling, or that he had any responsibility for the payment of the utilities or the general upkeep of the dwelling. Testimony Defendant was present at the dwelling on several occasions and testimony he lived[2] "[a]t 1108 Carolina Street" cannot alone support a conclusion Defendant kept or maintained the dwelling. Although men's clothing was found in the dwelling, there is no evidence the clothes belonged to Defendant. Accordingly, Defendant's motion to dismiss the charge of maintaining a dwelling to keep or sell controlled substances should have been granted.

II

[2] Defendant was charged with possession with the intent to sell or deliver marijuana in violation of N.C. Gen. Stat. § 90-95(a)(1). Under this statute, the State has the burden of proving: (1) Defendant possessed the controlled substance, and (2) with the intent to sell or distribute it. *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 72-73 (1996).

Defendant contends the trial court erred in failing to dismiss this charge because there is no evidence he possessed the drugs found in the dwelling. We disagree.

Possession may be either actual or constructive. *State v. Broome*, 136 N.C. App. 82, 87, 523 S.E.2d 448, 452 (1999), *disc. review denied*, 351 N.C. 362, — S.E.2d — (2000). Actual possession requires a party to have physical or personal custody of the item. 28 C.J.S. *Drugs and Narcotics* § 170, at 773 (1996). Constructive possession,

2. Branch's testimony Defendant lived at the dwelling on Carolina Street was not supported by any evidence and thus is nothing more than a conclusion. This unsupported conclusion cannot be the basis for holding the State has presented substantial evidence of a violation of N.C. Gen. Stat. § 90-108(a)(7).

however, exists when a person, although not having actual possession of the controlled substance, has the intent and capability to maintain control and dominion over the controlled substance. *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993). Constructive possession of drugs is most often shown by evidence the defendant has exclusive possession of the property in which the drugs are located. *State v. Alston*, 91 N.C. App. 707, 710, 373 S.E.2d 306, 309 (1988). It can also be shown with evidence the defendant has nonexclusive possession of the property where the drugs are located; provided, there is other incriminating evidence. *Id.* Possession of the property where the drugs are located, either exclusive or nonexclusive, is not, however, the sole method of showing constructive possession. Evidence the defendant was "within close juxtaposition to a narcotic drug," along with other incriminating evidence can constitute constructive possession. *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976); *see State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972) (defendant within three or four feet of drugs); *see also Neal*, 109 N.C. App. at 687-88, 428 S.E.2d at 290 (incriminating circumstance includes fleeing from the area where the illegal drugs are found). Furthermore, "routine access" by a defendant to property where drugs are located can support a conclusion the defendant has constructive possession of those drugs. *See State v. James*, 81 N.C. App. 91, 94, 344 S.E.2d 77, 80 (1986).

In this case, Defendant was found in the dwelling located at 1108 Carolina Street, he was seen there on several other occasions, he attempted to flee from the officers, 7.5 grams of marijuana were found on his person, and approximately 72.7 grams of marijuana were found in and about the house. This evidence is sufficient to support a conclusion Defendant had actual possession of some of the drugs and constructive possession of some of the drugs. *See State v. Bell*, 33 N.C. App. 607, 235 S.E.2d 886 (no limitation as to the amount of controlled substance which must be possessed in order to be found guilty of possession with intent to sell or deliver), *appeal dismissed*, 293 N.C. 254, 237 S.E.2d 536 (1977); *State v. Williams*, 307 N.C. 452, 456, 298 S.E.2d 372, 375 (1983) (evidence defendant was seen in the yard on at least four occasions within two weeks of the time of the search warrant is some evidence to raise a reasonable inference defendant was in constructive possession). Accordingly, Defendant's motion to dismiss the charge of possession with the intent to sell or deliver marijuana was properly denied.

III

[3] Any person who has been convicted of three felony offenses "is declared to be an habitual felon." N.C.G.S. § 14-7.1 (1999). When a person is charged with the commission of a felony and "is also charged with being an habitual felon," he must, upon conviction, be sentenced as an habitual felon. N.C.G.S. § 14-7.2 (1999). The indictment charging a person as an habitual felon "shall be separate from the indictment charging him with the principal felony." N.C.G.S. § 14-7.3 (1999). A separate habitual felon indictment is not required for each principal felony. *State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 709 (1996). Furthermore, there is no requirement the habitual felon indictment specifically refer to the principal felony. *Id.* at 636, 466 S.E.2d at 710.

In this case, Defendant was charged with three principal felonies and the habitual felon indictment specifically referenced only one of those felonies: felonious possession of marijuana. The trial judge dismissed the charge of felonious possession of marijuana and the merit of that dismissal has not been raised by the State. Defendant argues if the habitual felon indictment references a principal felony and that felony is subsequently dismissed, the habitual felon indictment fails and should not be submitted to the jury. We disagree.[3]

In order to be sufficient, a criminal indictment must allege all of the essential elements of the crime sought to be charged and any allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as mere surplusage. *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996). If an indictment contains surplus language, the surplusage may be ignored if its inclusion has not caused prejudice to the defendant. *State v. Sisk*, 123 N.C. App. 361, 366, 473 S.E.2d 348, 352 (1996), *aff'd in part and dismissed in part*, 345 N.C. 749, 483 S.E.2d 440 (1997). "What is important is the defendant's understanding of the charge against which he need[s] to defend." *State v. Cameron*, 83 N.C. App. 69, 73, 349 S.E.2d 327, 330 (1986).[4]

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3. We reject Defendant's argument that this Court's opinion in *State v. Little*, 126 N.C. App. 262, 484 S.E.2d 835 (1997) controls. In *Little*, prior to sentencing, the State obtained a superseding habitual felon indictment which changed one of the three felony convictions included in the prior habitual felon indictment. *Id.* at 269, 484 S.E.2d at 839. In *Little*, the change in the felony convictions was a substantive change in the indictment and, thus, altered an element of the offense. *Id.* at 269, 484 S.E.2d at 840.

4. Defendant argues we should apply N.C. Gen. Stat. § 15A-923(e) providing "[a] bill of indictment may not be amended." N.C.G.S. § 15A-923(e) (1999). Amendment of

Although the principal felony referenced in Defendant's habitual felon indictment, felonious possession of marijuana, had been dismissed, it is not an essential element of being an habitual felon and is treated as surplusage and ignored. *See Patton*, 342 N.C. at 636, 466 S.E.2d at 710. The essential purpose of an habitual felon indictment is to give a defendant notice he is being charged as an habitual felon so he may prepare a defense as to having a charge of the three listed felony convictions. *Id.* In the instant case, Defendant had notice of the habitual felon charge against him, including the three felony convictions listed in the indictment, and the State's intention to prosecute him as an habitual felon. Since Defendant had notice and understanding of the habitual felon indictment, he had the opportunity to present a defense and was, therefore, not prejudiced. Accordingly, the habitual felon indictment was properly submitted to the jury.

Maintaining a dwelling used to keep or sell a controlled substance: Reversed.

Possession with intent to sell or deliver marijuana: No error.

Habitual felon: No error.

Judges EDMUNDS and SMITH concur.

IN THE MATTER OF WILLIAM C. FLOWERS

No. COA99-1187

(Filed 3 October 2000)

1. Guardian and Ward— incompetency—superior court's standard of review

The superior court's standard of review in a proceeding to appoint a guardian for a person declared to be incompetent is confined to the correction of errors of law based on the record rather than a de novo review.

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an indictment has been defined as "any change . . . which would substantially alter the charge set forth in the indictment." *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478, *disc. review denied and dismissal allowed*, 294 N.C. 737, 244 S.E.2d 155 (1978). Because the principal felony listed in the indictment was surplusage, we do not address this issue.

2. Guardian and Ward— incompetency—appointment of guardian

The clerk of court did not err by appointing one of the incompetent father's sons as guardian for the father, because there was plenary evidence to support the clerk's findings that: (1) the father had the legal capacity to sign documents and was competent at the time he signed the general power of attorney and the health care power of attorney nominating his wife or his son to be guardian; (2) no good cause was shown why the son should not serve as general guardian for his father; and (3) the appointment of the son as guardian is in the best interest of the father.

3. Appeal and Error— appealability—no finding—argument minimally related to assignment of error

Although petitioners contend there was insufficient evidence in a guardianship proceeding to justify the clerk of court's finding that a will of the incompetent father would be probated that would devise the bulk of his estate to one of his sons, this argument is without merit because: (1) the clerk never made a finding in this regard; (2) petitioners' argument is minimally related to its assignment of error when the issue presented is the proper or improper appointment of a guardian, and the case law cited and argued relates to the validity or invalidity of a will; and (3) the potential invalidity of the father's will, power of attorney, and health care power of attorney showing the father's reliance on his son was a fact to be considered by the clerk in weighing the credibility of the evidence.

Appeal by petitioners from order entered 17 August 1999 by Judge Charles H. Henry in Carteret County Superior Court. Heard in the Court of Appeals 22 August 2000.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, Jr., for petitioner-appellants Patricia Flowers Piner, Joseph M. Flowers, and William C. Flowers, Jr.

Mason & Mason, P.A., by L. Patten Mason, for appellee Richard C. Flowers.

SMITH, Judge.

On 9 June 1999, petitioner Patricia Flowers Piner (Patricia) filed in Carteret County Superior Court a "Petition for Adjudication of

Incompetence and Application for Appointment of Guardian." She sought to have her father, William C. Flowers (Mr. Flowers), declared incompetent and a "Public Guardian" appointed to handle Mr. Flowers' affairs. On 24 June 1999, the Clerk of Superior Court of Carteret County conducted a hearing on the matter. During the hearing, L. Patten Mason, attorney for Richard Cass Flowers (Cass), who is a son of Mr. Flowers, moved that Cass be appointed guardian. His motion was "predicated upon the alleged powers of attorney appointing him as such and also to the effect that he was the only one who really understood the properties owned by [Mr. Flowers], and that he would be capable of managing the so called estate."

By order filed 25 June 1999, the court allowed petitioners Joseph M. Flowers (Joseph) and William C. Flowers, Jr. (William), sons of Mr. Flowers, to be made parties to the action. On 29 June 1999, the clerk entered an order finding "clear, cogent, and convincing evidence that [Mr. Flowers] is incompetent" and appointing Cass guardian for Mr. Flowers. Petitioners appealed to the superior court, which, in an order entered 17 August 1999, concluded:

1. The clerk's findings of fact in her June 29, 1999 order are supported by the evidence and testimony received during the June 24, 1999 hearing.

2. The clerk's conclusions of law are supported by her findings of fact contained in the above order.

3. The clerk has not abused her discretion in the appointment of Richard Cass Flowers as general guardian.

From this order, petitioners now appeal.

I.

[1] We first point out the superior court's standard of review in a proceeding to appoint a guardian for an incompetent:

> In the appointment and removal of guardians, the appellate jurisdiction of the Superior Court is derivative and appeals present for review only errors of law committed by the clerk. In exercising the power of review, the judge is confined to the correction of errors of law. The hearing is on the record rather than *de novo*.

In re Simmons, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966) (internal citations omitted); *see also In re Bidstrup*, 55 N.C. App. 394, 396, 285 S.E.2d 304, 305 (1982) ("The clerk's appointment of a guardian for

an incompetent's estate therefore involves a determination too routine to justify saddling a superior court judge with a review any more extensive than a review of the record."). Likewise, when the superior court sits as an appellate court, "[t]he standard of review in this Court is the same as in the Superior Court." *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2-3 (1995) (citation omitted).

II.

[2] Petitioners first contend the clerk of court erred in appointing Cass as guardian for Mr. Flowers. They argue that the evidence before the clerk substantiated their claim that Cass "had already obtained over three and one-half million dollars from [Mr. Flowers] by the use of a power of attorney that was fraudulently obtained and was holding said sum for his own use and benefit." Accordingly, petitioners contend, the clerk's appointment of Cass was contrary to law and reversible error. We disagree.

Looking to the record as it was submitted to us,[1] the evidence of Mr. Flowers' incompetence was uncontested and not challenged on appeal. Mr. Flowers' decline began in the early 1990's; his communication skills had greatly declined by the end of 1995 and had ceased by 1998.

Other evidence before the clerk was that Mr. and Mrs. Flowers resided in the motel they owned and ran in Atlantic Beach. William, a resident of Kannapolis, testified that he visited several times a year. He testified that when the motel burned down in early 1996, Cass took Mr. and Mrs. Flowers in and helped rebuild the motel. The Flowers' returned to the motel upon completion of the renovation. When Mrs. Flowers died, Cass assumed the care-taking of Mr. Flowers.

The middle son, Joseph, also testified. Joseph lives in Florida and testified that he had visited several times since Mr. Flowers got sick and that recently Mr. Flowers was unable to acknowledge Joseph was his son. He testified that Cass seemed to be responsible for the ongoing care of Mr. Flowers; Mr. Flowers' physical care was good.

Patricia testified she has had a good relationship with her father. However, when she inquired in July 1995 about his hygiene, Mr. Flowers asked her to leave. Her next visit to her parents was after the

1. We note that no transcript of the hearing before the clerk was included in the record on appeal. Accordingly, our review is limited to the clerk's notes and statement and exhibits, all of which were included in the record.

motel burned. From January to mid-October 1998, Patricia ran the motel for her father. She testified she did not visit her parents when they were with Cass. Patricia further testified that Cass has provided for Mr. and Mrs. Flowers, but contended that he received expense checks from the motel.

Also testifying was Robert Cummings (Cummings), the attorney who drafted Mr. Flowers' will and power of attorney in 1995. After counseling Mr. and Mrs. Flowers, he formed the opinion that Mr. Flowers was competent. Accordingly, he prepared the documents and sent them to Mr. and Mrs. Flowers for their review. The couple made a few changes and came to Cummings' office to sign the will. Cummings went over the details of the will with Mr. Flowers. They conversed about family and politics. Cummings testified that Mr. Flowers gave good answers but seemed a bit hard of hearing. Mr. Flowers signed the documents in the presence of witnesses. Cummings spoke again with Mr. and Mrs. Flowers on two or three occasions after the motel burned. On 8 August 1997, he prepared an affidavit regarding Mr. Flowers' competence.

Cecil Harvell (Harvell), an attorney hired by Cass in 1998, prepared an irrevocable trust, which was signed by Mr. Flowers and was for the benefit of Mr. Flowers during his lifetime and, upon the death of Mr. Flowers, for the benefit of Cass's children. Harvell testified that the purpose of the trust was to give relief from federal estate and inheritance taxes.

Several documents were entered in evidence: (1) Mr. Flowers' 1995 will left all of his tangible property to his wife if surviving, otherwise to Cass. It gave $100.00 to each of the four children; it provided that, of Mr. Flowers' shares of stock in Flowers Development Corporation, Inc., one-half each would be distributed to Mrs. Flowers and Cass. Mr. Flowers' residuary estate was bequeathed to his wife, if surviving, otherwise to Cass. Cass and Mrs. Flowers were appointed co-executors of his estate. (2) Mr. Flowers' 1995 general power of attorney appointed Mrs. Flowers and Cass as attorneys-in-fact. (3) Mr. Flowers' 1995 health care power of attorney appointed Mrs. Flowers and Cass as health care attorneys-in-fact. (4) Cummings' affidavit detailed the correspondence involved in drafting the 1995 documents and attested to the competence of Mr. Flowers at the time of execution. (5) An Amendment and Restatement of Power of Attorney, signed by Mr. Flowers in December 1998, again appointed Cass as attorney-in-fact and Sylvia M. Flowers as successor attorney-in-fact.

Based on the foregoing evidence, the clerk made the following findings of fact:

1. On the 11th day of May, 1995, William C. Flowers signed a general power of attorney as well as a health care power of attorney, both of which documents provided that in the event it became necessary for a court to appoint a guardian of W.C. Flowers' property, he nominated his agents (Richard Cass Flowers and Grace L. Flowers) to be guardian of his property and to serve without bond or security. Grace L. Flowers is now deceased.

2. The general power of attorney and health care power of attorney above referenced both provided that if one of the agents or attorneys in fact was unable to serve, then William C. Flowers appointed the remaining agent to act as his successor agent and to be vested with the same powers and duties.

3. At the time William C. Flowers signed the general power of attorney and the health care power of attorney, he was competent and had the legal capacity to sign said documents.

4. The guardian ad litem recommended to the Clerk that Richard Cass Flowers be appointed general guardian for his father, William C. Flowers.

5. Richard Cass Flowers has cared for his father and been responsible for his father's estate exclusively since the time of his mother's death in August of 1998.

6. Richard Cass Flowers' performance of his duties in caring for the personal and estate interests of William C. Flowers has been pursuant to the 1995 power of attorney and health care power of attorney.

7. Richard Cass Flowers has kept accurate records of the receipts and expenditures that he has handled [o]n behalf of his father.

8. The petitioner has requested the Clerk to appoint the public guardian to serve as general guardian for William C. Flowers.

9. The estate of William C. Flowers consists of a motel, rental property and other assets which require extensive time and

knowledge to manage. The public guardian does not have the time, personnel or resources to be guardian of the estate of William C. Flowers.

Based on these findings, the clerk concluded:

2. At the time William C. Flowers signed the general power of attorney and the health care power of attorney, he was competent and had the legal capacity to sign said documents.

3. Richard Cass Flowers is not disqualified from being general guardian of his father's estate and person.

4. No good cause has been shown as to why Richard Cass Flowers should not serve as general guardian for his father.

5. The appointment of Richard Cass Flowers as guardian for his father, William C. Flowers, is in the best interest of William C. Flowers[.]

Our review of the record shows plenary evidence to support the clerk's findings, and we discern no error of law in appointing Cass as guardian. The clerk aptly reviewed the evidence and applied the law to the evidence presented. This assignment of error is overruled.

III.

[3] Petitioners next contend "there was insufficient evidence offered at the hearing to justify the clerk to find that a will of William C. Flowers would be probated that would devise the bulk of the estate of William C. Flowers to Richard Cass Flowers." This argument is without merit.

First, the phraseology of petitioners' argument would lead one to believe that the clerk made a "finding of fact" that Mr. Flowers' will would devise the bulk of his estate to Cass. However, no such finding exists. The only language resembling that offered by petitioners is found in a document entitled "Statment [sic] by Clerk on Appeal," which was submitted to the superior court on petitioners' appeal. The statement reads in pertinent part:

The Court notes that if it appears that [Cass] has been presumptuous with indicating how property in the Trust should be directed upon the death of his father, it does follow the direction of the Last Will and Testament. Taking all matters in considera-

tion, it is reasonable to believe that the copy of the Last Will and Testament could be probated, at the proper time.

The clerk never made a "finding" in this regard; indeed, such a finding would have been beyond the scope of the clerk's authority.

Second, in making this argument, petitioners' brief refers this Court to its Assignment of Error #2, which reads: "The appointment of the guardian was made on the basis of a false representation or a mistake by the Clerk in considering alleged copies of a will, health care power of attorney, and general power of attorney, the originals of which were destroyed." The argument made in their brief, while referencing Assignment of Error #2, is at best minimally related to the assigned error. The case law cited and argued on appeal relates solely to issues surrounding the validity or invalidity of a will. The issue presented to the clerk, and now on appeal to this Court, is the proper or improper appointment of a guardian. Mr. Flowers' will, power of attorney, and health care power of attorney merely evidenced Mr. Flowers' trust in and reliance on Cass and his desire to provide for a child who had provided care and support for him. The potential invalidity of the documents was a fact to be considered by the clerk in weighing the credibility of the evidence. Accordingly, this assignment of error is overruled.

As a final matter, we note that petitioners' assignments of error set forth in the record on appeal fail to make "clear and specific" references to the record or transcript. N.C. R. App. P. 10(c)(1). While this alone subjects an appeal to dismissal, we have thoroughly considered the arguments raised on this appeal and found them meritless. The order of the superior court is affirmed.

Affirmed.

Judges GREENE and EDMUNDS concur.

SAVE OUR SCHOOLS OF BLADEN COUNTY, INC., PLAINTIFF v. BLADEN COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA99-1290

(Filed 3 October 2000)

Laches— school consolidation plan—delay awaiting bond referendum—summary judgment

Summary judgment on the basis of laches was warranted for defendant board of education in an action that sought an injunction to prevent defendant from proceeding with a school building and consolidation program where plaintiff's issues were based on actions taken by defendant prior to its vote to proceed in July of 1997; plaintiff did not begin an action then but made an apparently tactical decision to see if a bond referendum would settle matters; the bond referendum passed in September of 1998, but plaintiff did not institute suit until March of 1999; defendant proceeded during that time with actions necessary to carry out the consolidation; and defendant pled the affirmative defense of laches. There is no factual dispute; plaintiff may be charged with knowledge of the facts underlying the claim, plaintiff could have brought the suit when defendant approved the consolidation plan in July of 1997, and defendant was prejudiced. Although laches was not mentioned in the summary judgment order, summary judgment will be affirmed if it can be sustained on any grounds.

Appeal by plaintiff from judgment filed 5 August 1999 by Judge Knox V. Jenkins, Jr., in Bladen County Superior Court. Heard in the Court of Appeals 15 August 2000.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Michael Crowell, and Hester, Grady, Hester, Greene & Payne, by Donna Gooden Payne, for defendant-appellee.

EDMUNDS, Judge.

Plaintiff Save Our Schools of Bladen County, Inc. appeals the trial court's order granting summary judgment to defendant Bladen County Board of Education. We affirm.

In 1995, in anticipation of a major state school bond issue, the North Carolina Department of Public Instruction (DPI) mandated that each school system conduct an assessment of its anticipated needs and prepare a ten-year building plan. At the request of defendant, DPI conducted an assessment of Bladen County schools and prepared its plan. DPI's study revealed that it would cost approximately $35 million to bring the existing school facilities up to standard. Plan development and adjustments for inflation increased the overall estimated cost to approximately $45 million.

Although in December 1995 the Board of Commissioners of Bladen County (the commissioners) approved the DPI report and plan in order to satisfy the deadline for the state bond issue, the commissioners requested that defendant develop a more economical and educationally sound plan. Accordingly, defendant began exploring other options after the passage of the school bond referendum in November 1996. Bladen County school superintendent Dr. Byron Lawson and his staff settled on five possible proposals. These were presented to defendant in February 1997 at a one-day retreat, which was open to the public.

At the retreat, defendant's members reached a nonunanimous consensus in favor of a proposal that included closing the county's two middle schools, converting its three existing high schools into middle schools, and building two high schools. Defendant voted 7-1 to proceed with this option at its May 1997 meeting, and in June 1997, defendant scheduled a public hearing for the thirtieth day of that month. Three articles and one editorial discussing the proposed construction plan were printed in the local Bladen County newspaper.

After the sparsely-attended public hearing, defendant on 21 July 1997 voted 7-1 to approve its building and consolidation program. However, only approximately $11 million was available to defendant from the state bond referendum, which was insufficient to carry out the plan. Defendant requested that the commissioners issue an additional $25 million in local bonds to make up for the shortfall. A county bond referendum was set for September 1998, and both opponents and supporters of the plan campaigned actively before the election. The referendum passed and was upheld over protest.

On 9 March 1999, plaintiff, a nonprofit North Carolina corporation composed of Bladen County citizens and taxpayers, filed suit, seeking an injunction to prevent defendant from proceeding

further with its plan. Plaintiff alleged that defendant instituted the consolidation plan without conducting a thorough study and without properly noticing and holding public hearings, in violation of N.C. Gen. Stat. § 115C-72 (1999); that defendant had thereafter entered into option contracts for the purchase of real estate without approval from county commissioners, in violation of N.C. Gen. Stat. § 115C-426 (1999); that defendant entered into the consolidation plan without amending its previous budget resolution, in violation of N.C. Gen. Stat. §§ 115C-432(4) and 115C-433 (1999); and that defendant failed to conduct a construction versus renovation analysis, in violation of N.C. Gen. Stat. § 115C-521 (1999). Defendant asserted a Rule 12(b)(6) defense for failure to state a claim upon which relief may be granted, N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1999), and also raised laches as an affirmative defense, *see* N.C. Gen. Stat. § 1A-1, Rule 8(c) (1999). Defendant thereafter filed a motion for summary judgment supported by affidavits from Dr. Lawson, school board members, and Larry Hammond, the director of elections for Bladen County. After hearing arguments and considering briefs, depositions, affidavits, and exhibits, the trial court granted defendant's motion. Plaintiff appeals.

Although plaintiff's appeal raises several issues pertaining to defendant's compliance with N.C. Gen. Stat. § 115C-72 prior to instituting its school consolidation plan, we need not reach these questions. In its answer, defendant pled the affirmative defense of laches. *See* N.C. Gen. Stat. § 1A-1, Rule 8(c).

> In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case. Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay.

Teachey v. Gurley, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938). The burden of proving laches is on the party pleading the affirmative defense. *See Poultry Co. v. Oil Co.*, 272 N.C. 16, 157 S.E.2d 693 (1967).

> When laches is raised, an appellate court faces
>
> a three-fold question: (1) Do the pleadings, affidavits and exhibits show any dispute as to the facts upon which defendants rely to show laches on the part of plaintiffs? (2) If not, do the undisputed facts, if true, establish plaintiffs' laches? (3) If so, is it appropriate that defendants' motion for summary judgment, made under G.S. 1A-1, Rule 56(b), be granted?

Taylor v. City of Raleigh, 290 N.C. 608, 621, 227 S.E.2d 576, 584 (1976). The facts in the case at bar are undisputed. In February 1997, at a public retreat, defendant reached a nonunanimous consensus to proceed with consolidation, and at its meeting in May 1997, defendant formally decided to begin the consolidation process. On 2 June 1997, defendant scheduled a public meeting for 30 June 1997, and after that meeting, defendant in July 1997 gave final approval to the building plan. The successful bond referendum was held in September 1998, and plaintiff brought suit in March 1999.

We next address whether these undisputed facts establish laches. As an initial matter, we note that laches serves as a bar only when the claimant knew of the existence of the grounds for the claim. *See Abernethy v. Town of Boone Bd. Of Adjustment*, 109 N.C. App. 459, 427 S.E.2d 875 (1993). Affidavits and depositions in the record establish that public debate over the wisdom of consolidation began after the February 1997 retreat where defendant first reached a consensus in favor of consolidation. Although plaintiff disputes the diligence with which news of the proposed consolidation was disseminated, there is ample evidence in the record that the issue was a matter of controversy in the community. The local newspaper ran specific articles and an equally specific editorial setting forth the time, place, and date of the meeting and the issue to be addressed. *See* Editorial, *School Expansion Project Must Have Our Support*, Bladen Journal, June 27, 1997, at 4A ("But don't take our word for it. Attend the Board of Education's public meeting this Monday, June 30 at 7:30 p.m. It will be held in the superior courtroom of the county courthouse and is intended as a forum for citizens to get answers and to voice their opinions regarding the expansion project."). These articles are in contrast to the general articles found insufficient to give a petitioner notice of the facts underlying a claim in *Allen v. City of Burlington Bd. of Adjustment*, 100 N.C. App. 615, 397 S.E.2d 657 (1990). In addition, one member of plaintiff is a spouse of a school board member, and another member of plaintiff, in an affidavit, described obtaining

information about consolidation as early as July 1996. Accordingly, plaintiff may be charged with knowledge of the facts underlying its claim.

" '[T]he mere passage or lapse of time is insufficient to support a finding of laches; for the doctrine of laches to be sustained, the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke it.' " *Taylor*, 290 N.C. at 622-23, 227 S.E.2d at 584-85 (quoting 22 Am. Jur. 2d *Declaratory Judgments* § 78 (1965)). Because plaintiff challenges the thoroughness of defendant's study prior to proceeding with consolidation and the sufficiency of defendant's notice of public hearing on the plan, plaintiff could have brought the instant suit when defendant gave final approval to the consolidation plan in July 1997. Instead, plaintiff waited to see the results of the September 1998 referendum, then waited another six months. According to plaintiff's complaint and defendant's answer, defendant has entered into contracts that include options to purchase land for the consolidated schools. These actions undertaken by defendant in compliance with the results of its own vote to consolidate and passage of the school bond issue in a general election demonstrate that defendant has been prejudiced by plaintiff's delay. This evidence is sufficient to establish plaintiff's laches.

Finally, we must consider whether summary judgment was appropriate. Summary judgment may be granted in favor of a defendant raising an affirmative defense of laches, *see Cannon v. City of Durham*, 120 N.C. App. 612, 463 S.E.2d 272 (1995), and "is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law,' " *Thompson v. Three Guys Furniture Co.*, 122 N.C. App. 340, 344, 469 S.E.2d 583, 585 (1996) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). As noted above, there is no dispute about the facts alleged to constitute laches. The trial court recited that it had considered affidavits, depositions, and briefs and arguments of the parties, as summarized above. The court's order granted summary judgment on the basis of its finding that defendant did comply with the statutory requirements for undertaking the consolidation program. Although laches was not mentioned in the order, "[i]f 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) (citations omitted).

A survey of cases involving delayed challenges to state actions may be found in *Taylor*, 290 N.C. 608, 227 S.E.2d 576. In *Taylor*, the action challenging a rezoning ordinance was brought two years and twenty-two days after the ordinance was adopted; during that time, the purchaser of the rezoned property incurred expenses in the development and use of the property. The Supreme Court held that laches barred the suit challenging the rezoning. By contrast, laches was not found in other cases recited in *Taylor* where challenges had been brought within four days to three months of the passage of the ordinance.

In the case at bar, plaintiff's issues are based on actions taken by defendant prior to its vote to proceed with consolidation in July 1997. Instead of instituting suit at that time, plaintiff made what appears to have been a tactical decision to wait and see whether defeat of the bond referendum would settle matters. When the referendum passed in September 1998, plaintiff still did not institute suit until March 1999. During that time, defendant was proceeding with actions necessary to carry out the consolidation. Based on plaintiff's delay and the resulting prejudice to defendant, we hold that summary judgment was properly granted.

Affirmed.

Judges GREENE and SMITH concur.

LUCHIA TORRES, PLAINTIFF v. ROBERT A. McCLAIN, DEFENDANT

No. COA99-1166

(Filed 3 October 2000)

1. Divorce— separation agreement—choice of law provision

The trial court properly applied Illinois law based on the choice of law provision in the parties' separation agreement executed while the parties were stationed overseas with the military in Japan, because: (1) there was a reasonable basis for the par-

ties' choice of law provision in favor of Illinois since at the time the agreement was drafted, both parties were domiciliaries of Illinois; and (2) applying the law of Illinois will not violate any fundamental public policy of the State of North Carolina nor will it violate any applicable law.

2. Divorce— equitable distribution—military pension—unincorporated separation agreement

The trial court did not err by awarding plaintiff wife a portion of defendant husband's military pension when the parties' Japanese divorce judgment does not incorporate the parties' separation agreement providing for the division of defendant's military pension, because an unincorporated separation agreement is a contract that cannot be modified without the consent of the parties.

3. Divorce— equitable distribution—separation agreement—created more rights than statute provides—no public policy violation

The trial court did not err by awarding plaintiff wife a portion of defendant husband's military pension even though defendant contends the parties' separation agreement with an Illinois choice of law provision violates the public policy of North Carolina, because: (1) although the parties created rights in plaintiff which she would not have had under the equitable distribution statute of N.C.G.S. § 50-20(b) as it was written at the time, it does not follow that there was a violation of North Carolina's public policy; and (2) there was no showing that the law violates some prevalent conception of good morals, fundamental principle of natural justice, or involves injustice to the people of the forum state.

4. Divorce— equitable distribution—military pension—no abuse of discretion

The trial court did not abuse its discretion when it chose to apply Illinois law using the "reserved jurisdiction approach" rather than the "immediate offset approach" to determine that plaintiff wife was entitled to 30% of defendant husband's military pension.

Appeal by defendant from judgment entered 14 May 1999 by Judge Leonard W. Thagard in Onslow County District Court. Heard in the Court of Appeals 21 August 2000.

Law Offices of Mark E. Sullivan, P.A., by Mark E. Sullivan, Nancy L. Grace and Deborah Sandlin-Brockmann, for plaintiff-appellee.

Ellis, Hooper, Warlick & Morgan, L.L.P., by Victor H.E. Morgan, Jr., for defendant-appellant.

EAGLES, Chief Judge.

Luchia Torres (plaintiff) and Robert McClain (defendant) were married on 14 June 1975. On 1 June 1976, defendant joined the United States Marine Corps. The parties had two children during their marriage: Allyson R. McClain, born 30 January 1977, and Debrah L. McClain, born 5 January 1979.

In 1988, while stationed in Okinawa, Japan, the parties executed a separation agreement containing an Illinois choice of law provision. Although stationed overseas at the time they executed the separation agreement, both parties were domiciliaries of Illinois. The separation agreement provided in part that

> the Wife shall retain any and all rights and claims that she may have in and to said military retirement and that, if the Husband subsequently becomes entitled to receive said military retirement benefits, either party may bring this matter before a court of competent jurisdiction for resolution at any time thereafter.

On 13 May 1988, the parties were divorced pursuant to a judgment of divorce entered in the Naha Family Court in Okinawa, Japan. The judgment neither incorporates nor refers to the separation agreement. However, the judgment does provide that the parties were divorced in accordance with the law of Illinois.

Beginning in 1992, the parties filed a series of motions in Onslow County District Court requesting modification of child support and a determination of arrearage. As part of these proceedings, on 15 September 1997, shortly after defendant's 1 May 1997 retirement from the United States Marine Corps, plaintiff filed a motion asking the Court to award her a percentage of defendant's military pension.

After hearing evidence and examining the record in the case, Judge Thagard concluded that Illinois law governed the disposition of the case pursuant to the choice of law provision in the separation agreement. Judge Thagard further found that "60% of the defendant's

military retirement accrued from the date of marriage to the date of separation, and, therefore the plaintiff is entitled to one-half of the marital interest which is 30% of the defendant's military retirement pay." From the judgment and order entered 14 May 1999, defendant appeals.

Defendant sets forth two assignments of error: (1) the trial court erred in awarding plaintiff a share of defendant's military pension, and (2) even if the trial court properly awarded plaintiff a share of the military pension, the court erred in awarding the plaintiff 30% of the pension.

[1] At the outset, we hold that the trial court properly applied Illinois law in this case. We have previously held that "[t]he parties' choice of law is generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental public policy of the state or otherwise applicable law." *Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)). Paragraph 25 of the parties' separation agreement explicitly provides that it is to be construed and applied according to Illinois law. At the time the agreement was drafted, both parties were domiciliaries of Illinois. Therefore, we find a reasonable basis for the parties' choice of law provision in favor of Illinois. In addition, applying the law of Illinois will not violate any fundamental public policy of the State of North Carolina, nor will it violate any applicable law. For these reasons, we conclude the trial court properly applied Illinois law.

[2] We now turn to defendant's first assignment of error. In support of his contention that the trial court erred in awarding plaintiff a portion of defendant's military pension, defendant relies primarily on the Illinois case *In Re Marriage of Brown*, 587 N.E.2d 648 (Ill. App.3d 1992). Defendant argues that the trial court should have dismissed this action for lack of subject matter jurisdiction based on *Brown*. We disagree.

In *Brown*, the parties obtained a divorce in Germany while the husband-defendant was stationed there on active military duty. *Id.* at 650. Prior to the entry of divorce, the parties executed a separation agreement giving the wife-plaintiff a share of the defendant's military pension. *Id.* When plaintiff attempted to register the foreign judgment, the Illinois Court affirmed the dismissal of the action on the grounds that subject matter jurisdiction was lacking. *Id.* at 653.

There is a critical difference between *Brown* and this case. In *Brown*, the German divorce decree incorporated the parties' separation agreement, thereby making it part of the foreign judgment. *Id.* at 650-51. In this case, the Japanese divorce judgment does not incorporate the parties' separation agreement.

It is this critical, factual difference that controls the outcome here. Illinois law is clear that an unincorporated separation agreement is not modifiable absent the consent of the parties. *In re Marriage of Delitt*, 571 N.E.2d 523 (Ill. App.3d 1991). In *Delitt*, the parties executed a separation agreement which provided for monthly maintenance of the wife until her death or remarriage. The separation agreement was not incorporated into the judgment of dissolution of marriage. *Id.* at 524. The husband petitioned the court to reduce his monthly payments based on a change of circumstances. The Illinois Court held that the case involved "contract law . . . and the terms of the settlement agreement entered into by the parties may not be modified except by the agreement of both parties." *Id.* at 525. Likewise, in this case, the separation agreement providing for the division of defendant's military pension was not incorporated into the Japanese divorce judgment. For this reason, the separation agreement is merely a contract, and subject only to contract remedies. *Id.* Accordingly, we hold that the trial court properly awarded plaintiff a share of defendant's military pension.

Assuming *arguendo* that North Carolina law controls the outcome in this case, the result would be the same. North Carolina, like Illinois, provides that an unincorporated separation agreement is a contract that cannot be modified without the consent of the parties. *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983); *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 347 S.E.2d 19 (1986); *Grover v. Norris*, 137 N.C. App. 487, 529 S.E.2d 231 (2000); *Crane v. Green*, 114 N.C. App. 105, 441 S.E.2d 144 (1994); *Rose v. Rose*, 108 N.C. App. 90, 422 S.E.2d 446 (1992). Thus, it is clear that even if the choice of law provision in the separation agreement did not control this case, plaintiff would be entitled to a share of defendant's military pension under North Carolina law.

[3] Defendant also argues that this Court should reverse the trial court's order awarding plaintiff a share of his military pension on the grounds that the separation agreement violates the public policy of North Carolina. We are not persuaded.

At the time the separation agreement was drafted, G.S. 50-20(b) did not provide for the statutory equitable distribution of non-vested pensions. However, the courts of North Carolina have long held that separation agreements will be enforced as ordinary contracts, even when the agreement creates rights not provided for by statute. *Blount v. Blount*, 72 N.C. App. 193, 323 S.E.2d 738 (1984); *Altman v. Munns*, 82 N.C. App. 102, 345 S.E.2d 419 (1986). Although the parties in this action created rights in the plaintiff which she would not have had under the equitable distribution statute as it was written at the time, it does not follow that this amounts to a violation of North Carolina's public policy.

The courts of North Carolina have been reluctant to find that the law of another state violates our public policy absent a showing that the law violates "some prevalent conception of good morals or fundamental principle of natural justice or involve injustice to the people of the forum state." *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 857-58 (1988). We hold there is no such violation here.

[4] Defendant next assigns error to the trial court's application of the test to determine the portion of defendant's military pension to be awarded plaintiff. The trial court calculated and concluded that 60% of defendant's military pension accrued during the parties' marriage. Based on that finding, the trial court awarded plaintiff 30% of defendant's military pension, payable as of 1 May 1997, the date of defendant's retirement. Defendant argues the trial court should have applied the "immediate offset approach" in this case, not the "reserved jurisdiction approach."

Illinois law provides two methods for dividing pensions: the "immediate offset approach" and the "reserved jurisdiction approach." *In re Marriage of Whiting*, 534 N.E.2d 468, 470-71 (Ill. App.3d 1989). In *In re Marriage of Korper*, 475 N.E.2d 1333, 1338 (Ill. App.3d 1985), these two different methods were summarized as follows:

> In an appropriate case, the court can reduce the pension plan to present value and award an offsetting value of money or property to the nonemployee spouse. This is the immediate offset approach. In other cases, the court can order the employee spouse to pay the allocated portion of the fund, as disbursed, retaining jurisdiction to enforce the decree. This is the reserved jurisdiction approach. (Citations omitted).

The distribution of marital property is a matter within the discretion of the trial court, and will not be disturbed absent a showing of abuse of that discretion. *Id.* at 1336. We hold that the defendant has failed to show an abuse of discretion.

Again assuming *arguendo* that North Carolina law controls this case, the outcome would be the same. The "distribution of marital property is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion." *O'Brien v. O'Brien*, 131 N.C. App. 411, 416, 508 S.E.2d 300, 304 (1998). Under North Carolina law, this Court would not reverse the trial court's award to plaintiff of 30% of defendant's military pension in the absence of an abuse of discretion.

For the foregoing reasons, we affirm the trial court's order and judgment of 14 May 1999.

Affirmed.

Judges MARTIN and HORTON concur.

STEPHEN L. LOVEKIN, EMPLOYEE, PLAINTIFF v. LOVEKIN AND INGLE, EMPLOYER; FIRST OF GEORGIA INSURANCE, CARRIER; DEFENDANTS

No. COA99-1069

(Filed 3 October 2000)

Workers' Compensation— injury by accident—multiple events

The Industrial Commission erred in a workers' compensation action by concluding that plaintiff sustained an injury by accident where plaintiff, an attorney, suffered an acute cardiac incident and underwent coronary artery bypass surgery as a result of stressful events in the preceding months. Multiple events over a period of time do not constitute an accident, which must result from an event.

Appeal by defendants from opinion and award filed 21 August 1997 by the Full Commission of the North Carolina Industrial Commission and from supplemental opinion and award filed 3 May 1999 by Deputy Commissioner George T. Glenn, II. Heard in the Court of Appeals 15 August 2000.

Patrick, Harper & Dixon, LLP, by Gary F. Young, for plaintiff-appellee.

Stiles Byrum & Horne, L.L.P., by Henry C. Byrum, Jr., for defendant-appellants.

GREENE, Judge.

Lovekin and Ingle (Employer) and First of Georgia Insurance (collectively, Defendants) appeal an opinion and award of the Full Commission of the North Carolina Industrial Commission (Full Commission) filed on 21 August 1997, in favor of Stephen L. Lovekin (Plaintiff).

The evidence shows that on 12 July 1993, Plaintiff, an attorney, was employed as a senior partner with Employer. Plaintiff began his work with Employer in 1980, when he entered into a partnership with John Ingle (Ingle) to form Employer. Plaintiff practiced in a variety of areas of law; however, the focus of his practice in 1992 and 1993 was personal injury cases. The staff of attorneys working for Employer at that time consisted of Plaintiff, Ingle, and Leslie Yount (Yount). Plaintiff testified that in 1992 and 1993, several events occurred that altered his workload with Employer. In 1992, the number of cases being handled by Employer "grew considerably." This increase "was the beginning of some of the stress that was put on" Plaintiff in 1992 and 1993. In addition, there was "employee discontent," and in December of 1992, Yount left her employment with Employer. Then, in January of 1993, an employee who worked as a paralegal and office manager also left her employment. Finally, in March of 1993, a legal assistant left her employment. Although Plaintiff worked approximately nine or ten hours per day in 1992, near the end of 1992 and in the beginning of 1993 he began working "fifteen, sixteen, seventeen, eighteen hours a day trying to keep up" due, in part, to the departure of the employees. In January of 1993, Employer hired a new associate to assist with the increased workload; however, the associate did not perform his work as expected, and he left Employer in April or May of 1993. Plaintiff described the difficulties relating to the new associate as "another stressor." Plaintiff testified the "anxiety that [he] experienced in trying to keep [his] head above water . . . increased tenfold" during this time. Plaintiff's work was also affected by a malpractice lawsuit which had been filed against Employer. In 1992 and 1993, this malpractice lawsuit was in the discovery stage and "created distraction and stress." At the same time, Plaintiff was threatened

with the possibility of another malpractice lawsuit, which "required a great deal of [Plaintiff's] time."

In addition to an increased workload, Plaintiff testified regarding changes in his financial obligations that occurred in 1992 and 1993. In October of 1992, Employer decided to purchase the building in which its offices were located, and Plaintiff and Ingle personally guaranteed a loan for the purchase of the building and renovations to the building. Additionally, beginning in November of 1992 and continuing for several months, the Internal Revenue Service completed an audit of Plaintiff and Employer that it had begun in 1991. The audit resulted in a tax liability totaling $120,000.00, including $30,000.00 in taxes for which Plaintiff was personally responsible. Finally, in 1993, Employer conducted an internal investigation of its trust account due to a discrepancy in the trust account records, and this investigation required many hours of work by employees. Employer discovered prior to 12 July 1993, however, that the cause of the discrepancy was a numerical error.

Plaintiff testified that on 12 July 1993, he arrived at work at approximately 8:30 a.m. Plaintiff spent the morning working in the office, and went to lunch at approximately 12:15 p.m. Sometime after his arrival at work, Plaintiff felt "extremely tired and stressed out." Plaintiff did not testify, however, that any unusual events occurred on this day to cause him to feel "extremely tired and stressed out." When Plaintiff returned to his office from lunch at approximately 1:00 p.m., the office manager noticed that he appeared pale and she drove him to a doctor's office. Plaintiff was diagnosed as having "an acute cardiac incident," and he was taken to the hospital. At the hospital, Plaintiff underwent coronary artery bypass surgery.

F. Michael Crouch, M.D. (Dr. Crouch), an expert in cardiothoracic surgery, performed Plaintiff's 12 July 1993 surgery. Dr. Crouch stated Plaintiff suffered from coronary artery disease. In Dr. Crouch's opinion, "work-related stressors . . . probably did contribute to the worsening cardiac status of [Plaintiff] and played a part in him having to have heart surgery." Dr. Crouch stated that Plaintiff had three "very strong risk factors for developing coronary artery disease": diabetes that required Insulin, a family history of heart disease, and a history of smoking. Additionally, Norris Brown Harbold, Jr., M.D. (Dr. Harbold), a medical doctor specializing in cardiovascular disease, testified he reviewed Plaintiff's medical chart subsequent to Plaintiff's surgery. Dr. Harbold testified Plaintiff suffered from coronary heart

disease. He stated that in his opinion, " 'stress was . . . an aggravating factor in a long buildup of this disease.' "

In an opinion and award filed 29 August 1996, the Deputy Commissioner denied Plaintiff's workers' compensation claim, concluding Plaintiff's surgery did not result from an "injury by accident." Plaintiff appealed the opinion and award of the Deputy Commissioner to the Full Commission.

In an opinion and award filed on 21 August 1997, the Full Commission made findings of fact consistent with the above-stated facts, including the following pertinent findings of fact:

> 12. . . . [T]he unusually high level of stress suffered by [Plaintiff] in the months prior to his attack triggered, aggravated, or accelerated his acute cardiac incident necessitating emergency coronary by-pass surgery.
>
> . . . .
>
> 16. . . . The stressful events in the months preceding the attack were directly related to the business of the law practice of [Employer]. This series of events were not events which were a part of the usual and customary practice of law experienced by [Plaintiff] previously.

The Full Commission then made the following pertinent conclusions of law:

> 1. Increased work related stresses preceding his heart attack constituted an interruption of his normal work routine for [P]laintiff. . . .
>
> 2. On 12 July 1993, [P]laintiff sustained an injury by accident arising out of and in the course of his employment when he experienced an acute cardiac incident as the result of unusual levels of work related stress.

Based on these conclusions of law, the Full Commission awarded Plaintiff the cost of "medical treatment incurred by [P]laintiff as a result of his injury by accident, including the emergency by-pass surgical procedure" and "other compensation to which [P]laintiff is entitled, if any, as may be agreed to by the parties or determined by a Deputy Commissioner after hearing."

The dispositive issue is whether a series of events, which occur over a period of approximately eight months and cause injury to an employee, constitute an "accident" within the meaning of the North Carolina Workers' Compensation Act.

Plaintiff argues "the legislature has not excluded all multiple events occurring over a period of time from the definition of accident." We disagree.

The term "accident," within the meaning of the North Carolina Workers' Compensation Act, is defined as: "(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E.2d 109, 110-11 (1962). Under this well-established definition of "accident," an accident must result from "an . . . event," and multiple events occurring over a period of time, therefore, do not constitute an "accident."[1] *Cf.* N.C.G.S. § 97-52 (1999) (series of events occurring over extended period of time do not constitute "accident" and may constitute occupational disease).

An "accident" is inferred by the occurrence of "an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986).[2] Unusual conditions, however, do not interrupt an employee's work routine when "the employee has gained proficiency performing in the new employment

1. In support of his argument that "multiple events occurring over a period of time" may constitute an "accident," Plaintiff cites *Larson's Workers' Compensation Law*. Larson states that an injury not compensable as an occupational disease may be compensable as an "accident" even if the injury is "gradual in onset and consequences." 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 50.06 (2000) [hereinafter *Larson's Workers' Compensation Law*]. Further, Larson notes that "the accident and causal concepts are in many . . . ways so commingled that it is impossible to segregate them," 2 *Larson's Workers' Compensation Law* § 46.02, and "[t]he only valid and distinctive function of the words 'by accident' is to introduce the requirement of genuine unexpectedness," *id.* § 46-03[6]. While Larson's statements may have merit, the North Carolina Supreme Court has rejected any broadening of the "accident" element of a workers' compensation claim on the ground that any change to the definition of "accident" must come from the General Assembly. *Harding*, 256 N.C. at 429, 124 S.E.2d at 111; *Hensley v. Cooperative*, 246 N.C. 274, 280-81, 98 S.E.2d 289, 293-94 (1957) (noting interpretation of "accident" in North Carolina differs from majority of jurisdictions and stating that any change to definition must nevertheless be made by legislature).

2. *Gunter* does not *define* "accident" as "an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences"; rather, it states such an interruption in the work routine results in an *infer-*

and become accustomed to the conditions it entails." *Id.* at 675, 346 S.E.2d at 398.

In this case, the Full Commission did not find as fact that a particular event occurred which caused Plaintiff's "acute cardiac incident." Rather, the Full Commission found as fact, in pertinent part, that Plaintiff experienced several "stressful events in the months preceding the attack" and "the unusually high level of stress suffered by [Plaintiff] in the months prior to his attack triggered, aggravated, or accelerated his acute cardiac incident necessitating emergency coronary by-pass surgery." These findings of fact, because they rely on several events occurring over an extended period of time, do not support the Full Commission's conclusion of law that "[P]laintiff sustained an injury by accident" within the meaning of the North Carolina Workers' Compensation Act. *See Hemric v. Manufacturing Co.*, 54 N.C. App. 314, 316, 283 S.E.2d 436, 437-38 (1981), *disc. review denied*, 304 N.C. 726, 288 S.E.2d 806 (1982) (appellate review of decision of the Full Commission is limited to whether the record contains competent evidence to support the findings of fact and whether the findings of fact support the Full Commission's conclusions of law). Accordingly, the opinion and award of the Full Commission is reversed.[3]

Because the opinion and award of the Full Commission is reversed, we need not address Defendants' additional assignments of error.

Reversed.

Judges EDMUNDS and SMITH concur.

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ence that an accident has occurred. *Gunter*, 317 N.C. at 673, 346 S.E.2d at 397. We, therefore, do not read *Gunter*, and cases that rely on *Gunter*, as expanding the definition of "accident" in North Carolina. *See, e.g., Dye v. Shippers Freight Lines*, 118 N.C. App. 280, 282, 454 S.E.2d 845, 847 (1995).

3. Plaintiff argues in his brief to this Court that his coronary heart disease may also be compensable under the North Carolina Workers' Compensation Act as an occupational disease. The Full Commission, however, did not determine whether Plaintiff's coronary heart disease constitutes an occupational disease. Because Plaintiff did not cross-assign error to the opinion and award of the Full Commission, this argument is not properly before this Court. *See* N.C.R. App. P. 10(d) (appellee may cross-assign error to omission of trial court when omission raises "an alternative basis in law" for supporting the order of the trial court).

KIMBERLY M. CABE, PLAINTIFF v. WOODARD W. WORLEY, DEFENDANT

No. COA99-1188

(Filed 3 October 2000)

1. **Judgments— default—refusal to set aside—no abuse of discretion**

The trial court did not abuse its discretion in a personal injury case by refusing defendant's motion to set aside entry of default for good cause shown under N.C.G.S. § 1A-1, Rule 55(d), because: (1) defendant's only action in this case was to deliver the suit papers to his insurance company; and (2) after delivery, he took no further action to inquire into the progress of the case.

2. **Jury— plaintiff's waiver of demand for jury trial—defendant's motion to set aside entry of default—appearance by defendant**

The trial court committed reversible error by conducting a personal injury trial on damages without a jury after plaintiff waived her demand for a jury trial and requested the court to conduct a bench trial, because: (1) a plaintiff who requests in her pleadings a jury trial may not withdraw that request after defendant makes an appearance in the case; (2) although defendant failed to file an answer within 30 days from the date of service, once defendant filed his motion to set aside entry of default, he "appeared" in the action for purposes of N.C.G.S. § 1A-1, Rule 38(d); and (3) plaintiff is not entitled to amend her complaint to delete the jury request under N.C.G.S. § 1A-1, Rule 15(a) since this amendment would contravene the purpose of N.C.G.S. § 1A-1, Rule 38(d).

Appeal by defendant from order filed 20 April 1999 by Judge Dennis J. Winner and from judgment filed 15 July 1999 by Judge J. Marlene Hyatt in Jackson County Superior Court. Heard in the Court of Appeals 22 August 2000.

Melrose, Seago & Lay, P.A., by Mark R. Melrose, for plaintiff-appellee.

Cogburn, Goosmann, Brazil & Rose, P.A., by Steven D. Cogburn and Benjamin R. Olinger, Jr., for defendant-appellant.

GREENE, Judge.

Woodward W. Worley (Defendant) appeals an order filed 20 April 1999 denying Defendant's motion to set aside entry of default and a judgment filed 15 July 1999 granting Kimberly M. Cabe (Plaintiff) a $25,000.00 award.

Plaintiff filed her complaint on 1 February 1999, requesting a jury trial and alleging Defendant was responsible for personal injuries caused by his negligent driving. Defendant was served by certified mail on 4 February 1999 at his residence in Livingston, New York. There were no responsive pleadings filed and on 10 March 1999, Plaintiff made a motion for entry of default against Defendant. On 10 March 1999, the Clerk of Superior Court of Jackson County concluded Plaintiff was entitled to an entry of default against Defendant and such entry was made.

On 16 March 1999, Defendant made a motion to set aside entry of default and attached a copy of his proposed answer. Defendant's motion to set aside the entry of default was heard in Jackson County Superior Court on 12 April 1999, and the trial court denied the motion finding there was no good cause to set aside the entry of default.

On 13 April 1999, Defendant filed a motion for reconsideration of his motion to set aside entry of default. On 29 April 1999, Defendant submitted two affidavits: one sworn by him and one sworn by Dannette Mall (Mall), an office manager at Mike Preis, Inc. Insurance, Defendant's insurance agent. In his affidavit, Defendant stated that when he received the complaint and civil summons in the mail, he immediately delivered them to his insurance agent. Defendant was told the papers would be forwarded to an attorney to handle the responsive pleadings. Between the time he delivered the suit papers to his agent and the time default was entered, Defendant had no knowledge of any of the events taking place.

Mall's affidavit revealed she received the suit papers from Defendant on 9 February 1999 and mailed them to Allstate Insurance Company (Allstate) in Charlotte, North Carolina, by certified mail, return receipt requested. The papers were received by Allstate on 15 February 1999. In addition, Mall stated any delay in getting the papers to defense counsel would have been caused by the insurance company and not Defendant. Defendant's motion to reconsider the 16 March 1999 motion to set aside entry of default was denied on 12 May 1999.

In the interim, however, on 29 April 1999, Plaintiff moved for the court to enter a default judgment against Defendant and to conduct an evidentiary hearing on the issue of damages. Plaintiff waived her demand for a jury trial on 29 April 1999 and requested the court conduct a bench trial. The action was then tried without a jury, over the noted objection of Defendant, on 6 July 1999.

Based on the evidence presented at trial, the court found Plaintiff was entitled to recover $25,000.00 from Defendant for her personal injury damages.

The issues are whether: (I) the trial court abused its discretion in refusing to set aside the entry of default; and (II) a plaintiff, who requested in her pleadings a jury trial, may withdraw that request after defendant makes an appearance in the case.

I

[1] Generally, an entry of default may be set aside "[f]or good cause shown." N.C.G.S. § 1A-1, Rule 55(d) (1999). "A trial court's determination of 'good cause' to set aside an entry of default will not be disturbed on appeal absent an abuse of discretion." *Brown v. Lifford*, 136 N.C. App. 379, 382, 524 S.E.2d 587, 589 (2000). If a defendant gives the claim papers to his insurer and continues to actively monitor the case, this Court has been "amenable to allowing claims to be litigated." *Lifford*, 136 N.C. App. at 384, 524 S.E.2d at 590. Where a defendant gives the claim papers to the insurance company and does not inquire further, however, "we have been far less receptive to a contention that an entry of default was inappropriate." *Id.*

In this case, Plaintiff filed her complaint on 1 February 1999 and it was served on Defendant on 4 February 1999, thus Defendant's responsive pleadings were required to be filed no later than 9 March 1999. On 9 February 1999, Defendant took the claim papers to his insurance agent who told him they would be forwarded to an attorney to handle the responsive pleadings. The claim papers were mailed to Allstate and received on 15 February 1999. Between the time Defendant submitted the papers to his insurance agent and the time the entry of default was made, Defendant had no contact with his insurance company. Neither Defendant, nor his representatives, submitted an answer and on 10 March 1999, upon Plaintiff's motion, the clerk made an entry of default against Defendant.

Defendant's only action in this case was to deliver the suit papers to his insurance company. After delivery, he took no further

action to inquire into the progress of the case. Accordingly, the trial court did not abuse its discretion in refusing to set aside the entry of default.[1]

II

[2] "A demand for trial by jury . . . may not be withdrawn without the consent of the parties who have pleaded or otherwise appear[ed] in the action." N.C.G.S. § 1A-1, Rule 38(d) (1999). Thus, a plaintiff who has requested a jury trial may withdraw that request, without the consent of the defendant, at any time before an answer is filed or before an appearance is made by the defendant.

Generally, an appearance requires "some presentation or submission to the court." *Roland v. Motor Lines*, 32 N.C. App. 288, 289, 231 S.E.2d 685, 687 (1977) (citing *Port-Wide Container Co. v. Interstate Maintenance Corp.*, 440 F.2d 1195 (3d Cir. 1971)). A defendant does not have to directly respond to the complaint in order to "appear" in an action, but makes an "appearance" when the defendant "takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff." *Roland*, 32 N.C. App. at 289, 231 S.E.2d at 687 (citing 6 C.J.S. *Appearances* § 18).

In this case, Defendant failed to file an answer within 30 days from the date of service; however, he did file a motion to set aside entry of default on 16 March 1999. Plaintiff withdrew her demand for a jury trial on 29 April 1999,[2] more than a month after Defendant filed his motion to set aside the entry of default. Once Defendant filed his motion to set aside entry of default, he "appeared" in the action for purposes of the statute and, thus, Plaintiff was prevented from unilaterally withdrawing her jury request. The trial court, therefore, committed reversible error in conducting the trial on damages without a jury.

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1. Likewise, the trial court did not err in denying Defendant's request to reconsider its decision to deny the motion to set aside the entry of default.

2. Plaintiff contends in the alternative she was entitled to amend her complaint to delete the jury request. We disagree. Rule 15(a) of the North Carolina Rules of Civil Procedure does permit one amendment of a complaint, without the permission of the trial court, any time before an answer is filed. N.C.G.S. § 1A-1, Rule 15(a) (1999). To allow such an amendment to delete a jury request, however, would contravene the clear teaching of Rule 38(d) and must not be permitted. *See* N.C.G.S. § 1A-1, Rule 38(d).

Denial of motion to set aside entry of default: Affirmed.

Trial: Reversed and remanded.

Judges EDMUNDS and SMITH concur.

IN THE MATTER OF: SYDNEY O'NEAL

No. COA99-1164

(Filed 3 October 2000)

Child Support, Custody, and Visitation— custody—grandparents—failure to allow evidence concerning best interest of child

The trial court erred by refusing to allow the paternal grandfather of a child who had been removed from the custody of her parents to offer evidence at a review hearing on the question of the best interest of the child in support of his motion for custody of his grandchild under N.C.G.S. § 50-13.1(a), because: (1) the intervening grandparents and the parents of the child had the right to offer evidence in support of their respective motions for custody; and (2) the trial court did not exclude the evidence because it was incompetent, irrevelant, or cumulative, but simply declined to hear anything else about the case.

Appeal by intervenor Robert O'Neal from order entered 19 May 1999 by Judge John L. Whitley in Edgecombe County District Court. Heard in the Court of Appeals 21 August 2000.

W. Michael Spivey for intervenor-appellant Robert O'Neal.

Kenneth D. Myers for appellees Ken and Carol Matonis; and Etheridge, Sykes, Britt & Hamlett, by J. Richard Hamlett, II, for appellees Lauren Matonis and Christopher O'Neal.

HORTON, Judge.

Lauren Matonis and Christopher O'Neal are the birth parents of Sydney O'Neal, who was born on 23 February 1998 with heroin in her system. Sydney was declared to be a dependent child in the Edgecombe County District Court on 26 May 1998, and her legal cus-

tody placed with the Edgecombe County Department of Social Services (DSS). DSS placed the physical custody of the child with Velma Eatmon, who is a friend of the paternal grandfather of the child, appellant Robert O'Neal. Robert O'Neal filed a motion to be allowed to intervene in the juvenile proceeding, and asked for custody of Sydney, as did Ken and Carol Matonis, the maternal grandparents. On 22 September 1998, all grandparents were allowed to intervene in the proceeding.

On 23 November 1998, the trial court continued legal custody of Sydney with DSS but transferred the child's physical custody to the maternal grandparents, Ken and Carol Matonis, who reside in Ohio. A review of the custody arrangement was set for 16 February 1999, and the trial court ordered that any party who desired to present testimony at the review hearing notify the other parties of his or her intent. Robert O'Neal, the appellant, gave notice on 8 December 1998 that he would introduce evidence at the February review hearing. Prior to the review hearing, Robert O'Neal moved that the trial judge recuse himself because the judge had allegedly expressed opinions about disposition of the case, and had refused to allow appellant O'Neal to present evidence at the November review hearing. On the day scheduled for the February review hearing, all parties reached a settlement in the case. Under the terms of their agreement, appellant Robert O'Neal agreed to withdraw his request for custody of Sydney; legal custody of the child was to be transferred to the Ohio DSS; physical custody was to remain in the maternal grandparents; and Mr. O'Neal was to remain a party to the Ohio action, and was to have certain rights of visitation with Sydney. The parties prepared a handwritten settlement agreement, but it was never signed by the trial court, nor was an order incorporating its terms ever entered.

Problems developed with the settlement, however, when the Ohio DSS would not accept custody of the child subject to the conditions the parties set out in the settlement agreement. Robert O'Neal then wanted to withdraw, or alter, the settlement agreement in light of the changed circumstances, and filed a motion to do so on 23 March 1999. The motion was noticed for hearing on 13 April 1999. At the 13 April 1999 hearing, the trial court did not hear from Mr. O'Neal, but informed the parties that if they could not reach a compromise agreement, the court would resolve the matter. As the parties could not reach a compromise of the issues between them, the trial court declined to hear further evidence, and entered an order returning the child to the custody of her parents effective 16 February 1999. The

trial court also refused to allow appellant O'Neal to proffer his evidence for the record so as to preserve it for appellate review. Robert O'Neal appealed to this Court in apt time. The trial court stayed its order pending our review.

Appellant argues that the trial court erred by refusing to allow him to offer evidence in support of his motions, and erred by refusing to allow him to make a proffer of his evidence for appellate review. We agree with appellant, reverse the order announced by the trial court at the 13 April 1999 hearing and entered in written form on 19 May 1999, and remand the matter for a proper hearing.

On 26 May 1998, the trial court adjudicated Sydney to be a dependent child within the meaning of the juvenile code. *See* N.C. Gen. Stat. § 7A-517(13) (1995). Because her parents could not adequately care for her at that time, the child was removed from their custody and placed in the legal custody of DSS. Where a child is removed from the custody of his parents, the code requires there be periodic reviews of the case. N.C. Gen. Stat. § 7A-657 (1998 Cum. Supp.) Our Supreme Court construed an earlier, but substantially similar, version of N.C. Gen. Stat. § 7A-657 to authorize the trial court to

> do one of the following: (1) enter an order continuing the placement under review; (2) enter an order providing for a different placement; or (3) restore custody of [the child] to her mother. Regardless of the option chosen by the trial court, the trial court must deem that option to be in the best interest of [the child].

In re Shue, 311 N.C. 586, 599, 319 S.E.2d 567, 575 (1984). In *Shue*, the Supreme Court noted that at such review hearings, the trial court was only ordering a *trial placement* of the child, unless one or both of the parents of the child or "some other person, agency, organization or institution claiming the right to custody . . . files a motion in the cause pursuant to G. S. 50-13.1 . . . ." *Id.* at 601, 319 S.E.2d at 576.

In the case before us, appellant Robert O'Neal filed a motion for custody of his grandchild pursuant to N.C. Gen. Stat. § 50-13.1(a) (1999), as did the maternal grandparents, Carol and Ken Matonis. Thus, the trial court had authority to receive evidence at the review hearing and not only consider return of the child to her parents, but also consider granting custody to appellant or to the maternal grandparents. The intervening grandparents had the right to offer evidence in support of their respective motions for custody, as did the parents of the child.

Here, the appellant attempted to offer evidence at the 13 April 1999 review hearing, and informed the trial court of the names of the witnesses he wished to call. The trial court heard the statements of counsel, declined to hear further evidence, and announced that it was making a retroactive return of custody to the parents effective 16 February 1999. Appellant then asked permission to proffer his evidence "on the review for the record." The trial court declined, however, to allow him to do so, stating that, "when you get back the judgment from the Court of Appeals saying that this has got to be heard further, . . . then . . . you can have your evidence at that point in time . . . ."

In *Shue*, the trial court limited the mother of the child whose placement was in dispute to one hour of evidence in support of her request that her child be returned to her. The Supreme Court held that the trial court committed prejudicial error by failing to admit and consider the mother's evidence:

> Without hearing and considering this evidence (although the trial court was not required to believe this evidence), the trial court could not intelligently decide what was in the best interest of Loretta Shue. In spite of the fact that all of the psychological reports and the reports prepared by various DSS professionals recommended that it was in the best interest of Loretta Shue for her to remain in the custody of her father, Roy Shue, *the trial court was still required to hear and consider all of the evidence tendered to the court by the mother which was competent, relevant and non-cumulative. In failing to do so, the trial court committed prejudicial error.*

Shue, 311 N.C. at 598, 319 S.E.2d at 574 (emphasis added).

Here, as in *Shue*, the trial court erred in refusing to allow appellant to offer his evidence on the question of the best interest of this minor child. We also note that the trial court did not exclude appellant's evidence because it was incompetent, irrelevant, or cumulative, but simply declined to "hear anything else about this thing today." That the court could not do.

The order orally entered by the trial court on 13 April 1999, reduced to written form and signed on 11 May 1999, and filed on 19 May 1999, is reversed and the case is remanded to the District Court of Edgecombe County for a full hearing as provided by law.

Reversed and remanded.

Chief Judge EAGLES and Judge MARTIN concur.

EDWIN E. FICKLEY, DONALD F. SMITH, AND CORAL R. SMITH, PLAINTIFFS V. GREYSTONE ENTERPRISES, INC., DAVID OSTEEN AND CONNIE OSTEEN, DEFENDANTS

No. COA99-1211

(Filed 3 October 2000)

Collateral Estoppel and Res Judicata— res judicata—claim preclusion—compulsory counterclaims—opportunity to assert in appeal from magistrate's judgment

The trial court did not err by granting defendants' renewed motions for directed verdict on the retaliatory eviction and unfair trade practices claims in a second action based on res judicata after a summary ejectment proceeding, because: (1) plaintiffs should have asserted their rights in the summary ejectment proceeding by way of a compulsory counterclaim since the determinative question in both actions is whether plaintiffs breached their respective lease agreements making defendants' termination of the lease agreements valid; and (2) even though plaintiffs could not have asserted this action as a compulsory counterclaim to the summary ejectment proceeding while it was before the magistrate since plaintiffs seek damages in excess of the $3,000 jurisdictional amount in small claims actions under N.C.G.S. § 7A-210(1), plaintiffs had the opportunity to file retaliatory eviction as a counterclaim under N.C.G.S. § 1A-1, Rule 13 in an appeal from the magistrate's judgment. N.C.G.S. § 7A-219.

Appeal by plaintiffs from judgment entered 15 March 1999 by Judge Robert P. Johnston in Henderson County Superior Court. Heard in the Court of Appeals 23 August 2000.

John E. Tate, Jr. for the plaintiff-appellants.

Prince, Youngblood & Massagee, by Boyd B. Massagee, Jr., for the defendant-appellees.

LEWIS, Judge.

Effective appellate review of this case was made more difficult by the filing of an incomplete record on appeal. The parties' exhibits, which were necessary to an understanding of appellants' assignments of error, were not included in the record in this case. The Rules of Appellate Procedure require appellants to present complete records as necessary to understand the errors assigned. N.C.R. App. P. 9(a)(1)(e),(j). We could have dismissed this appeal for failure to comply with the Rules of Appellate Procedure. N.C.R. App. P. 25(b); 34(b)(1). However, we waived the violation pursuant to Appellate Rule 2, obtaining most of these documents through numerous contacts with counsel by the Clerk of this Court. We caution all appellants in the future to be more diligent in complying with the Rules of Appellate Procedure.

Plaintiff Edwin Fickley ("Fickley") and plaintiffs Donald and Coral Smith ("the Smiths") purchased double wide manufactured homes from defendant Greystone Enterprises, Inc. ("Greystone") in 1992 and 1988, respectively. Fickley and the Smiths leased lots for their manufactured homes in Greystone Subdivision, a residential rental community owned by Greystone. Both lease agreements provided that "[i]tems excluded and forbidden from Greystone [subdivision] shall include . . . 'For Sale,' 'For Rent' and other signs used for advertising purposes." Fickley and the Smiths subsequently placed "For Sale" signs on their respective leased premises, and defendants terminated both leases. When the plaintiffs failed to vacate the respective premises, on 25 May 1993, Greystone instituted two summary ejectment proceedings against them. On 3 June 1993 the magistrate entered a judgment for summary eviction in both proceedings.

Neither Fickley nor the Smiths properly perfected an appeal for de novo review in district court from the magistrate's judgment. Instead, plaintiffs instituted this action for damages ("second action") on 27 November 1996 in superior court against Greystone, David Osteen, president of Greytone, and Connie Osteen, vice-president of Greystone, ultimately asserting claims for retaliatory eviction and unfair trade practices. Specifically, plaintiffs alleged defendants evicted them as a result of "animosity" arising from plaintiffs' participation in the Greystone subdivision homeowners' association and for placing "For Sale" signs on their leased premises. In their answer, defendants asserted as affirmative defenses that the claims in the second action were compulsory counterclaims under Rule 13(a) and thus barred by the doctrine of res judicata.

At trial, the court submitted the retaliatory eviction and unfair trade practices claims to the jury, which was unable to reach a unanimous verdict. The court declared a mistrial and subsequently conducted a hearing on defendant's renewed motion for directed verdict, which the court granted. Plaintiffs appeal.

Plaintiffs contend the trial court erred in granting defendants' renewed motion for directed verdict on the basis that sufficient evidence supported each claim. Defendants maintain the court properly dismissed plaintiffs' claims since, pursuant to their asserted affirmative defenses, the claim for retaliatory eviction was a compulsory counterclaim which should have been asserted in the prior summary ejectment proceeding. Defendants argue plaintiffs are thereby precluded by the doctrine of res judicata from asserting either of the claims in the second action. We agree.

Where a defendant establishes an affirmative defense as a matter of law, there are no issues to submit to a jury and a plaintiff has no right to recover. Directing a verdict for the defendant in such a situation is appropriate. *Goodwin v. Investors Life Insurance Co. of North America*, 332 N.C. 326, 329, 419 S.E.2d 766, 768 (1992). Under the doctrine of res judicata:

> Where a second action or proceeding is between the same parties as the first action or proceeding, the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding.

Young v. Young, 21 N.C. App. 424, 204 S.E.2d 711 (1974) (citations omitted).

We conclude plaintiffs should have asserted their rights in the summary ejectment proceeding by way of a compulsory counterclaim. Generally, a counterclaim is compulsory if "it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." N.C.R. Civ. P. 13(a). To determine whether a claim arises out of the same transaction or occurrence as a prior claim, the court must consider: "(1) whether the issues of fact and law are largely the same; (2) whether substantially the same evidence is involved in each action; and (3) whether there is a logical relationship between the two

actions." *Cloer v. Smith*, 132 N.C. App. 569, 574, 512 S.E.2d 779, 782 (1999) (quoting *Brooks v. Rogers*, 82 N.C. App. 502, 507-08, 346 S.E.2d 677, 681 (1986)).

Here, the action for summary ejectment was based on the assertion that plaintiffs violated the terms of their respective lease agreements with Greystone. The second action is based on allegations that defendants terminated their lease agreements in retaliation for certain of plaintiffs' actions and exercised the remedy of summary ejectment in an effort to deprive plaintiffs of their investment. Although in the second action Fickley and the Smiths seek damages, and in the summary ejectment action, defendants sought injunctive relief, the determinative question in both actions is whether Fickley and the Smiths breached their respective lease agreements, making defendants' termination of the lease agreements valid. Because the issues of fact and law are largely the same, substantially the same evidence is involved in both and the actions are logically related, the second action was a compulsory counterclaim in the summary ejectment action filed by defendants. *See also Cloer*, 132 N.C. App. at 574, 512 S.E.2d at 782.

In the second action, however, plaintiffs seek damages in excess of $10,000, which exceeds the $3,000 jurisdictional amount in small claims actions pursuant to the provisions of N.C. Gen. Stat. § 7A-210(1) at the time the second action was filed. Accordingly, plaintiffs could not have asserted this action as a compulsory counterclaim to the summary ejectment proceeding while it was before the magistrate. N.C. Gen. Stat. § 7A-219 (1999) ("No counterclaim . . . which would make the amount in controversy exceed the jurisdictional amount established by G.S. 7A-210(1) is permissible in a small claim action assigned to a magistrate.") Instead, plaintiffs were required to file the action, if at all, in an *appeal* from the magistrate's decision to the district court. N.C. Gen. Stat. § 7A-220 (1999) ("On appeal from the judgment of the magistrate for a trial de novo before a district judge, the judge shall allow appropriate counterclaims . . . ."); *see also Cloer*, 132 N.C. App. at 574-75, 512 S.E.2d at 782-83 (counterclaim for an amount in excess of $10,000 would have been properly filed on appeal from the judgment of a magistrate to district court).

Rule 13 requires a party to assert as a counterclaim any claim arising out of the same transaction or occurrence as the pending action, "at peril of being barred" from asserting the claim in a separate action. Comment, N.C.R. Civ. P. 13 (1999). Because plaintiffs had

the opportunity to file retaliatory eviction as a counterclaim in an appeal from the magistrate's judgment, the doctrine of res judicata barred plaintiffs from asserting either the underlying retaliatory eviction claim or the unfair trade practices claim in the second action. *See, e.g., Furr v. Noland*, 103 N.C. App. 279, 281, 404 S.E.2d 885, 886 (1991).

In their remaining assignments of error, plaintiffs contend the court erred in refusing to submit several issues to the jury. However, by directing a verdict in favor of defendants, the action was completely removed from the jury's consideration. Plaintiffs' contentions surrounding the court's refusal to submit issues to the jury are thereby rendered moot, and we will not address them.

Affirmed.

Judges WALKER and HUNTER concur.

WILLIAM DONALD BRITT, PLAINTIFF v. GEORGE DOUGLAS HAYES, DEFENDANT

No. COA99-792

(Filed 3 October 2000)

Motor Vehicles— road rage—intentional act—assault rather than negligence

The trial court did not err by granting summary judgment for defendant in a negligence action arising from a road rage incident where the conduct complained of by plaintiff is more properly characterized as intentional rather than negligent, but plaintiff failed to bring an action for assault and battery within the one-year statute of limitations.

Appeal by plaintiff from orders entered 7 April and 3 May 1999 by Judge William C. Gore, Jr. in Superior Court, Bladen County. Heard in the Court of Appeals 27 March 2000.

Hester, Grady, Hester, Greene & Payne, by H. Clifton Hester, for plaintiff-appellant.

Anderson, Daniel & Coxe, by Bradley A. Coxe, for defendant-appellee.

TIMMONS-GOODSON, Judge.

This action arises out of a road rage incident occurring on 15 July 1998 between William Donald Britt ("plaintiff") and George Douglas Hayes ("defendant") on U.S. Highway 701 in Tabor City, North Carolina. In his complaint for personal injuries and property damage filed 4 January 1999, plaintiff alleges that he was traveling behind defendant in the northbound lane of the highway when defendant "suddenly and without warning began backing up . . . [and] collid[ed] forcibly with [plaintiff's vehicle]." Plaintiff claims that in so acting, defendant negligently violated several rules and regulations adopted by the North Carolina Division of Motor Vehicles. He further contends that defendant's negligence "was the sole and proximate cause of [his] injuries."

Defendant filed an answer asserting, among other defenses, self-defense and the statute of limitations. Upon defendant's subsequent motion for summary judgment, the trial court entered an order stating the following:

> 1. That Plaintiff's action is based upon an alleged assault and battery by Defendant, to wit, the intentional backing of his tractor trailer into the Plaintiff.
>
> 2. That Plaintiff has failed to file his action within the applicable one year statute of limitation for assault and/or battery.
>
> . . . .
>
> IT IS, THEREFORE, ORDERED that Defendant's Motion for Summary Judgment is granted and Plaintiff's action is DISMISSED WITH PREJUDICE.

From this order and from the order denying plaintiff's motion for a new trial, plaintiff appeals.

By his sole assignment of error, plaintiff argues that the trial court improperly entered summary judgment for defendant, because the evidence raised an issue of fact as to whether defendant intended to injure plaintiff when he backed his vehicle into plaintiff's truck. We must disagree.

Summary judgment is appropriate if after reviewing the pleadings, depositions, answers to interrogatories and other evidentiary materials, the trial court is convinced that no genuine issue of ma-

terial fact remains and that, as a matter of law, the moving party is entitled to judgment in his favor. *Lynn v. Burnette*, 138 N.C. App. 435, 437-38, 531 S.E.2d 275, 278 (2000). In ruling on a motion for summary judgment, the trial court must consider the evidence in the light most helpful to the party opposing the motion, allowing that party the benefit of all inferences reasonably drawn from the evidence. *Meares v. Jernigan*, 138 N.C. App. 318, 320, 530 S.E.2d 883, 885 (2000). The burden of demonstrating the absence of a triable issue of fact resides with the party seeking summary judgment. *Lynn*, 138 N.C. App. at 438, 531 S.E.2d at 278.

"Negligence is the breach of a legal duty proximately causing injury." *Id.* at 439, 531 S.E.2d at 278. Conversely, intentional torts, such as assault and battery, do not arise out of any duty owed to the injured party, but out of intentionally injurious conduct on the part of the tortfeasor. *Id.* at 439, 531 S.E.2d at 279. "An assault is an offer to show violence to another without striking him[.]" *Ormond v. Crampton*, 16 N.C. App. 88, 94, 191 S.E.2d 405, 409 (1972). A battery is committed when the threat of violence is executed by way of an "intentional and unpermitted contact with one's person." *Dickens v. Puryear*, 302 N.C. 437, 445, 276 S.E.2d 325, 330 (1981).

This Court has articulated the distinction between negligence and intentional torts as follows:

> An intentional infliction of harm is not a negligent act. If the operator of an automobile operates his car in violation of the speed law and in so doing inflicts injury as a proximate result, his liability is based on his negligent conduct. But if the driver intentionally runs over a person, it makes no difference whether the speed is excessive or not; the driver is guilty of an assault. Such wilful conduct is beyond and outside the realm of negligence.

Ormond, 16 N.C. App. at 93, 191 S.E.2d at 409. Having carefully examined the record in its entirety, we hold that the evidence in this case does not support a theory of negligence on the part of defendant.

Viewed in the light most favorable to plaintiff, the evidence tends to show that he first encountered defendant on Highway 701 in or near Loris, South Carolina. Plaintiff testified that defendant ran plaintiff's pickup truck off the highway and into a ditch after unsuccessfully attempting to pass him. Plaintiff claims that when he returned to

the highway, he proceeded to follow defendant in order to obtain his license plate number. According to plaintiff, defendant's license plate was not visible from the rear of his tractor trailer. Plaintiff therefore attempted to pass defendant to view the plate on the front of the vehicle, but when he did so, defendant again ran him off the road. Plaintiff managed to pull his vehicle back onto the roadway and continued to pursue defendant into Tabor City. Plaintiff stated that as defendant rounded the curve at the intersection of Highways 701 and 410, he slowed his speed, put the tractor trailer in reverse, and backed it into plaintiff's truck. The incident caused plaintiff personal injury and property damage.

Although in his complaint, plaintiff purports to characterize defendant's actions as negligent, the evidence does not bolster this theory of liability. Nothing in the record suggests that defendant's behavior was anything but intentional, and plaintiff acknowledges as much in his deposition testimony:

> Q. Was there anything in front of him that would make him want to back up?
>
> A. No, nothing.
>
> Q. So he did that on purpose?
>
> A. Yes.
>
> Q. There's no doubt in your mind that he did that on purpose?
>
> A. There was nothing in the left lane, nothing in the right land [sic]. Just him.
>
> Q. No other reason for him to back up other than to hit you; is that right?
>
> A. That's—that's the only way I see it.

Nonetheless, plaintiff argues that while defendant's actions may have constituted an assault, no battery was committed, because defendant did not touch his "person." It is plaintiff's position that without such contact, defendant's intent to injure remains at issue. However, this Court has stated that "[t]he intent required to prove battery is intent to act, i.e., the intent to cause harmful or offensive contact, not the intent to injure." *Russ v. Great American Ins. Companies*, 121 N.C. App. 185, 188, 464 S.E.2d 723, 725 (1995). Moreover, regarding the contact required, Professor Daye has said

that such "[c]ontact need not be made directly with the plaintiff's person. Contact with something so associated with the plaintiff's person will be sufficient for liability to be imposed." Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts* § 3.32.2, 22 (2nd ed. 1999) (citing Restatement (Second) of Torts § 18 cmt. c (1965)). Similarly, Professor Prosser describes the requisite contact as follows:

> Protection of the interest in freedom from intentional and unpermitted contacts with the plaintiff's person extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus, if all other requisites of a battery against the plaintiff are satisfied, contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in the plaintiff's hand, will be sufficient; and the same is true of the chair in which the plaintiff sits, the horse or *the car the plaintiff rides or occupies*, or the person against whom the plaintiff is leaning. The interest in the integrity of person includes all things which are in contact or connected with the person.

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 9, at 39-40 (5th ed. 1984) (emphasis added) (footnotes omitted).

Therefore, we hold that the trial court was correct in concluding that the conduct of which plaintiff complains is more properly characterized as intentional, rather than negligent. Because plaintiff failed to bring an action for assault or battery within the one-year statute of limitations, his action is time-barred. Thus, summary judgment for defendant was appropriate.

For the foregoing reasons, we affirm the order of the trial court.

Affirmed.

Chief Judge EAGLES and Judge HUNTER concur.

MARTIN COUNTY ON BEHALF OF EVELYN HAMPTON, (AKA PEJU O. BABALOLA), PLAINTIFF-APPELLANT v. MELVIN E. DALLAS, DEFENDANT-APPELLEE

No. COA99-1186

(Filed 3 October 2000)

Child Support, Custody, and Visitation— registration of foreign support order—determination of arrearage—burden of proof

The trial court erred by vacating the registration of a Virginia child support order in North Carolina where defendant had filed a motion seeking to terminate future support and to receive credit for support which came due while he served a jail sentence in New York. The correct amount of arrearage can be determined just as it would in a dispute arising from a North Carolina order, but the existence of such a dispute is not grounds for vacating a registered foreign support order, nor does it shift the burden of proof to plaintiff.

Appeal by plaintiff from order entered 6 July 1999 by Judge Michael A. Paul in Martin County District Court. Heard in the Court of Appeals 21 August 2000.

Bowen & Batchelor, by J. Melvin Bowen, for plaintiff appellant.

No brief filed for defendant.

HORTON, Judge.

Melvin E. Dallas (defendant) was married to Evelyn J. Keyes Dallas (now Evelyn Hampton, aka Peju O. Babalola) on 5 November 1976, in Baltimore, Maryland. Two children were born to their marriage, namely: Jaimi C. Dallas, born on 30 May 1976, and Mark E. Dallas, born on 9 June 1978. Melvin and Evelyn Dallas separated on 1 July 1981, and Evelyn Dallas was granted an absolute divorce on 7 October 1982 in the Circuit Court for the City of Hampton, Virginia. The Circuit Court entered an order awarding custody of the parties' two children to Evelyn Dallas, and ordering defendant to pay the sum of $150.00 per month for each of the minor children until each attained the age of 18 years.

Following the divorce, defendant moved to New York, where he was convicted of attempted murder in November 1984. Defendant served a lengthy prison sentence in New York, from which he was

released in June 1991 under parole supervision. In 1993, Evelyn Dallas Hampton registered the Virginia child support order in New York for enforcement under the Uniform Reciprocal Enforcement of Support Act (URESA), the predecessor of the Uniform Interstate Family Support Act (UIFSA). In October 1993, a New York court modified the defendant's *prospective* child support obligation to $60.00 per week, but did not modify his unpaid support balance.

In November 1996, the New York court terminated defendant's obligation to pay future child support because both children had reached 18 years of age. In September 1997, defendant moved to North Carolina. In July 1998, the New York Child Support Enforcement Agency forwarded a request to the North Carolina Support Enforcement Unit in Raleigh, seeking assistance in collection of a substantial child support arrears alleged to be due under the Virginia order.

On 2 December 1998, Martin County filed a Notice of Registration of Foreign Support Order in the Martin County District Court on behalf of Peju O. Babalola, formerly known as Evelyn (Dallas) Hampton. The proceeding sought enforcement of arrears in the amount of $33,124.02 allegedly due under the Virginia child support order.

The Notice and accompanying documents filed by Martin County included the information required by North Carolina's version of UIFSA, codified in Chapter 52C of the North Carolina General Statutes. The Notice advised defendant that, if he wished to contest the validity or enforcement of the registered Virginia child support order, he "must file a written request for hearing asking the Court to vacate registration of the order, asserting any defense regarding alleged noncompliance with the order, or contesting the amount of arrears allegedly owed under the order or the remedies that are being sought to enforce the order."

Pursuant to the instructions in the Notice, defendant filed a Motion on 4 December 1998 to terminate any future child support obligation and to give him credit for child support which came due during the jail sentence he served in the State of New York from 2 January 1984 through 26 June 1991. Defendant also asked that records of his support payments prior to his incarceration and after his release be obtained from officials in both New York and Virginia to demonstrate his compliance with the Virginia child support order.

At a hearing held on 19 May 1999, the Martin County District Court denied registration of the Virginia order "because the Department of Social Services has failed to prove by a clear and convincing evidence why the Virginia order should be registered in North Carolina upon the request of the State of New York." The trial court also ruled that the order should not be registered because of the "conflicting evidence" presented by defendant and the State of North Carolina. Plaintiff contends that the trial court erred in its ruling, and we agree.

In pertinent part, UIFSA provides that a support order from another state is registered when the order is filed in the registering tribunal of this state. N.C. Gen. Stat. § 52C-6-603(a) (1999). "[U]pon filing, a support order becomes registered in North Carolina and, unless successfully contested, must be recognized and enforced." *Welsher v. Rager*, 127 N.C. App. 521, 525, 491 S.E.2d 661, 663 (1997). Under N.C. Gen. Stat. § 52C-6-607, a party who desires to vacate the registration of the order

> has the burden of proving at least one of seven narrowly-defined defenses. The possible defenses are as follows: (1) the issuing tribunal lacked jurisdiction; (2) the order was fraudulently obtained; (3) the order has been vacated, suspended, or modified; (4) the issuing tribunal has stayed the order pending appeal; (5) the remedy sought is not available in this state; (6) payment has been made in full or in part; and (7) enforcement is precluded by the statute of limitations. N.C. Gen. Stat. § 52C-6-607(a) (1995).

Welsher, 127 N.C. App. at 525-26, 491 S.E.2d at 663-64.

Thus, under the relevant statutory provision, the Virginia order here in question became registered upon its filing in the office of the Martin County Clerk of Court on 2 December 1998. The trial court did not have the discretion to vacate that registration unless the *defendant* met the burden of proving one of the defenses set out in N.C. Gen. Stat. § 52C-6-607(a). Here, it appears that defendant attempted to raise the sixth defense to enforcement, that payment had been made in whole or in part. N.C. Gen. Stat. § 52C-6-607(a)(6). The thrust of defendant's motion was directed toward his receiving a credit for the time he was incarcerated in the State of New York, and receiving credit for additional payments of child support he contends he made.

It is not unusual for questions about the correct amount of arrearage to be raised in these multi-state child support matters. The cor-

rect amount of arrearage can be determined in a case of this sort just as it could in a dispute arising out of a North Carolina child support order. However, the mere existence of such a dispute is not grounds for vacating a registered foreign support order, nor does it shift the statutory burden of proof to the plaintiff.

The trial court erred in placing the burden on the plaintiff in this case to prove that the Virginia order should be registered. While there were conflicts in the evidence presented by defendant and by plaintiff, such conflicts are for the trial court to resolve; their presence does not justify or permit vacation of the prior registration.

The order entered by the trial court purporting to deny registration of the Virginia order is reversed, and the matter is remanded for a hearing at which defendant will have the burden of demonstrating that he is entitled to credit either for his period of incarceration in New York, or for payment of his child support obligation in whole or in part.

Reversed and remanded.

Chief Judge EAGLES and Judge MARTIN concur.

DAVID NORMAN HUMMER AND CYNTHIA WAX HUMMER, PLAINTIFFS V. PULLEY, WATSON, KING & LISCHER, P.A., TRACY K. LISCHER, INDIVIDUALLY AND AS AGENT OF PULLEY, WATSON, KING & LISCHER, P.A., DEFENDANTS AND THIRD-PARTY PLAINTIFFS V. WILLIE D. GILBERT, II, P.A. AND WILLIE D. GILBERT, II, THIRD-PARTY DEFENDANTS

No. COA99-1046

(Filed 17 October 2000)

1. Appeal and Error— appealability—grant of partial summary judgment—Rule 11 sanctions

Although the parties improperly attempted to stipulate that the parties wished to proceed with these appeals even though plaintiffs and third-party defendants contend the appeals of an order allowing partial summary judgment and an order granting Rule 11 sanctions against defendants and their counsel are interlocutory, the Court of Appeals will hear appeals from both orders because: (1) an order imposing sanctions on counsel, or any other non-party to the underlying action, may immediately be appealed

as a final order; (2) even though defense counsel failed to name themselves in the body of the notice of appeal, it is a procedural rather than a jurisdictional error, and defense counsel achieved the functional equivalent of naming themselves as appellants by signing the notice of appeal; (3) defendants' appeal from the sanctions order will be heard since the same facts are involved in both appeals by defendants and their counsel; and (4) defendants' appeal from the partial summary judgment order will be heard since the determination of the propriety of sanctions cannot be separated from the trial court's grant of partial summary judgment.

2. Negligence— contributory—affirmative defense—doctrine of avoidable consequences

The trial court did not err by granting plaintiffs' motion for summary judgment as to defendants' affirmative defense of contributory negligence allegedly based on plaintiff teacher's failure to file the petition for judicial review that defendants, a law firm hired by plaintiff in connection with any dismissal proceedings that might arise, prepared and sent to him after defendants missed the deadline to request that a Professional Review Committee review a superintendent's decision to recommend plaintiff's dismissal, because: (1) plaintiff's original injury was caused by defendants' failure to mail the letter requesting review of the superintendent's recommendation that he be dismissed; and (2) defendants' argument that he should have petitioned for judicial review thereafter would only have been relevant as to whether he failed to mitigate his damages or avoid the consequences of defendants' negligence.

3. Negligence— insulating—affirmative defense

The trial court did not err by granting plaintiffs' motion for summary judgment as to defendants' affirmative defenses of insulating negligence, contribution, and indemnification allegedly based on third-party defendants' intentional or negligent failure to petition for judicial review after defendants, a law firm hired by plaintiff teacher in connection with any dismissal proceedings that might arise, missed the deadline to request that a Professional Review Committee review a superintendent's decision to recommend plaintiff's dismissal, because plaintiffs hired third-party defendant attorney to handle plaintiffs' claims against defendants instead of to obtain judicial review of plaintiff teacher's dismissal.

4. Pleadings— Rule 11 sanctions—failure to file pleading well-grounded in fact

The trial court did not err by imposing N.C.G.S. § 1A-1, Rule 11 sanctions against defendants and their counsel based on a failure to file a pleading that is well-grounded in fact, because: (1) the third-party complaint and affirmative defenses are based upon defendants' contention that plaintiffs or third-party defendants, acting on plaintiffs' behalf, should have sought judicial review of a board of education's decision to terminate plaintiff teacher; (2) the specific prohibition set out in N.C.G.S. § 115-325(n) against judicial review for a career employee public school teacher terminated under circumstances such as those in the case at bar overrides any general allowance of judicial review of an agency decision permitted by N.C.G.S. §§ 150B-43 to 150B-52; and (3) neither plaintiffs nor third-party defendants could have been negligent as a result of any action they took or failed to take after the time elapsed to request a review of the superintendent's decision by a Professional Review Committee.

5. Pleadings— Rule 11 sanctions—failure to form a reasonable belief pleadings warranted by existing law

The trial court did not err by imposing N.C.G.S. § 1A-1, Rule 11 sanctions against defendants and their counsel based on a failure to form a reasonable belief that the pleadings were warranted by existing law, because: (1) as to the affirmative defense of contributory negligence, although the Board attorney's letter suggested that defendants file a petition for judicial review, defendants instead waited until they terminated their relationship with plaintiff teacher and then proposed that plaintiff file the petition; and (2) as to the affirmative defense of insulating negligence by third-party defendants and for filing the third-party complaint, defendants knew or should have known that third-party defendants were in no position to file a petition for judicial review.

6. Pleadings— Rule 11 sanctions—professional liability insurance—abuse of discretion

The trial court abused its discretion by ordering defendants and their counsel to pay third-party defendant attorney $2,500 representing the difference between the $5,000 professional liability insurance deductible that is currently available to third-party defendant, and the $2,500 deductible that would have been

available to third-party defendant if the third-party complaint had not been filed, because: (1) the order imposing sanctions contains no finding that third-party defendant actually purchased professional liability insurance; and (2) the amended record on appeal contains a letter from the president of third-party defendant's insurance company explaining that his policy contained a $5,000 deductible since he had a gap of over two years in his professional liability insurance coverage, rather than as the result of any pending suit against him.

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

Although defendants challenge the trial court's supplemental order authorizing entry of judgment, defendants failed to preserve this issue under N.C. R. App. P. 28(b)(5) since they did not cite any authority to support this assignment of error.

Judge LEWIS dissenting in part.

Appeal by defendants and third-party plaintiffs from order entered 29 January 1999 by Judge Abraham Penn Jones in Durham County Superior Court. Heard in the Court of Appeals 19 May 2000.

Law Offices of Willie D. Gilbert, II, P.A., by Willie D. Gilbert, II, for plaintiff-appellees, and Law Offices of James E. Hairston, Jr., by James E. Hairston, Jr., for third-party defendant-appellees.

Bryant Patterson Covington & Idol, P.A., by Lee A. Patterson, II, for defendant-and third-party plaintiff-appellants.

EDMUNDS, Judge.

Defendants and third-party plaintiffs appeal the trial court's grant of summary judgment to plaintiffs and third-party defendants and imposition of Rule 11 sanctions. We affirm in part and reverse in part.

Plaintiff David Hummer (Hummer) was a "career status teacher" in the Durham Public School system. On 12 June 1997, during a teacher workday at Northern Durham High School, Hummer was approached by the principal, Isaac Thomas (Thomas). A heated exchange ensued, and Hummer told Thomas that if Thomas wished to take another teacher's side in a personal conflict with Hummer,

Thomas should "let me know, and I can add you to the list and kick your tail too." As a result, Thomas instructed Hummer to leave the premises and informed Hummer that he would have him fired.

On 8 July 1997, Hummer met with attorney Tracy Lischer, a member of the law firm Pulley, Watson, King & Lischer, P.A. (The firm is a defendant/third-party plaintiff, as is Ms. Lischer individually. For clarity, we will refer to the firm as Pulley, Watson, to Ms. Lischer as Lischer, and to these parties collectively as defendants.) Lischer agreed to represent Hummer in connection with any dismissal proceedings that might arise. On 4 August 1997, the superintendent of Durham Public Schools notified Hummer by certified mail that she was suspending him without pay and announced her intention to recommend his dismissal on the grounds of insubordination, neglect of duty, failure to fulfill the duties and responsibilities imposed upon teachers by the general statutes of North Carolina, and failure to comply with the reasonable requirements of the Board of Education (the Board). In accordance with N.C. Gen. Stat. § 115C-325(h)(2), (3) (1994), the superintendent also informed Hummer that unless he challenged her dismissal recommendation by making a written request within fifteen (15) days of receipt of her notice letter for either (a) a review of the superintendent's proposed recommendation for dismissal by members of a Professional Review Committee or (b) a hearing before the Board, her recommendation would be submitted directly to the Board for action.

Hummer provided defendants a copy of this letter. Although Lischer drafted a letter requesting that a Professional Review Committee review the superintendent's decision to recommend Hummer's dismissal, the letter was never mailed due to a mistake made in defendants' office. On 9 September 1997, the Board voted to dismiss Hummer from his job. On 18 September 1997, Lischer wrote the Board, asking that it reconsider its decision, and in a letter to Hummer written on Pulley, Watson stationery dated 22 September 1997, Lischer took full responsibility for failing to mail the request for a hearing. She informed Hummer that because Pulley, Watson's malpractice carrier had instructed that Lischer could continue to "try to undo the damage," she had written the Board asking the Board to rescind its action or grant Hummer a hearing. Lischer then invited Hummer to consult another attorney about his potential malpractice claim.

On 7 October 1997, Lischer again wrote Hummer stating that she was waiting for the Board to respond to her last request for an exten-

sion of time to request review of the superintendent's recommendation. However, by a letter also dated 7 October 1997, the Board through its attorney informed defendants it would not reconsider its decision to uphold the superintendent's recommendation that Hummer be dismissed. The letter also suggested that defendants consider filing a petition for review pursuant to N.C. Gen. Stat. § 115C-325(n). That statute, however, states judicial review is not available to a career employee (such as Hummer) who is dismissed and does not request a hearing before a board of education. *See id.*

On 20 October 1997, Lischer advised Hummer by letter that because of the increasing adversarial nature of their relationship, she could no longer represent him. She enclosed a petition requesting judicial review of the Board's decision and suggested Hummer file it *pro se* or have another attorney file it. Lischer's letter included information about where and when to file the petition. On 28 October 1997, defendants mailed Hummer a letter stating that defendants' malpractice carrier, Lawyers Mutual, "expect[ed] Mr. Hummer to follow through on the petition for judicial review" and reminding him to file it by 5 November 1997. Hummer never filed such a petition.

On 31 October 1997, third-party defendant Willie D. Gilbert, II (Gilbert), an attorney with third-party defendant law firm Willie D. Gilbert, II, P.A., wrote Lischer advising that he had been retained by Hummer in connection with a potential lawsuit against Pulley, Watson and requesting that any further contact with Hummer be through Gilbert. On 13 February 1998, Gilbert filed suit against defendants on behalf of Hummer and his wife (collectively, plaintiffs), seeking recovery for breach of contract, legal malpractice, negligent infliction of emotional distress, and negligent misrepresentation. Defendants answered through their counsel, Bryant, Patterson, Covington & Idol, P.A., denying the material allegations of the complaint and asserting affirmative defenses of contributory negligence (alleging Hummer's failure to petition for judicial review) and insulating negligence (alleging Gilbert's failure to petition for judicial review on Hummer's behalf). Defendants also filed a third-party complaint against Gilbert individually and as a professional corporation, seeking contribution or indemnity under the theory that he negligently or intentionally caused or contributed to plaintiffs' harm.

At the close of the pleadings, plaintiffs moved for partial summary judgment as to defendants' affirmative defenses of contributory

and insulating negligence. Gilbert filed a motion for summary judgment as to all claims for contribution and indemnity. Both plaintiffs and Gilbert sought Rule 11 sanctions against defendants and defendants' counsel, asserting that the affirmative defenses in defendants' answer and the grounds for relief in the third-party complaint were neither well-grounded in fact nor warranted by existing law. *See* N.C. Gen. Stat. § 1A-1, Rule 11 (1999).

Following a 28 October 1998 evidentiary hearing, the trial court entered two orders on 29 January 1999. The first order granted plaintiffs' and Gilbert's motions for summary judgment, while the second order granted plaintiffs' and Gilbert's motions for Rule 11 sanctions. The order of sanctions decreed that plaintiffs recover $3,562.50 in attorney fees from defendants and their counsel, that Gilbert recover $1,917.50 in attorney fees from defendants and their counsel, and that defendants and their counsel pay to Gilbert an additional $2,500.00, representing the difference "between the $5,000.00 professional liability insurance deductible that is currently available to the Third-Party Defendants, and the $2,500.00 deductible that would have been available to the Third-Party Defendants had the [defendants] complied with their obligations under Rule 11." The order stated that defendants and their counsel were jointly and severally liable for these amounts.

Defendants appealed from the order allowing summary judgment and from the order granting sanctions. Twelve days later, defendants filed a Rule 60(b) motion for relief from the order imposing the $2,500.00 sanction. N.C. Gen. Stat. § 1A-1, Rule 60(b) (1999). The trial court declined to include their motion in the record on appeal. Although this Court denied defendants' petition for writ of certiorari to include this motion in the record on appeal, we allowed defendants to amend the record on appeal to include the motion.

I.

[1] We first address the issue of whether this appeal is interlocutory. Although plaintiffs and Gilbert contend in their joint appellate brief that the appeal is interlocutory, all parties expressed a willingness to proceed at oral argument. This agreement is not binding because the prohibition against interlocutory appeals is statutory. *See* N.C. Gen. Stat. § 1A-1, Rule 54 (1999); N.C. Gen. Stat. § 1-277 (1999). "The parties cannot by stipulation modify the extent of appellate review prescribed in the statute." *Fisher v. E.I. Du Pont De Nemours*, 54 N.C. App. 176, 177-78, 282 S.E.2d 543, 544 (1981).

However, this Court previously has held that " 'an order imposing sanctions on counsel, or any other non-party to the underlying action, may immediately be appealed as a final order.' " *Mack v. Moore*, 107 N.C. App. 87, 90, 418 S.E.2d 685, 687 (1992) (citation omitted). Defendants and their counsel were held to be jointly and severally liable for various monetary penalties. We therefore consider whether defendants' counsel appealed.

Defendants' counsel did not include the firm name on the notice of appeal from the sanction order. Although entry of notice of appeal is jurisdictional, *see Abels v. Renfro Corp.*, 126 N.C. App. 800, 486 S.E.2d 735 (1997), this Court has stated that if a party technically fails to comply with a procedural requirement in filing papers with the Court, the Court may nevertheless find compliance if the party achieved the functional equivalent of the requirement, *see State ex rel. Utilities Comm'n v. MCI*, 132 N.C. App. 625, 514 S.E.2d 276 (1999); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422 (1990). Here, defendants' counsel are not parties to the case. The sanctions order did not name defendants' attorneys in the caption, nor was there any finding of fact in the body of the order that defendants' attorneys had been derelict. Instead, the order made numerous and extensive findings of fact about defendants, but only recited in its conclusions of law that defendants' counsel were jointly and severally liable with defendants. Defendants' counsel's signature on the notice of appeal from the sanctions order indicated participation in the appeal. In light of these factors, we hold that defendants' counsel's failure to name themselves in the body of the notice of appeal is a procedural rather than a jurisdictional error, and defendants' counsel achieved the functional equivalent of naming themselves as appellants in the notice of appeal.

Because we may hear the appeal of the sanctions imposed upon defendants' counsel, and because precisely the same facts are involved in defendants' appeal of sanctions imposed upon them, we elect to hear that aspect of this appeal as well. Further, because the determination of the propriety of sanctions cannot be separated from the trial court's grant of summary judgment, in the interest of judicial economy, we will review the order granting summary judgment to plaintiffs and third-party defendants on defendants' affirmative defenses and third-party claims. *See* N.C. R. App. P. 2.

II.

Defendants contend the trial court erred in granting plaintiffs' motion for summary judgment as to defendants' affirmative defenses of contributory and insulating negligence. 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). Although the trial court's order contained findings of facts and conclusions of law, we have held:

> A trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper. However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment.

Mosley v. Finance Co., 36 N.C. App. 109, 111, 243 S.E.2d 145, 147 (1978) (internal citations omitted). We address defendants' issues *seriatim*.

A. Contributory Negligence

[2] Defendants contend that Hummer was contributorily negligent in not filing the petition for judicial review that defendants prepared and sent to him. This issue is controlled by our holding in *Watson v. Storie*, 60 N.C. App. 736, 300 S.E.2d 55 (1983), where the decedent's wife brought suit against the defendant after her husband died from injuries sustained while riding as a passenger in the defendant's vehicle. The defendant, the defendant's brother, and the decedent's wife urged the decedent to seek medical treatment after the accident, but the decedent refused for two days. The decedent finally gave in to the importuning but died while preparing to see a doctor. Although the jury found that the decedent had been contributorily negligent, we held on appeal that an instruction on contributory negligence was not supported by the evidence.

> [C]ontributory negligence "is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negli-

> gence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." It is "a plaintiff's negligence which concurs with that of the defendant in producing the occurrence which caused the original injury . . . ."

Id. at 738, 300 S.E.2d at 57 (internal citations omitted).

In the case at bar, Hummer's original injury was caused by defendants' failure to mail the letter requesting review of the superintendent's recommendation that he be dismissed. Therefore, defendants' argument that Hummer should have petitioned for judicial review thereafter would only have been relevant as to whether he failed to mitigate his damages or avoid the consequences of defendants' negligence.

> "The doctrine of avoidable consequences is to be distinguished from the doctrine of contributory negligence. Generally, they occur—if at all—at different times. Contributory negligence occurs either before or at the time of the wrongful act or omission of the defendant. On the other hand, the avoidable consequences generally arise after the wrongful act of the defendant. That is, damages may flow from the wrongful act or omission of the defendant, and if some of these damages could reasonably have been avoided by the plaintiff, then the doctrine of avoidable consequences prevents the avoidable damages from being added to the amount of damages recoverable."

Miller v. Miller, 273 N.C. 228, 239, 160 S.E.2d 65, 74 (1968) (citation omitted). Accordingly, we affirm the trial court's grant of summary judgment as to defendants' affirmative defense of contributory negligence.

B. Insulating Negligence, Contribution, and Indemnification

[3] Defendants also pled insulating negligence, arguing that Gilbert's intentional or negligent failure to petition for judicial review proximately caused Hummer's injuries and barred recovery from defendants. However, defendants' claims fail if there is no evidence that Gilbert was negligent.

Based on our review of the record, we conclude that, even assuming judicial review was available to plaintiffs, Gilbert's conduct could not support a claim of insulating negligence, contribution, or indemnification. The record demonstrates that plaintiffs did not engage Gilbert to seek judicial review of Hummer's dismissal. The engage-

ment letter signed by Gilbert and plaintiffs, and a later letter from Gilbert to defendants, indicate that Gilbert's representation was limited to handling plaintiffs' claims against defendants. "A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued." Rev. R. Prof. Conduct N.C. St. B. 1.2, 2000 Ann. N.C. 531. Because plaintiffs did not hire Gilbert to obtain judicial review of Hummer's dismissal, defendants' theories of insulating negligence, contribution, and indemnification are inapplicable. These assignments of error are overruled, and the trial court properly granted summary judgment as to these issues.

III.

[4] Defendants next contend the trial court erred in imposing Rule 11 sanctions against defendants and defendants' counsel. N.C. Gen. Stat. § 1A-1, Rule 11. A party or his attorney may not file a pleading that is (1) not well grounded in fact, (2) not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," or (3) filed for an improper purpose. *Id.* A violation of any one of these requirements may support sanctions under Rule 11. *See Williams v. Hinton*, 127 N.C. App. 421, 423, 490 S.E.2d 239, 241 (1997).

We review the imposition of sanctions *de novo*. *See id.* at 423, 490 S.E.2d at 240.

> *De novo* review by an appellate court involves a determination of: (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence.

Id. at 423, 490 S.E.2d at 240-41 (citation omitted).

We consider the legal sufficiency of the sanctions in accordance with the following analysis:

> "[T]he court must first determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially plausible, then the second issue is (1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, formed a reason-

> able belief that the paper was warranted by existing law, judged as of the time the paper was signed. If the court answers either prong of this second issue negatively, then Rule 11 sanctions are appropriate."

McClerin v. R-M Industries, Inc., 118 N.C. App. 640, 643-44, 456 S.E.2d 352, 355 (1995) (alteration in original) (citations omitted). The trial court made the following finding of fact as to defendants' claim of insulating negligence by Gilbert and defendants' third-party complaint against Gilbert:

> Not only have the Defendants/Third-Party Plaintiffs failed to demonstrate that they undertook a reasonable inquiry into the law and the facts underlying their claims of alleged negligence on the part of the Third-Party Defendants, but they have also failed to demonstrate that, based upon the results of such an inquiry, they reasonably believed that their claims of negligence on the part of the Third-Party Defendants were well-grounded in fact and in law.

Based on this and other findings of fact, the court concluded as a matter of law:

> By signing the verified Answer and the verified Third-Party Complaint in this action, the [defendants] have violated Rule 11. This is true because although the Court concludes that at the time the [defendants] signed their verified Answer and Third-Party Complaint the [defendants] had failed to conduct a reasonable inquiry into the law and the facts underlying their claims of alleged negligence on the part of the Third-Party Defendants, even if the Court were to assume such a reasonable inquiry, the Court nevertheless concludes that no reasonable person in [defendants'] position, after having read, studied and considered the applicable law and facts of this case, could have concluded that the claims of negligence on the part of the Third-Party Defendants are well-grounded in fact and in law. Nor could such a reasonable person have concluded that the claims of negligence on the part of the Third-Party Defendants are warranted by a good faith argument for the extension, modification, or reversal of existing law.

The trial court did not make similar findings of fact or conclusions of law with regard to defendants' affirmative defense of contributory negligence by plaintiffs.

We first determine whether defendants' third-party complaint and affirmative defenses are facially plausible. Although we held in Part II, above, that summary judgment was appropriate as to the third-party complaint and the affirmative defenses, we will analyze the argument advanced by defendants. The third-party complaint and the affirmative defenses are based upon defendants' contention that plaintiffs, or Gilbert acting on plaintiffs' behalf, should have sought judicial review of the Board's decision to terminate Hummer. The record reveals that Hummer was notified by the superintendent in accordance with N.C. Gen. Stat. § 115C-325(h)(2), (3) that unless he challenged the superintendent's recommendation for dismissal by mailing a written request, within fifteen days of receipt of her notice letter, for either (a) a review of the superintendent's proposed recommendation for dismissal by members of a Professional Review Committee, or (b) a hearing before the Durham County Board of Education, her recommendation would be submitted directly to the Board for action. The fifteen-day deadline for challenging a superintendent's recommendation is statutory. *See* N.C. Gen. Stat. § 115C-325(h)(3). The General Assembly has further provided in N.C. Gen. Stat. § 115C-325(n):

> Any teacher who has been dismissed or demoted pursuant to G.S. 115C-325[(h)] . . . shall have the right to appeal from the decision of the board to the superior court . . . . *A teacher who has been demoted or dismissed . . . who has not requested a hearing before the board of education pursuant to this section shall not be entitled to judicial review of the board's action.*

(Emphasis added.) Defendants did not file a timely request for review by the Board pursuant to N.C. Gen. Stat. § 115C-325(h)(3). This failure to file foreclosed any possibility of later judicial review. *See* N.C. Gen. Stat. § 115C-325(n).

Nevertheless, defendants argue that judicial review was available to Hummer. Defendants' theory, set out in their third-party complaint, is that Hummer had until 5 November 1997 to petition for judicial review, based on defendants' contention that the thirty-day period to file an appeal for judicial review started running on 7 October 1997, the day Hummer was notified that the Board would not reconsider its prior decision to accept the superintendent's recommendation that Hummer be dismissed. Consequently, defendants argue, plaintiffs and Gilbert had time to petition for judicial review and were negligent in failing to do so. Defendants' theory raises the question of why defend-

ants did not themselves petition for judicial review on Hummer's behalf between 7 October 1997, when the Board announced its decision not to reconsider, and 20 October 1997, when defendants unilaterally terminated their relationship with Hummer. We will address this question below.

Any contention that Hummer or Gilbert might have filed for judicial review fails in light of the plain language of N.C. Gen. Stat. § 115C-325(n), which states that the time to request judicial review begins running the day notice of the Board's decision is received. Hummer was advised of the Board's decision to terminate him by certified letter dated 15 September 1997, and any right he had to request judicial review began to run at that time. Defendants' contention that the time to request such review began upon the Board's refusal to reconsider its action is incorrect. The time to file a request for judicial review (had review been permitted by statute) elapsed thirty days after Hummer's receipt of the 15 September 1997 letter, at which time defendants were still representing Hummer; they did not unilaterally terminate their representation of Hummer until 20 October 1997. As a consequence, no subsequent attorney could have asked for timely review.

However, even if a request for judicial review had been filed in accordance with defendants' theory, N.C. Gen. Stat. § 115C-325(n) unmistakably states that Hummer was not entitled to such review. Although defendants cite *Sherrod v. N.C. Dept. of Human Resources*, 105 N.C. App. 526, 414 S.E.2d 50 (1992) and *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 375 S.E.2d 712 (1989), for the proposition that judicial review was available, neither case involves a teacher. The dismissed employee in both *Sherrod* and *Lewis* was therefore able to seek judicial review apparently pursuant to N.C. Gen. Stat. § 150B-43 (1999). By contrast, plaintiff in the case at bar was a teacher whose employment was covered by N.C. Gen. Stat. § 115C-325. When conflicting statutes are construed, the specific controls over the general if the statutes cannot be reconciled. *See Krauss v. Wayne County DSS*, 347 N.C. 371, 493 S.E.2d 428 (1997). Therefore, the specific prohibition set out in section 115C-325(n) against judicial review for a career employee public school teacher terminated under circumstances such as those in the case at bar overrides any general allowance of judicial review of an agency decision permitted by N.C. Gen. Stat. §§ 150B-43 to -52.

Consequently, neither plaintiffs nor Gilbert could have been negligent as a result of any action they took or failed to take after the

time elapsed to request a review of the superintendent's decision by a Professional Review Committee. Defendants' affirmative defenses and third-party complaint therefore were not well-grounded in fact and were facially implausible.

[5] We next determine whether defendants undertook a reasonable inquiry into the law and, if so, whether defendants formed a reasonable belief that the pleadings were warranted by existing law. As to the affirmative defense of contributory negligence, it does not appear from our research that the issue raised by defendants, whether judicial review was available where the procedures for administrative review had not been exhausted, had been litigated previously. Therefore, defendants had little guidance as to this issue. In addition, in his letter of 7 October 1997, the Board's attorney suggested that defendants petition for judicial review. Accordingly, we will assume that defendants made a reasonable inquiry into the law. However, we are unable to find that defendants formed a reasonable belief that the pleading was warranted by existing law. As noted above, defendants were advised by letter dated 7 October 1997 that the Board had declined to reconsider its decision to terminate Hummer. That same letter, written to Lischer, contained the suggestion: "*You* have indicated that your next step would be a writ of mandamus. *You* may wish to consider filing a petition for review pursuant to G.S. § 115C-325(n) instead." (Emphasis added.) Defendants continued to represent Hummer until they terminated their relationship with him on 20 October 1997. Defendants' letter to Hummer ending their relationship stated:

> Your next step, according to the letter we received from Ken Soo on October 8, 1997 is to petition for judicial review. We have that petition drafted. However, if I sign it, I will be attorney of record and may or may not be allowed to withdraw if the attorney-client relationship deteriorates further in the future.

This letter provides no explanation why defendants failed to file a petition for judicial review during the period between 8 October 1997 and 20 October 1997. Although the Board's attorney's letter suggested that defendants file the petition, defendants instead waited until they terminated their relationship with Hummer, then proposed that he file the petition. We conclude from this pattern of behavior that defendants did not have a reasonable belief that the pleading was warranted by existing law.

We reach a similar conclusion as to the sanctions imposed on defendants for raising the affirmative defense of insulating negligence by Gilbert and for filing the third-party complaint against Gilbert. At the time defendants filed the third-party complaint, they knew or should have known that Gilbert was in no position to file a petition for judicial review. In a letter dated 31 October 1997, long before defendants' 13 March 1998 filing of its answer and third-party complaint, Gilbert wrote Lischer informing her that he had been retained for the purpose of representing plaintiffs in their claims against defendants. In the same letter, Gilbert also stated that it was defendants' responsibility to seek relief from the original mistake of failing to seek judicial review. This letter leaves no doubt that Gilbert's representation of plaintiffs was limited to representation of them in their breach of contract and legal malpractice claims against defendants. Accordingly, sanctions imposed by the trial court based upon defendants' affirmative defense of insulating negligence and defendants' third-party complaint were proper.

[6] Defendants also challenge the trial court's order that they and their counsel pay Gilbert "$2,500.00[] representing the difference between the $5,000.00 professional liability insurance deductible that is currently available to the Third-Party Defendants, and the $2,500.00 deductible that would have been available to the Third-Party Defendants" if the third-party complaint had not been filed. This sanction is reviewable under an abuse of discretion standard, *see Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989), and upon careful review of the record, we hold this sanction was imposed improperly. The order imposing sanctions contains no finding that Gilbert actually purchased professional liability insurance. In addition, the amended record on appeal contains a letter from the president of Gilbert's insurance company explaining that his policy contained a $5,000.00 deductible because Gilbert had a gap of over two years in his professional liability insurance coverage, rather than as the result of any pending suit against him. The sanctions order in this regard is reversed.

IV.

[7] Finally, defendants challenge the trial court's 3 May 1999 "Supplemental Order Authorizing The Entry Of Judgment." Although defendants contend this order was entered improperly, they have cited no authority to support this assignment of error. *See* N.C. R. App. P. 28(b)(5). Accordingly, this assignment of error is overruled.

To conclude, we affirm the trial court's grant of summary judgment to plaintiffs on defendants' affirmative defenses. We also affirm the trial court's grant of summary judgment to third-party defendants on defendants' third-party claims. We further affirm the imposition of sanctions based upon defendants' alleging the affirmative defenses of insulating negligence and contributory negligence and defendants' filing of the third-party complaint. We reverse the imposition of sanctions in the amount of $2,500.00 pertaining to liability insurance. We remand this matter to the trial court for reentry of an order of sanctions in accordance with this opinion.

Affirmed in part, reversed in part.

Chief Judge EAGLES concurs.

Judge LEWIS dissents in part.

Judge LEWIS dissenting in part.

I respectfully dissent from that portion of the majority's opinion upholding the imposition of sanctions upon defendants and their counsel for asserting the defense of contributory negligence in their answer. As the majority articulates, review of sanctions first requires us to determine the facial plausibility of defendants' assertion of contributory negligence. *Mack v. Moore*, 107 N.C. App. 87, 91, 418 S.E.2d 685, 688 (1992). If their defense was not facially plausible, we then consider whether defendants (1) undertook a reasonable inquiry into the law and (2) based upon this inquiry, formed an objectively reasonable belief that the contributory negligence defense was warranted by existing law or an extension thereof. *Id.* I believe assertion of contributory negligence was facially plausible. The relevant statute does state, "A career employee who has been demoted or dismissed . . . who has not requested a hearing before the board of education pursuant to this section shall not be entitled to judicial review of the board's action." N.C. Gen. Stat. § 115C-325(n) (1999). At the time defendants asserted their defense, however, our courts had developed no case law construing or applying this provision. Defendants argued there should be *judicially*-created exceptions to this provision based upon "manifest unfairness," such as when a client intended to request a hearing but his lawyer inadvertently failed to do so. Defendants also claimed that their belated petition for hearing preserved the right to judicial review and the statute thereby

entitled them to a thirty-day period during which to exercise that right. Although these arguments ultimately proved unpersuasive, I cannot say that they were so facially implausible as to warrant the imposition of sanctions.

Furthermore, even if the defense was not facially plausible, I believe defendants undertook a reasonably sufficient inquiry and, based upon that inquiry, formed an objectively reasonable belief that the defense was warranted by existing law or an extension thereof. The trial court found that defendants did neither. However, there is no evidence in the record to support this finding. *See Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989) (stating that de novo review of sanctions requires determining, among other things, whether the findings of fact are supported by sufficient evidence). This is a statute that had never been construed before. Accordingly, a reasonable inquiry could not have involved extensive research. Furthermore, at the time defendants asserted contributory negligence, the Board's own attorney had instructed them via letter that they should try to petition for judicial review via section 115C-325(n), even though that statute states they were not entitled to judicial review at all because they failed to seek a hearing within fourteen days of receipt of the superintendent's intended recommendation. N.C. Gen. Stat. § 115c-325(h)(2)-(3), (n) (1999). This lends objective credence to defendants' beliefs and illustrates their beliefs were not so unreasonable as to warrant the imposition of sanctions for asserting contributory negligence as a defense.

However, I do concur in the majority's conclusion that imposition of sanctions for filing the third-party complaint was appropriate. I agree with the majority's reasoning that third-party defendants' letter clearly notified defendants they were involved in this matter solely for the purpose of plaintiffs' breach of contract and legal malpractice claims—not for further legal assistance in restoring plaintiff's job. I also concur with the majority's opinion that the $2500 sanction based on insurance fees cannot stand.

IN THE MATTER OF X. HUFF

No. COA99-1256

(Filed 17 October 2000)

1. **Termination of Parental Rights— failure to pay any costs of foster care—reasonable portion—no finding of specific amount**

The trial court did not err by finding that termination of parental rights was justified pursuant to N.C.G.S. § 7A-289.32(4), which requires a parent to pay a fair, just, and equitable portion of the cost of foster care, where the parents made no payments during the pertinent six-month period. Although the reasonable portion standard is often difficult to apply, zero is not a reasonable portion under the circumstances here. Moreover, there is no requirement that the court make a finding as to a specific amount that would constitute a reasonable portion.

2. **Termination of Parental Rights— religious inquiry—Wiccan parents**

The trial court did not err in a termination of parental rights proceeding by permitting questioning and testimony concerning the religious beliefs and practices of the Wiccan parents where the inquiry was appropriately brief and was a far cry from the "inquisition" prohibited by *Peterson v. Rogers*, 111 N.C. App. 712; the questions addressed the ways in which the parents' religious beliefs might impact their behavior in specific ways rather than focusing on the general beliefs and doctrines of the religion; the inquiry was primarily directed at the father rather than an expert; and the court made no findings regarding the religious practices of the parties and there is no indication that the religious inquiry impacted the trial court's decision.

3. **Termination of Parental Rights— six children in seven years—few resources—finding not unconstitutional**

The constitutional rights of the respondents in a termination of parental rights proceeding were not violated by a finding that the mother gave birth to six children in seven years despite the fact that the parents had few financial resources. In a termination of parental rights proceeding, there are factors that may be weighed against a parent that might be constitutionally protected in other circumstances. The findings here, while arguably infring-

ing on the autonomy of the parents to some degree, are appropriate considerations within this context since they bear directly on the likelihood of future neglect of the child.

4. Termination of Parental Rights— findings—adopted from prior reviews

The trial court did not err in a termination of parental rights proceeding by reciting and adopting findings from prior review hearings involving placement of the child where five findings out of fifty reiterated factual findings from prior review hearings and the court considered conditions after the loss of custody as well as evidence of neglect prior to losing custody. The court's determination that termination of parental rights was in the best interests of the child was independent of the prior adjudication of neglect.

5. Evidence— hearsay—authentication of documents—bench trial—no showing of reliance by court

There was no prejudicial error in a bench trial involving termination of parental rights where the court admitted hearsay statements and medical documents allegedly not properly authenticated. An appellant must show that the court in a bench trial relied upon the incompetent evidence; here, respondents offer brief suggestions as to how the evidence could have impacted the court's judgment in theory, but nothing specific.

6. Termination of Parental Rights— neglect—best interests of child

The trial court did not err by concluding that it was in the child's best interests to terminate parental rights where the picture painted by the transcript and the record portrays parents who failed over an extended period to provide a healthy and safe environment and who failed to show significant improvement in their parental abilities after removal of the child. There was overwhelming evidence that the parents have not accepted responsibility for the ways in which their actions caused their family problems and the chronic nature of the behavior creates a significant likelihood of future neglect.

Appeal by respondents from order entered 6 January 1999 by Judge William A. Christian in Harnett County District Court. Heard in the Court of Appeals 15 August 2000.

The Woodall Law Firm, P.A. by E. Marshall Woodall, for petitioner-appellee.

Bain & McRae by Alton D. Bain, for respondent-appellant Tampatha C. Huff.

Richard E. Jester, for respondent-appellant James J. Huff.

McLeod & Harrop by Donald E. Harrop, Jr., as Guardian ad Litem.

Smith, Judge.

The Harnett County Department of Social Services (petitioner) filed a petition to terminate the parental rights of respondents (the parents) Tampatha C. Huff (the mother) and James J. Huff (the father) to their child, Xavier J. Huff (the child). The trial court ordered termination of respondents' parental rights, and respondents appeal from that order. We affirm.

The child, born 22 December 1994, was initially removed from respondents' home and placed in foster care in September 1995. The child was subsequently adjudicated a neglected juvenile and his physical and legal custody were awarded to petitioner on 20 October 1995. Placement of the child was reviewed at five hearings between March 1996 and October 1997. At the fourth review hearing in April 1997, physical placement of the child was given to his paternal grandparents, with whom he presently resides. On 7 August 1997, petitioners filed a petition to terminate the parental rights of respondents pursuant to Article 24B, Chapter 7A of our General Statutes. The petition alleged that grounds for terminating respondents' parental rights existed under three separate subsections of N.C.G.S. § 7A-289.32 (1996): subsection (2) (neglect or abuse), subsection (3) (child willfully left in foster care for 12 months), and subsection (4) (parents' willful failure to pay reasonable portion of cost of care for the child).

A proceeding for termination of parental rights involves two stages. At the adjudication stage, the petitioner must show 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.G.S. § 7A-289.30(e) (1996). If one or more of the specific grounds listed in the statute are shown, then the court moves to the disposition stage to determine whether it is in the best interests of the child

to terminate the parental rights. N.C.G.S. § 7A-289.31 (1996). The standard for review in termination of parental rights cases is whether the court's "findings of fact are based upon clear, cogent and convincing evidence" and whether the "findings support the conclusions of law." *See In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996) (citation omitted).

The trial court determined that termination of parental rights was warranted pursuant to all three of the grounds alleged in the petition. The trial court then concluded that it was in the best interests of the child to terminate parental rights, and ordered the termination of respondents' parental rights on 6 January 1999. Respondents appeal from that order, bringing forth 24 assignments of error which we have condensed into six main issues for review.

I.

[1] Respondents first assign error to the trial court's finding that termination of parental rights was warranted pursuant to subsection (4) of G.S. § 7A-289.32. This subsection provides for termination of parental rights where

> [t]he child has been placed in the custody of a county Department of Social Services . . . or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition, has wilfully failed for such period to pay a reasonable portion of the cost of care for the child although physically and financially able to do so.

G.S. § 7A-289.32(4). Subsection (4) requires a parent "to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981).

In the present case, the pertinent six-month period preceding the filing of the petition is 7 February 1997 to 7 August 1997. During this time, neither parent made any payments toward the cost of care for the child. At the hearing, neither parent offered any specific reasons for their failure to pay support. When the father was asked why he failed to pay any support, he answered, "I don't think I know how to answer that question, sir." When the mother was asked the same question, she stated that she did not make any support payments because she and her husband "were trying to get [their] finances . . . in order."

Respondents do not dispute the following factual findings of the trial court. The parents initially obligated themselves to pay child support for the child while in foster care by signing a service agreement on 6 December 1995. Despite the fact that social workers advised the parents that failure to pay support could be grounds for termination of their parental rights, the parents failed to pay any support through December 1996, at which time the parents moved to Asheboro, North Carolina. After moving, the parents failed to provide their new address to the Child Support Enforcement Office (the CSEO). Despite making numerous efforts to contact the parents, the CSEO heard nothing from the parents until approximately 17 months later, when the parents came to the CSEO for paternity testing. After canceling one appointment to discuss child support, the parents eventually signed a Voluntary Support Agreement on 26 June 1998.

The cost of foster care placement for the six-month period immediately preceding the filing of the petition was $828.00. Neither parent made any support payments during the relevant six-month period. Furthermore, neither parent made any support payments whatsoever until over a year after the petition to terminate parental rights was filed. On 30 October 1998, after being found guilty of criminal contempt for non-payment of court-ordered support, the mother paid the sum of $239.70 toward care for the child. The father has yet to make any payments, and there is a criminal contempt citation currently pending against the father for his failure to make any payments.

"On review, this Court must determine whether the trial court's findings of fact were based on clear, cogent, and convincing evidence." *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996) (citation omitted). We believe there was ample evidence from which the trial court could find that the parents willfully failed to pay a reasonable portion of the cost of care for the child.

Respondents attempt to rely on *Bost v. Van Nortwick*, 117 N.C. App. 1, 449 S.E.2d 911 (1994), for the proposition that a "willful" failure to pay support cannot be shown where a parent is "unable" to pay child support due to an inability to maintain employment. Respondents argue that they were unable to make any support payments because they were supporting two minor children, they were attempting to reduce their debt, and they were unable to maintain steady employment. Initially, we note that both parents were employed for at least half of the relevant six-month period. We also note that, in fact, the parents were caring for only one minor child

during this time (the second minor child referred to by respondents was not born until 13 June 1998).

More importantly, respondents' reliance on *Bost* is misplaced. *Bost* involved the specific situation in which a parent is unable to pay support due to a "psychological or emotional illness." *Id.* at 16, 449 S.E.2d at 919. The father in that case was unable to pay child support because his "severe alcoholism" rendered him unable to maintain permanent employment. *Id.* at 16, 449 S.E.2d at 920. The Court held that in such cases a parent's failure to pay support may be justified. *Id.* at 17, 449 S.E.2d at 920. While it is clear that respondents have had some difficulty in maintaining employment, respondents have not indicated that any unemployment during the relevant six-month period was a result of some "psychological or emotional illness" that would warrant a finding that their failure to pay support was not "willful" under the reasoning in *Bost*. In fact, any unemployment during this period appears to have occurred only after the parents voluntarily terminated previous jobs.

Also, despite respondents' arguments to the contrary, there is no requirement that the trial court make a finding as to what specific amount of support would have constituted a "reasonable portion" under the circumstances. The cases cited by respondents simply require that the trial court make specific findings that a parent was able to pay some amount greater than the amount the parent, in fact, paid during the relevant time period. *See In re Garner*, 75 N.C. App. 137, 141, 330 S.E.2d 33, 36 (1985); *In re Manus*, 82 N.C. App. 340, 349-50, 346 S.E.2d 289, 295 (1986). In the case at bar, the trial court satisfied this requirement.

The parents failed to pay any portion of the cost of care for the child during the relevant six-month period. Although the "reasonable portion" standard is often a difficult standard to apply, *see Clark*, 303 N.C. at 604, 281 S.E.2d at 55, we have no difficulty concluding that zero is not a reasonable portion under the circumstances here. We hold that the trial court did not err in concluding that the parents were able to pay some amount above zero. This assignment of error is overruled. Furthermore, because we hold that termination was proper pursuant to subsection (4) of G.S. § 7A-289.32, it is unnecessary to address respondents' assignments of error pertaining to the other two subsections of the statute on which the trial court based its decision. *See In re Davis*, 116 N.C. App. 409, 413, 448 S.E.2d 303, 305, *disc. review denied*, 338 N.C. 516, 452 S.E.2d 808 (1994).

II.

[2] Respondents next argue the trial court erred in permitting questioning and testimony concerning the religious beliefs and practices of the parents. The parents in this case belong to a religion referred to during the proceedings as "WICCA" or "Wicken" (hereinafter Wicken). Other than a few brief remarks by three witnesses, the only inquiry into the religion of the parents occurred when the trial court permitted the guardian ad litem to question the father about his religious beliefs.

This line of questioning comprises approximately six pages of the transcript. The father was asked whether his wife is a "witch" and what this term means. The father responded that his wife is a witch, and that this term is used in the Wicken religion "to describe someone who believes in the faith." The father was then asked whether his wife can cast a spell, and he responded that he did not know. He was also asked whether he was aware that his wife had once stated that the reason one of her children slept well on a particular night while in the hospital was because she had cast a spell. The father stated he was not aware of this incident.

Following some additional questioning about casting spells, the guardian ad litem asked the father about spells within the context of the father's ability to find employment:

Q: Well, do you pray that you'll get a job?

MR. BAIN: Objection.

THE COURT: Overruled.

A: Yes, I do pray that I can get a job.

Q: Is that what you're relying on to help you get a job?

A: No, I don't rely on it. Many [sic] of this is very sympathetic in nature, if you look at it from a psychological standpoint. The fact of praying, in and of itself, is what helps bolster the human spirit. The way that I prefer to pray, the way that I think deep down will ultimately help me is probably unorthodox in this part of the country but is the way that I still choose to do so.

We are faced here with the specific tension that occasionally arises between, on the one hand, the objective of determining the best interests of the child, and, on the other hand, the desire to avoid

infringing upon the religious freedom of the parties involved. We addressed this same issue in depth in *Petersen v. Rogers*, 111 N.C. App. 712, 433 S.E.2d 770 (1993), *rev'd on other grounds*, 337 N.C. 397, 495 S.E.2d 901 (1994).

Petersen involved a child custody proceeding to determine whether custody of Paul, the minor child in question, would be transferred to Paul's biological parents, who had consented to Paul's adoption but had subsequently revoked their consent, or whether custody would remain with the Petersens, the parents who had adopted Paul. During the proceedings the court admitted testimony about the Petersens' involvement with a religious organization known as "The Way." The court allowed two witnesses to testify about The Way, which testimony comprised 147 pages of the transcript and involved an "in-depth examination of the general beliefs, tenets, and practices of members of The Way." *Id.* at 715, 433 S.E.2d at 773.

In its order, the trial court made findings of fact regarding the religious practices of the Petersens and the biological parents. *See id.* at 716, 433 S.E.2d at 773. The trial court also made findings regarding the home life of the Petersens and of the biological parents, and concluded that both the Petersens and the biological parents were fit and proper persons to have custody of Paul. *See id.* However, the court concluded that Paul's best interests required that he live with his biological parents, with no visitation from the Petersens unless approved by the biological parents. *See id.* at 717, 433 S.E.2d at 774.

On appeal, this Court reversed and remanded, holding that the religious inquiry at trial had violated the First Amendment rights of the Petersens. *See id.* at 725, 433 S.E.2d at 778. The Court set forth the general rule that "a limited inquiry into the religious practices of the parties is permissible if such practices may adversely affect the physical or mental health or safety of the child, and if the inquiry is limited to the impact such practices have upon the child." *Id.* at 719, 433 S.E.2d at 775 (citations omitted). The Court placed special emphasis on the difference between inquiry into the *practices* of a religion, and inquiry into the *beliefs* of a religion, and concluded that "the limited inquiry may touch upon the *religious practices of the parties* as they relate to the health and safety of the child, but such inquiry may not focus on the *general beliefs and doctrines* of a religion." *Id.* (citation omitted) (emphasis added). We are guided by the reasoning in *Petersen* in holding that there occurred no violation of the respondents' First Amendment rights in the present case.

A.

The most significant factor that distinguishes *Petersen* from the present case is the extent of the religious inquiry. The Court in *Petersen* treated the extent of the religious inquiry, including 147 pages of testimony from two witnesses called solely to testify about The Way, as a determinative factor in its analysis. The Court recognized that "[a]lthough the trial judge has wide discretion and control in child custody cases, we believe this discretion could be abused by a religious inquiry *so extensive* that it would violate [the First Amendment rights of the parties involved] and thus become an inquisition." *Id.* at 717, 433 S.E.2d at 774 (emphasis added). The Court found that precisely such a religious "inquisition" had occurred, and for this reason reversed and remanded the case to the trial court "for proceedings free from unwarranted religious inquisition into the beliefs of the parties." *Id.* at 725, 433 S.E.2d at 778.

In the case at bar, the religious inquiry consisted of a few brief remarks by three witnesses, and six pages of inquiry during the examination of the father. This inquiry can hardly be described as an "inquisition." Furthermore, it would be unrealistic to expect a trial court to be able to make a determination about whether the religious practices of the parents "may adversely affect the physical or mental health or safety of the child," *id.* at 719, 433 S.E.2d at 775, without first allowing some brief inquiry into the religious practices of the parents. In other words, a trial court must have some preliminary information regarding the religious practices of the parents in order to determine whether the "limited inquiry" permitted by *Petersen* is appropriate. The inquiry that transpired in this case was appropriately brief, and a far cry from the type of "inquisition" prohibited by *Petersen*.

B.

In addition to the extent of the inquiry, the nature of the inquiry played a significant role in the Court's analysis in *Petersen*, and distinguishes that case from the case at bar. The *Petersen* Court stated that a limited inquiry "may touch upon the religious practices of the parties as they relate to the health and safety of the child, but such inquiry may not focus on the general beliefs and doctrines of a religion." *Id.* at 719, 433 S.E.2d at 775. In *Petersen*, the expert witness was asked general questions about the tenets of The Way, such as whether The Way is a Christian religion and whether members of The Way believe that Jesus Christ was the Son of God. *See id.* at 720-21, 433 S.E.2d at 775-76.

By contrast, the questions put to the father in the present case address the ways in which the parents' religious beliefs might impact their behavior in specific ways. For example, the father was asked whether he was aware that the mother believes that casting spells can affect the behavior of their children. He was also asked whether he believes that a spell can impact his ability to get a job. We believe these sorts of questions are the kinds of questions that are permissible under *Petersen*.

Furthermore, these questions appear especially appropriate within the context of this case. One of the recurring themes during the proceedings was the notion that the parents have such an unusually strong need to portray themselves in a positive light that they distort reality as a result. For example, Dr. Robert Aiello testified that the mother's score on the Minnesota Multiphasic Personality Inventory revealed a "remarkable" need to present herself "in the most favorable light possible in all circumstances," resulting in the inability to accept responsibility for how her behavior contributes to her family problems.

The trial court stated at the conclusion of the proceedings that the parents "have continued to demonstrate, really, an apparent misunderstanding of their responsibility in terms of child care," and that "both parents seem to have an altered sense of reality" in that "[t]hey've failed to recognize dangers to the children inherent in their personal living habits and hygiene." While respondents argue that the trial court's use of the phrase "altered sense of reality" reveals an improper consideration of the religion of the parents, we feel that, when placed in context, this phrase merely emphasizes the degree to which the parents are unwilling to accept responsibility for their actions.

The trial court found as fact that "[t]he parents have failed to accept responsibility for their contributions to the problems that resulted in the removal of the child from the home and the child's continued placement in care." Within this context, it seems quite appropriate that the father was questioned about whether he and his wife rely on spells to solve practical problems such as putting a child to sleep or finding employment.

C.

The Court in *Petersen* found especially troubling the fact that testimony was admitted regarding The Way from two witnesses, one a

qualified expert and the other a Way minister. The Court stated that "[a]lthough [the expert witness] expressed concern over some of the practices of The Way, she testified that she had never met the Petersens or Paul. Therefore, none of her testimony could have related to the present or possible future effect of the Petersens' religious practices on Paul." *Id.* at 722, 433 S.E.2d at 776-77. Thus, whether religious inquiry is appropriate depends, in part, on the person at whom such inquiry is directed, and that person's relationship to the family in question.

The limited religious inquiry in the present case was primarily directed at the father regarding the parents' religious practices. Such inquiry is inherently relevant to the present or possible future impact of the parents' religious practices on the child. We perceive a significant difference between, on the one hand, questioning a father about the religious practices of the family, and, on the other hand, questioning an expert witness and a minister about the general tenets of the religion.

D.

It was also significant in *Petersen* that the trial court made findings of fact regarding the religious practices of the parties. *See id.* at 716, 433 S.E.2d at 773. For example, the trial court found that the Petersens were members of The Way, describing The Way as a "Pentecostal, biblically-oriented Christian sect which encourages its members to lead an affirmative lifestyle and . . . to reflect religiosity by overtly speaking in tongues." *Id.* These factual findings indicated that the trial court had been influenced by the religious practices of the parties.

In the case at bar, the trial court made no findings regarding the religious practices of the parties. In a bench trial, it is presumed that the judge disregarded any incompetent evidence. *In re Paul*, 84 N.C. App. 491, 497, 353 S.E.2d 254, 258, *disc. cert. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied*, 484 U.S. 1004, 98 L. Ed. 2d 646 (1988). Therefore, even assuming *arguendo* that the trial court erred in allowing any religious inquiry, such error was not prejudicial because there is no indication that the testimony impacted the trial court's decision.

Furthermore, in *Petersen* there was little evidence weighing in favor of placing custody with the biological parents other than the religious considerations. Therefore, it appeared likely that the trial

court's determination had been influenced by these considerations. In the present case, there was an overwhelming amount of evidence unrelated to the religion of the parents to support the trial court's termination of parental rights. Thus, any error in allowing the religious inquiry was not prejudicial.

This assignment of error is overruled.

III.

[3] Respondents next assign as error the factual finding of the trial court that "[n]otwithstanding the fact that the respondent parents had little financial resources available to them, the respondent mother gave birth to six children in seven years." Respondents argue that procreation and parenthood are matters protected by the State and Federal Constitutions, and that the trial court's consideration of these matters violated the constitutional rights of the parents. After careful consideration, we believe the trial court's consideration of the number of children born to the mother was an appropriate consideration of one relevant fact among many related to the future well-being of the child.

Respondents correctly assert that "[t]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education." *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 12, 431 S.E.2d 828, 833, *dismissal allowed, disc. review denied*, 335 N.C. 175, 436 S.E.2d 379 (1993), *cert. denied sub nom. Winfield v. Kaplan*, 512 U.S. 1253, 129 L. Ed. 2d 894 (1994) (citing *United States v. Orito*, 413 U.S. 139, 142, 37 L. Ed. 2d 513, 517 (1973)). However, within the context of a termination of parental rights proceeding, there are factors that may properly be weighed against a parent that, in other circumstances, might be constitutionally protected from consideration. For example, this Court has upheld termination of parental rights where one of the factors considered by the trial court was the mother's marriage to a boyfriend who had previously sexually abused the child in question. *See In re Parker*, 90 N.C. App. 423, 368 S.E.2d 879 (1988). Such consideration is appropriate because, where a mother chooses to marry a man who has previously abused her child, there is obviously an increased likelihood that the child will suffer further harm if parental rights are not terminated. Similarly, where parents continue to have additional children despite significant financial difficulties, and despite a chronic pattern of neglecting their children, there is an

increased likelihood that a child in their care will continue to be neglected as a result of the diminishing attention and resources the child will receive.

In the present case, the factual finding at issue appeared within a long list of findings that the trial court considered in reaching its conclusion. For example, the factual finding that appears immediately after the finding in question states:

> The parents have had three children since the removal of the subject child from their home on September 7, 1996, two of which reside with them. Since the birth of these latter two children, the parents have been the subject of at least four investigations by the Randolph County Department of Social Services; at least two of the investigations have been substantiated. Substantiation was made in connection with the parents' fifth child . . . due to among other things, medical neglect and unsanitary and unsuitable living conditions.

Such findings, while arguably infringing on the autonomy of the parents to some degree, are appropriate considerations within this context since they bear directly on the likelihood of future neglect of the child. Therefore, we hold that the trial court's consideration of the finding in question does not amount to a violation of respondents' constitutional rights. This assignment of error is overruled.

IV.

[4] Respondents next argue the trial court erred in "reciting and adopting as its findings" the findings of fact from prior review hearings involving placement of the child. Respondents correctly concede that "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). We further agree with respondents that *Ballard* requires the trial court in such cases to make an "independent determination" as to whether grounds exist for termination at the time of the hearing. *Id.* at 716, 319 S.E.2d at 223. However, we disagree with respondents' assertion that the trial court in the instant case failed to make an independent determination.

The trial court provided fifty detailed findings of fact, comprising almost twenty pages in the record. Five of these findings reiterated factual findings from prior review hearings. The trial court properly considered both evidence of neglect by the parents prior to losing

custody of the child (including the prior adjudication of neglect) as well as evidence of conditions since that time showing a likelihood of neglect in the future. The trial court made a determination, independent of the prior adjudication of neglect, that termination of parental rights was in the best interests of the child at the time of the hearing. This assignment of error is overruled.

V.

[5] Respondents next argue the trial court erred in admitting in evidence various hearsay statements, as well as medical documents which allegedly were not properly authenticated. The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. *See Best v. Best*, 81 N.C. App. 337, 341, 344 S.E.2d 363, 366 (1986). "Rather, the appellant must also show that the incompetent evidence caused some prejudice." *Id.* In the context of a bench trial, an appellant "must show that the court relied on the incompetent evidence in making its findings." *Id.* at 342, 344 S.E.2d at 366 (citation omitted). "Where there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence." *Id.* (citation omitted).

In the present case, although respondents offer some brief suggestions as to how admission of the evidence in question, in theory, could have impacted the trial court's judgment, respondents offer nothing specific to rebut the presumption that the trial court disregarded any incompetent evidence that may have been admitted. Thus, even assuming *arguendo* that the evidence was improperly admitted, respondents have failed to demonstrate prejudicial error. This assignment of error is overruled.

VI.

[6] Finally, respondents assign as error the trial court's determination that it would be in the best interests of the child to terminate respondents' parental rights. Even where a trial court finds that one or more grounds exist which warrant termination of parental rights, termination of parental rights is only required where the trial court further concludes that it would be in the best interests of the child to do so. G.S. § 7A-289.31.

In the instant case, the picture painted by the transcript and the record portrays parents who have failed over an extended period of time to provide a healthy and safe environment for their children, and

who have failed to show any significant improvement in their parental abilities since the removal of the child in question by petitioner. There was overwhelming evidence presented at the hearing that the parents have not accepted responsibility for the ways in which their own actions have caused their family problems. The chronic nature of such behavior creates a significant likelihood of future neglect. We recite just a few of the factual findings that support this conclusion:

(1) The child was removed from the care of the respondent parents partially for the reason of the unsanitary condition in which the parents maintained their home to include dirty and cluttered conditions with clothes, dirty dishes, bags of garbage, and particles of food on the tables and floors, and the presence of roaches and flies. After September of 1995, the parents continued to allow their home to remain in an unsanitary, unhygienic, and unsuitable condition.

(2) [S]ince January, 1997 [the parents] have not visited with the child at all, have not sent the child any letters, pictures, birthday cards . . . . The parents have spoken to the child by telephone on only one occasion since April of 1996. At all times relative [sic] hereto the parents have had the address and telephone number of the child.

(3) Since the birth of [the parents' fifth child], born January 17, 1997, [this fifth child] has been hospitalized three times for medical problems associated with asthma or reactive airway disease. The parents have failed to comply with the recommendations of Dr. Mary Johnson regarding proper treatment of and a proper home environment for [this child]. Specifically, the parents continue to this date to smoke and to expose the child to cigarette smoke despite being instructed on numerous occasions not to smoke around the child . . . . As recently as November, 1998, the respondent parents smoked marijuana in the presence of their children and the parents have a pending charge of simple possession of marijuana in Randolph County, North Carolina. The respondent parents also failed to keep an appointment for the child to be evaluated at Baptist Hospital for a heart murmur.

(4) Dr. Robert Aiello who performed the psychological evaluation of the respondent mother testified that in the absence of critical self-examination and intensive counseling as recom-

mended by him, future children in the custody of the respondent mother would be at risk.

(5) Both parents have failed to obtain psychological counseling as recommended and ordered. . . . The respondent mother has neither sought nor attended counseling since [March 1997].

Based on the foregoing findings, we cannot say that the trial court erred in concluding that it was in the child's best interests to terminate respondents' parental rights. Therefore, this assignment of error is overruled.

In conclusion, we find no prejudicial error in the proceeding to terminate respondents' parental rights. Furthermore, we hold that the trial court's findings of fact were supported by the evidence, and that the trial court's conclusions were supported by the findings of fact. The order entered by the trial court is affirmed.

Affirmed.

Judges GREENE and EDMUNDS concur.

CAROL S. WALL, PLAINTIFF v. CARROLL C. WALL, III, DEFENDANT

No. COA99-732

(Filed 17 October 2000)

1. Divorce— equitable distribution—marital home—value

There was no prejudicial error in an equitable distribution proceeding in the trial court's failure to set out its calculations regarding the net value of the marital dwelling where the net value could be made certain from the facts found by the court.

2. Divorce— equitable distribution—marital home—order to sell

The trial court did not abuse its discretion in an equitable distribution proceeding by ordering that the marital home be sold and the proceeds divided between the parties where the court classified and valued the residence before selling it.

3. Divorce— equitable distribution—pre-1997 action—value of profit-sharing plan—stipulation

The trial court did not err in an equitable distribution action in finding the value of a profit-sharing plan as of the date of separation, but erred by dividing the post-separation increases between the parties. Defendant is bound by a stipulation regarding the value of the plan, and amendments adding the concept of divisible property to the Equitable Distribution Act are not applicable because this claim was asserted before 1 October 1997.

4. Divorce— equitable distribution—evidence not considered—defendant's health

The trial court in an equitable distribution proceeding should have made findings to indicate that it had considered defendant's testimony about his health situation, even if the court rejected the testimony or gave it little weight. Once evidence as to the parties' health or other matters is presented, the trial court must consider the evidence and make sufficient findings.

5. Divorce— equitable distribution—tax consequences—not considered

No error was found in an equitable distribution action from the trial court's failure to consider the tax consequences of its equitable distribution order where defendant did not demonstrate that evidence of tax consequences was brought to the court's attention before the close of evidence.

6. Divorce— equitable distribution—pre-1997—debts paid after separation

The trial court did not abuse its discretion in a pre-1997 equitable distribution action in its treatment of debts paid by defendant after separation. Prior to the 1997 amendments, a trial court had a number of options in dealing with payments on a debt after the date of separation; here, the court chose to treat the debt payments as a distributional factor but gave little weight to that factor.

7. Divorce— equitable distribution—delay between close of evidence and entry of order—19 months

New evidence and a new equitable distribution order were required where there was a delay of 19 months from the date of the trial to the entry of judgment. While there is inevitably some passage of time between the close of the evidence in an equitable

distribution case and the entry of judgment, particularly in a lengthy, complicated matter, there was more than a de minimis delay in this case.

Appeal by defendant from judgment entered 26 June 1998 by Judge William N. Neely in Randolph County District Court. Heard in the Court of Appeals 14 August 2000.

Michelle D. Reingold for defendant appellant.

No brief filed for plaintiff.

HORTON, Judge.

Carol S. Wall (plaintiff) and Carroll C. Wall, III (defendant), were married on 19 December 1971. They separated on 5 May 1988 and were divorced by judgment entered 31 October 1994. Plaintiff's claim for equitable distribution was heard during September, October, and November 1996. The trial court took the matter under advisement and entered a written order on 26 June 1998, purporting to be "nunc pro tunc" 6 January 1998. The trial court concluded that an equal division would effect an equitable distribution of the marital property and debt, and defendant appealed.

Defendant contends that (I) the trial court erred in failing to properly value and distribute the marital home; (II) the trial court erred in failing to find a date-of-separation net value for the husband's profit-sharing plan, and also erred in dividing the post-separation appreciation of the plan assets. Defendant further contends (III) that the trial court erred in failing to consider his health condition as a distributional factor, (IV) failed to consider the tax consequences of the division to the parties, and (V) did not give him credit for payments on marital debt. Finally, (VI) defendant argues that the 19-month delay in entry of the equitable distribution order deprived him of due process.

I. The Marital Residence

[1] In North Carolina equitable distribution actions, trial judges are required "to first determine what constitutes marital property, to then determine the net market value of that property, and finally, to distribute it based on the equitable goals of the statute and the specific statutory factors." *Little v. Little*, 74 N.C. App. 12, 16, 327 S.E.2d 283, 287 (1985). The trial court is permitted to distribute only marital property in an equitable distribution proceeding. N.C. Gen. Stat. § 50-20(c)

(1999); *Truesdale v. Truesdale*, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988). The net market value of the marital property is calculated as of the date of the parties' separation. N.C. Gen. Stat. § 50-20(c); N.C. Gen. Stat. § 50-21(b) (1999). *See also Alexander v. Alexander*, 68 N.C. App. 548, 551, 315 S.E.2d 772, 775 (1984) (defining net value as "market value, if any, less the amount of any encumbrance serving to offset or reduce market value").

Here, the defendant argues that the trial court did not find the net fair market value of the marital home on the date of separation, as it was required to do. There was considerable disagreement between the plaintiff and defendant as to valuation, classification, and distribution of various items of property and debts. In an effort to define and narrow the issues, the parties entered into a detailed pretrial order on 14 May 1996. Based on their extensive pretrial discovery, the parties created fifteen schedules (identified as A through O) on which they listed all property, both marital and separate, and attempted to classify and value the property and debts. The schedules were attached to the pretrial order and incorporated therein by reference. The pretrial order was signed by the court, the parties, and their counsel on 14 May 1996.

As to the marital home, identified as the Country Club Drive residence, the parties were unable to agree as to either its net value or its distribution. On Schedule D of the pretrial order, plaintiff contended that the residence had a net value of $43,106.34 and defendant calculated the net value at $57,106.35. Both parties requested that they be awarded the marital home in the distribution of property. The parties also stipulated in the pretrial order that there were encumbrances on the marital residence on the date of separation, consisting of a mortgage to BB&T of $132,136.71 and an equity line of $10,756.95, also to BB&T. Subsequent to the trial of this case, the parties entered into a written stipulation on 24 November 1997 that the "current gross fair market value of the Country Club Drive residence is $221,250.00."

Based on these stipulations and evidence presented at trial, the trial court found that the residence was valued at $186,000.00 on the date of separation and $221,250.00 on the date of trial. The trial court provided for disposition of the marital home by sale, with the proceeds to be used, in part, to pay off the costs of sale and the encumbrances on the home. The court also found that the mortgage on the date of separation was $132,136.71 and the equity line debt on the date of separation was $17,753.20.

Defendant does not question the accuracy of the trial court's findings, but argues that the trial court did not make an explicit finding about the net value of the marital home on 5 May 1988, the date of separation. However, the trial court found a gross fair market value on the date of separation of $186,000.00, subject to encumbrances of $132,136.71 and $17,753.20. Subtracting the encumbrances from the gross value of the home leaves a net fair market value on the date of separation of $36,110.09. While it would have been better practice for the trial court to make a specific finding as to the net fair market value of the dwelling house on the date of separation, such value can be easily calculated from its findings. *See Shoe Store Co. v. Wiseman*, 174 N.C. 716, 717, 94 S.E. 452, 453 (1917) (applying the maxim " '[t]hat is certain which can be made certain' " to ascertain the amount due on notes in a bankruptcy proceeding). Though the net fair market value of the Walls' residence was not explicitly set out, it can be made certain from the facts found by the trial court. We hold, therefore, there is no prejudicial error in this case in the failure of the trial court to set out its calculations with regard to the net value of the marital dwelling.

[2] Nor do we find error in the trial court's disposition of the dwelling house. The defendant argues that the trial court must distribute the home to one of the parties, rather than ordering it sold. We disagree.

We first note that the trial court is vested with wide discretion in family law cases, including equitable distribution cases. *Beightol v. Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988) (citation omitted). Thus, a trial court's ruling "will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

While we have never expressly discussed the trial court's power to order the sale of marital assets as part of an equitable distribution, our prior decisions have implicitly recognized the power of the trial court to do so. *See, e.g., Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985) (trial court did not err in forbidding either party to receive a commission or broker's fee on the sale of the marital home after ordering the home sold); *Soares v. Soares*, 86 N.C. App. 369, 357 S.E.2d 418 (1987) (trial court erred in failing to value the marital home before ordering it sold); and *Thomas v. Thomas*, 102 N.C. App. 127, 401 S.E.2d 367 (1991) (citing *Soares* for same proposition). We

continue to stress the importance of following the steps of first classifying, then valuing and distributing marital property. Each step is a prerequisite to the performance of the next, and failure to follow the prescribed order will result in a fatally flawed trial court disposition. "[O]nly those assets and debts that are *classified* as marital property and *valued* are subject to *distribution* under the Equitable Distribution Act (Act) . . . ." *Grasty v. Grasty*, 125 N.C. App. 736, 740, 482 S.E.2d 752, 755, *disc. review denied*, 346 N.C. 278, 487 S.E.2d 545 (1997) (emphasis added). Here, there was no dispute over the classification of the marital home as marital property. Further, as we discussed above, the trial court properly valued the marital home prior to its distribution. Rather than distributing the home to one of the parties, the trial court ordered the parties to sell the property by 13 January 1998 and use the proceeds to pay off the costs of sale and the encumbrances on the home; any remaining funds from the sale were to be distributed to plaintiff-wife, with defendant-husband receiving a credit equal to one-half of these proceeds. The trial court classified and valued the Country Club Drive residence before distributing it, and we find no abuse of discretion in the trial court's order that the home be sold and proceeds divided between the parties.

II. The Pension Plan

[3] In *Becker v. Becker*, 88 N.C. App. 606, 607, 364 S.E.2d 175, 176 (1988), this Court adopted a very restrictive reading of the Equitable Distribution Act, and held that the marital estate was "frozen" on the date of separation. Thus, any gains on marital property after that date were not—by definition—marital property, even when the gains represented passive income such as interest on a bank account. *See* N.C. Gen. Stat. § 50-20(b) (definitions of marital and separate property). Since such increases were also not classifiable as separate property, the term "non-marital property" was formulated to describe these types of gains. *Chandler v. Chandler*, 108 N.C. App. 66, 68, 422 S.E.2d 587, 589 (1992). In response to the problem of accounting for post-separation increases in value during the distribution stage of equitable distribution, this Court decided to treat such increases as distributional factors, thereby accounting for their existence but stopping short of "thawing" the marital estate to allow additions after the date of separation. In *Truesdale*, we definitively stated that "[t]he post-separation appreciation of marital property is itself neither marital nor separate property. Such appreciation must instead be treated as a distributional factor under Section 50-20(c)(11a) or (12) . . . ." *Truesdale*, 89 N.C. App. at 448, 366 S.E.2d at 514. In *Mishler v.*

Mishler, 90 N.C. App. 72, 367 S.E.2d 385, *disc. review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988), we held that "where there is evidence of *active or passive appreciation* of the marital assets after that date [the date of separation], the court must consider such appreciation as a factor [in distributing the marital property] under G.S. 50-20(c)(11a) or (12), respectively." *Id.* at 77, 367 S.E.2d at 388 (emphasis added).

Further, we held that it was reversible error for a trial court to attempt to divide gains resulting from the increase in value of marital property, ruling that the trial court must instead consider the gains as a distributional factor, and then make a division which recognized that factor. *See Becker*, 88 N.C. App. at 607-08, 364 S.E.2d at 176-77. Fortunately, this restrictive reading of the Act was remedied by the passage of the 1997 amendments to the Act, which added the category of divisible property to deal with changes in marital property values after the date of separation. 1997 N.C. Sess. Laws ch. 302, §§ 1-3. Here, however, plaintiff asserted her claim for equitable distribution prior to 1 October 1997, so that the amendments adding the concept of "divisible property" to the Act are not applicable to this claim.

As to the defendant's pension plan, the parties stipulated in Schedule A of the pretrial order, item II-H, that the "[m]arital portion of defendant's profit sharing plan (includes post date of separation growth[])" had a net value of $245,791.53 on the date of separation, was in the possession of the defendant, and was to be distributed to the defendant. On Schedule M of the pretrial order, in an item numbered "10. III-H," the parties stipulated that the separate portion of defendant's profit-sharing plan was valued at $170,674.00 on the date of separation.

In its judgment, the trial court found that:

> 18. The marital portion of the defendant's profit-sharing plan (including post-date of separation growth) was $245,791.53 at the time of trial. Additional growth has occurred since trial. The new marital portion of this plan, including all growth on the funds in the account as of date of separation, should be calculated by accountant Robert Oates and such portion divided equally between the parties.

The court then decreed that:

8. The marital portion of the defendant's profit-sharing plan, including growth on the balance of the account as of the date of separation, shall be recalculated by Robert Oates. Plaintiff shall receive one-half of this amount plus an additional amount as indicated below.

9. Upon the sale of the Country Club Drive property, the proceeds shall be distributed in accordance with Finding of Fact 9.d. The plaintiff shall receive what would have been the defendant's half of the proceeds to apply toward the $112,813.21 in property required to equalize the division of the marital estate between the parties. The remainder of the $112,813.21 shall be transferred to the plaintiff from the defendant's profit-sharing plan following the sale of the Country Club Drive residence.

Defendant contends that the trial court erred in its treatment of the profit-sharing plan in at least two important respects: first, he contends that the trial court never carried out its mandate to value all property as of the date of separation, in that the value used by the trial court included post-separation gains on the marital portion of the profit-sharing plan. Second, defendant argues that any post-separation gains following the separation of the parties would not be subject to division by the trial court but would be treated as distributional factors in the distribution.

We agree that it would normally be error for the trial court to fail to value an item of marital property as of the date of separation, excluding gains or losses on the property since the date of separation. Here, however, the parties and their counsel stipulated to the value of the profit-sharing plan as of the date of separation. Although that value obviously included some gains on the plan assets after the date of separation, defendant is bound by his stipulation, and estopped to question the value used by the trial court.

Plaintiff and defendant engaged in years of discovery and negotiation, followed by the execution of a detailed, 38-page pretrial order. Such an order is designed to narrow the issues, save trial time and expense, and lead to a just result. The parties presented evidence in this case for some nine days, producing a transcript of 1,314 pages. During the entire proceeding, defendant did not question the accuracy of the stipulation with regard to the value of his profit-sharing plan on the date of separation, and the trial court properly relied on that agreement. Parties are not free to enter into stipulations for the purposes of trial, then abandon those agreements and chart a differ-

ent course when they sail into appellate waters. *Inman v. Inman*, 136 N.C. App. 707, 525 S.E.2d 820, *cert. denied*, 351 N.C. 641, 543 S.E.2d 870 (2000). In *Inman*, the parties signed a pretrial order with stipulations as to the classification of various items of property as marital property, and stipulated that the marital property be equally divided. *Id.* at 713, 525 S.E.2d at 824. The plaintiff later objected when items he believed to be his separate property were deemed marital by the court; he also disagreed with other facts which were the subject of pretrial stipulations. *Id.* We noted in *Inman* there was no evidence in the record showing any attempt to modify the terms of the pretrial order, nor was there any evidence showing that the stipulations were not voluntarily agreed upon. Consequently, plaintiff was bound by his stipulations. *Id.* at 716, 525 S.E.2d at 825. The same is true in the present case. The voluminous record does not show any involuntary actions by the parties regarding their stipulations. Absent such evidence, we will deem the parties bound by their stipulations and will not allow retroactive alterations of those stipulations. Therefore, based on the stipulation of the parties, the trial court did not err in finding that the date of separation net value of the profit-sharing plan was $245,791.53.

As to the division of the growth in the profit-sharing plan since the date of separation, however, we must agree with defendant's contention. Under our line of cases beginning with *Truesdale*, the trial court may not divide the post-separation increases between the parties. Therefore, insofar as the judgment of the trial court attempts to do so, it is erroneous and is reversed. On remand, the trial court will consider any increase in value of the husband's profit-sharing plan as a distributional factor in fashioning a new distribution order.

III. Defendant's Health As A Distributional Factor

[4] Defendant also contends that the trial court erred in failing to consider his health condition as a distributional factor. N.C. Gen. Stat. § 50-20(c)(3) provides that the court is to consider the "physical and mental health of both parties." Where evidence of a distributional factor such as a party's health is introduced, it is error for the trial court to fail to make findings of fact with respect to that factor. *Alexander*, 68 N.C. App. at 553, 315 S.E.2d at 776 (failure of trial court to establish physical health of the parties (among other things) in its findings of fact rendered the findings deficient). Once evidence as to the parties' health or other matters is presented, the trial court must consider the evidence and "make findings sufficient to address the

statutory factors and support the division ordered." *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988).

In the case before us, defendant testified at length during the nine-day trial about his health situation. He stated that he has chronic bronchitis, chronic sinusitis, ulcerated colitis (an inflammation of the colon), and back problems. He testified that these conditions forced him to miss work at times, and required hospitalization and continual doctor visits. Such testimony required that the trial court make appropriate findings of fact regarding the health of the defendant. Even if the trial court did not find the defendant's testimony to be credible, the court still should have made findings of fact to indicate that the court had considered the testimony, but rejected it or gave it little weight. On remand, the trial judge must consider the testimony defendant offered relative to the state of his health, and make written findings of fact based on the credible evidence.

IV. Tax Consequences

[5] Next, defendant argues that the trial court's failure to consider the tax consequences of its equitable distribution order was error. The trial court's finding of fact number 12(h) states "[t]he division ordered herein takes into account the tax consequences and tax issues raised by the parties, and equalizes the consequences to the extent possible. No tax consequences support a deviation from an equal distribution of property." Although defendant contends there are possible adverse tax consequences of the distribution which the trial court did not consider, he does not direct us to any evidence in the voluminous transcript which relates to the tax consequences he discusses in his brief. The trial court is not required to consider tax consequences unless the parties offer evidence about them. Defendant may not now ascribe error to the trial court's failure to make such findings without demonstrating that such evidence was brought to the trial court's attention before the close of evidence. Defendant has the burden of showing that the tax consequences of the distribution were not properly considered, and he has failed to carry that burden. Therefore, this assignment of error is overruled.

V. Defendant's Payments on Debts

[6] Defendant also contends that the trial court failed to consider payments he made on the marital home's mortgage debts and other debts. However, in its finding of fact number 12(n), the trial court found that

> [t]he husband has made post-date of separation payments toward marital debt, joint debt, taxes, expenses of the parties' children, including college expenses, and maintenance and upkeep of the marital property. These were largely a factor of life style. Credit for any such payments is inappropriate, except that he will get credit for principal payment on certain marital debt by receiving that debt in the distribution. The husband was the only party with ability to pay interest on the parties' debt. There were delays on husband's part in reaching a resolution of this matter, and he insisted that there be no settlement for several years.

We believe that "credit," in the context of the above finding of fact, means "dollar for dollar" credit, not just credit in a broader sense. Prior to enactment of the 1997 amendments, a trial court had a number of options in dealing with payments on debt after the date of separation. *Rawls v. Rawls*, 94 N.C. App. 670, 676, 381 S.E.2d 179, 182 (1989) (stating that the manner in which the court distributes or apportions marital debts is a matter committed to the discretion of the trial court). The court could give the payor an "adjustive credit" or make other appropriate adjustment, or could simply treat the payments as a distributive factor. *Truesdale*, 89 N.C. App. at 450, 366 S.E.2d at 516 (stating that trial court may award adjustive credits as part of an overall marital property distribution); *Hendricks v. Hendricks*, 96 N.C. App. 462, 386 S.E.2d 84 (1989), *cert. denied*, 326 N.C. 264, 389 S.E.2d 113 (1990) (properly crediting a spouse for post-separation payments made); *Haywood v. Haywood*, 106 N.C. App. 91, 415 S.E.2d 565 (1992), *rev'd in part and remanded on other grounds*, 333 N.C. 342, 425 S.E.2d 696 (1993) (post-separation payments treated as distributional factor). Here, the trial court obviously chose to treat the debt payments as a distributional factor, but gave little weight to that factor. We have previously held that the trial court could choose to give no weight to a distributional factor. *Smith v. Smith*, 111 N.C. App. 460, 510, 433 S.E.2d 196, 226, *disc. review denied*, 335 N.C. 177, 438 S.E.2d 202 (1993), *rev'd on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994) (trial court properly found a distributional factor to be present and chose not to give any weight to the factor). Consequently, we find here no abuse of the trial court's discretion in its treatment of debts paid by defendant after separation.

VI. Delay in the Entry of Judgment

[7] Defendant argues that his due process rights under both the United States Constitution and the North Carolina Constitution were

violated by the delay of 19 months from the date of trial to the entry of judgment in this matter. Defendant argues that an overall goal of our Equitable Distribution Act is "wind[ing] up the marriage and distribut[ing] the marital property fairly with as much certainty and finality as possible." *Lawing v. Lawing*, 81 N.C. App. 159, 183, 344 S.E.2d 100, 115 (1986).

We recognize there is inevitably some passage of time between the close of evidence in an equitable distribution case and the entry of judgment. That is particularly true in a lengthy, complicated matter such as the case before us. Competent counsel for the parties carried out extensive discovery, submitted numerous legal briefs and responded to the briefs filed by their opponents.

In many cases, a delay in the entry of judgment for 30 or 60 days following trial would not be prejudicial because there would be little or no change in the situation of the parties or the values assigned to the items of property. In this case, however, there was a nineteen-month delay between the date of trial and the date of disposition. This was more than a *de minimis* delay, and requires that the trial court enter a new distribution order on remand. Where there is such an extensive delay, even though it be due to factors beyond the trial court's control, we believe it would be consistent with the goals of the Equitable Distribution Act that the trial court allow the parties to offer additional evidence as to any substantial changes in their respective conditions or post-trial changes, if any, in the value of items of marital property.

Thus, on remand, the trial court must reconsider the evidence of the increase in value of the husband's profit-sharing plan following separation, treating such increase as a distributional factor, rather than attempting to divide the increase. Further, the trial court must reconsider the evidence offered by the husband on the state of his health, make appropriate findings about the evidence, and give it appropriate weight in making a new distribution decision. Finally, the trial court must give the parties an opportunity to offer evidence on the changes, if any, in value of the marital property since the trial of this matter. The trial court is then to make a new distribution order.

Except as set out herein, the remainder of the equitable distribution judgment from which this appeal was taken is affirmed.

Affirmed in part, reversed in part, and remanded.

Chief Judge EAGLES and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. LATON SHARMALE CUNNINGHAM

No. COA99-1016

(Filed 17 October 2000)

1. Appeal and Error— memorandum of additional authority— failure to comply with appellate rules

The Court of Appeals struck the State's memorandum of additional authority ex mero motu based on a failure to follow N.C. R. App. P. 28(g), because: (1) two of the five cases cited are not additional authorities since they were cited in the State's original brief; (2) the only material that can be included is the citation to a new case and the section of the brief to which that case is relevant; and (3) parenthetical summaries or quotes from the cases are not permissible.

2. Robbery— attempted armed—jury instruction—using terms "robbery" and "larceny" interchangeably

The trial court did not err by using the terms "robbery" and "larceny" interchangeably while instructing the jury on the fourth element of attempted armed robbery with a dangerous weapon, because: (1) N.C.G.S. § 14-87(a) only refers to attempting to take personal property from another and does not even mention robbery or larceny; and (2) robbery and larceny both involve the deprivation of property, and that deprivation is the primary focus on the fourth element.

3. Robbery— attempted armed—no merger with burglary conviction

Although defendant contends his conviction for attempted armed robbery must be arrested since it allegedly merged with his burglary conviction when robbery was submitted as the intended felony for purposes of burglary, the conviction is upheld because: (1) the attempted robbery offense was not committed until defendant took some further action apart from the alleged

burglary; and (2) the crimes did not merge since they were separate offenses.

4. Burglary and Unlawful Breaking or Entering— first-degree burglary—breaking—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of first-degree burglary based on insufficient evidence of a breaking, because: (1) defendant was one of several individuals involved in the alleged burglary, warranting a jury instruction on constructive breaking or acting in concert; (2) the trial court did not instruct the jury as to acting in concert but only on a theory of actual breaking; (3) defendant's confession did not include an admission that he broke down or otherwise opened any of the exterior or interior doors; and (4) a witness's testimony used to establish that defendant committed a breaking was based on the theory of a constructive breaking, and a defendant may not be convicted of burglary under a constructive breaking theory unless that instruction is given.

5. Homicide— felony murder—underlying felony vacated—new trial

Defendant must receive a new trial for the offense of felony murder with the limitation that only felonious breaking or entering may serve as the underlying felony on retrial, because the underlying felony of burglary was vacated and the underlying felony of the lesser-included offense of felonious breaking or entering was never submitted to the jury for consideration.

6. Homicide— felony murder—instructions on lesser-included offenses not required

The trial court was not required to submit second-degree murder or involuntary manslaughter for the jury's consideration when the evidence reveals that the victim was killed during the perpetration of a felony.

Appeal by defendant from judgments entered 7 April 1997 and 10 April 1997 by Judge Julius A. Rousseau, Jr. in Cabarrus County Superior Court. Heard in the Court of Appeals 16 August 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 31 March 1997 Session of Cabarrus County Superior Court on one count of first-degree murder of Loudeal Isom, one count of first-degree burglary, and one count of attempted armed robbery with a dangerous weapon. The State submitted two theories of first-degree murder to the jury: (1) premeditation and deliberation and (2) felony murder, with burglary as the underlying felony. (The State did not try to use the attempted robbery charge as an alternative underlying felony.) On 3 April 1997, the jury returned a verdict finding defendant guilty of first-degree murder under the felony murder rule, not guilty of first-degree murder based upon premeditation and deliberation, guilty of first-degree burglary, and guilty of attempted armed robbery with a dangerous weapon. Judgment was arrested on the burglary charge, and defendant was thereafter sentenced to life imprisonment plus a term of 77 to 102 months, to be served consecutively. Defendant appeals all three convictions.

[1] At the outset, we note that the State submitted a Memorandum of Additional Authority to this Court on 14 August 2000. We strike this memorandum *ex mero motu*, as it does not comply with our appellate rules of procedure. Rule 28(g) of the Appellate Rules states:

> *Additional* authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, *but shall simply state the issue to which the additional authority applies and provide a full citation of the authority.*

N.C.R. App. P. 28(g) (emphasis added). In its memorandum, the State has cited five cases. Of these, two are not even additional authorities, as they were cited in the State's original brief to this Court. Furthermore, after each citation, the State has included a lengthy parenthetical summary of the case's relevance on a particular issue. Indeed, after one citation, the State even included a lengthy quote from that case. The Appellate Rules are quite clear: the *only* material that can be included within a memorandum of additional authority is the citation to a *new* case (i.e., one not previously cited) and the section of its brief to which that case is relevant. Parenthetical summaries of, or quotes from, the cases are not permissible, as they tend to constitute arguments or rebuttals, which should be done in briefs

and oral arguments. Because the State has violated Rule 28(g), we strike its memorandum and will not consider it.

I. Defendant's Attempted Armed Robbery Conviction

[2] We begin with a consideration of defendant's conviction for attempted armed robbery with a dangerous weapon. Defendant alleges error in the court's jury instructions as to the fourth element of that offense, namely "that the defendant's use of the firearm was calculated and designed to bring about the robbery, and came so close to bringing it about that, in the ordinary and likely course of things, the robbery would have been completed had it not been stopped or thwarted." N.C.P.I., Crim. 217.25. The first time the trial judge instructed the jury, he basically quoted the above pattern jury instruction. The second time, the trial judge added the words "or larceny" after the term "robbery" such that his charge then read:

> I charge that if you find from the evidence beyond a reasonable doubt . . . that this was an act designed to bring about the robbery *or the larceny*, and which, in the ordinary course of things, would have resulted in the robbery *or larceny* had it not been stopped by reason of her being shot, . . . it would be your duty to return a verdict of guilty as charged to attempted armed robbery.

(3 Tr. at 82-83) (emphasis added). The trial judge then instructed the jury a third time by way of a handwritten summary of the elements. In this handwritten instruction, the trial judge instructed the jury largely as he had the first time, omitting any reference to larceny. Defendant claims the trial court's second instruction was error because it allowed defendant to be convicted of attempted robbery based upon a jury finding of only attempted larceny. We disagree.

Our courts have previously pointed out the special relationship between robbery and larceny. In particular, both offenses involve an unlawful taking of another's personal property. *State v. White*, 322 N.C. 506, 516, 369 S.E.2d 813, 818 (1988). In fact, the armed robbery statute involved here, section 14-87, does not even mention "robbery" or "larceny"; it only refers to "attempt[ing] to take personal property from another." N.C. Gen. Stat. § 14-87(a) (1999). Thus, the focus of the fourth element of attempted armed robbery is not on whether defendant's overt act was designed to carry out a robbery or a larceny specifically, but whether it was designed to deprive a person of his or her property in general. *Cf. State v. Irwin*, 304 N.C. 93, 99, 282 S.E.2d 439, 444 (1981) ("An attempted robbery occurs when a person with the requisite intent does some overt act *calculated to unlawfully deprive*

another of personal property by endangering or threatening his life with a firearm.") (emphasis added). Because robbery and larceny both involve the deprivation of property and that deprivation is the primary focus of the fourth element of attempted armed robbery, the trial judge did not err by using the terms "robbery" and "larceny" interchangeably.

[3] Defendant also contends that judgment on his attempted armed robbery conviction must be arrested because it merged with his felony murder conviction pursuant to *State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981). In *Rinck*, the defendant was prosecuted for felony murder with the underlying felony being burglary. *Id.* at 566, 280 S.E.2d at 923. Furthermore, robbery was submitted as the intended felony for purposes of the burglary offense. *Id.* at 567, 280 S.E.2d at 924. The jury was thus instructed on felony murder, burglary, and robbery. *Id.* The defendant, however, claimed the jury should have been instructed on certain lesser-included offenses as well. *Id.* at 566, 280 S.E.2d at 923. Our Supreme Court disagreed, reasoning as follows:

> [T]he instructions on both burglary and armed robbery were submitted to the jury as part of the murder charge. Under such circumstances, *the underlying felonies became part of the first-degree murder charge, prohibiting a further prosecution of the defendant for the underlying felonies. Defendant McMurry could not have been lawfully convicted of robbery upon his indictment for first-degree murder.* The court was therefore not required to instruct the jury as to the lesser included offenses of robbery.

Id. at 567, 280 S.E.2d at 924 (emphasis added) (citation omitted). Defendant maintains that the above language controls in this case. Specifically, because robbery was also submitted here as the intended felony for purposes of burglary, according to defendant, his conviction for attempted robbery must necessarily merge with his felony murder conviction. We conclude that his reliance upon *Rinck* is misplaced.

First and foremost, the issue before the *Rinck* Court involved instructing on lesser-included offenses, not the merger doctrine. Furthermore, the defendant in *Rinck* was not even indicted for any offenses other than felony murder. Accordingly, any statement from *Rinck* with respect to the merging of separate offenses amounts to pure *dicta*.

In reality, defendant has mischaracterized the issue. He speaks of the attempted robbery offense merging into the felony murder conviction. Technically this is not correct; it is the underlying *substantive felony* (i.e., burglary) that merges into felony murder because that felony becomes "[i]n this sense" a lesser-included offense of felony murder. *State v. Thompson*, 280 N.C. 202, 215-16, 185 S.E.2d 666, 675 (1972). Defendant's argument more properly deals with whether the *intended felony* merges with the *substantive felony*. Stated more precisely, the issue here is whether defendant's armed robbery conviction merges with his burglary conviction because robbery was submitted as the intended felony for purposes of burglary.

In *State v. Brady*, 299 N.C. 547, 264 S.E.2d 66 (1980), the defendant was convicted both of burglary with the intent to commit rape and of rape. Our Supreme Court upheld the convictions for both, reasoning:

> The offense of burglary is completed by the breaking and entering of the occupied dwelling of another, in the nighttime, with the intent to commit the designated felony therein. The crime has been committed even though, after entering the house, the accused abandons his intent to commit the designated felony. Consequently, the felonious intent required as an element of burglary cannot be equated with the commission of the underlying felony. If a burglar after breaking and entering proceeds to commit the underlying felony inside the dwelling, he can be convicted of both crimes.

Id. at 564, 264 S.E.2d at 75 (citations omitted); *see also* State v. Dammons, 293 N.C. 263, 275-76, 237 S.E.2d 834, 842-43 (1977) (upholding convictions for both kidnapping with intent to assault and felonious assault). Thus, the attempted robbery offense here was not committed until defendant took some further action apart from the alleged burglary. Because the crimes of attempted armed robbery and burglary were thus separate offenses, the former did not merge into the latter. We therefore uphold defendant's conviction for attempted armed robbery.

II. Defendant's Burglary Conviction

[4] Next we consider defendant's conviction for first-degree burglary. Defendant argues that there was insufficient evidence as to this charge. "In ruling upon defendant['s] motion to dismiss on the

grounds of insufficient evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all inferences in the State's favor." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981). To withstand this motion, the State must have presented substantial evidence of defendant's guilt as to each element of the offense charged. *Id.* The elements of first-degree burglary are five-fold: (1) breaking and entering (2) at night (3) into the dwelling of another (4) that is occupied at that time (5) with the intent to commit a felony therein. *State v. Simpson*, 303 N.C. 439, 449, 279 S.E.2d 542, 548 (1981). We conclude there was insufficient evidence of a breaking here and therefore vacate his conviction with respect to first-degree burglary.

A breaking is defined as any act of force, however slight, " 'employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed.' " *State v. Wilson*, 289 N.C. 531, 539, 223 S.E.2d 311, 316 (1976) (quoting 13 Am. Jur. 2d *Burglary* § 8 (1964)). The place of ingress may be an exterior door or an interior door. *State v. Freeman*, 313 N.C. 539, 549, 330 S.E.2d 465, 474 (1985). Generally speaking, the breaking may be actual or constructive. *State v. Helton*, 79 N.C. App. 566, 568, 339 S.E.2d 814, 816 (1986). A constructive breaking is defined as one in which "the opening is made by a person other than the defendant, if that person is acting at the direction of, or in concert with, the defendant." *Id.* Here, the evidence showed that defendant was one of several individuals involved in the alleged burglary, thereby warranting a jury instruction on constructive breaking or acting in concert. *See State v. Mitchell*, 24 N.C. App. 484, 486, 211 S.E.2d 645, 647 (1975) ("If the defendant is present with another and with a common purpose does some act which forms part of the offense charged, the judge must explain and apply the law of 'acting in concert.' ")

However, here, the trial judge did not instruct the jury as to acting in concert; he only instructed them under a theory of actual breaking. When no such instruction is submitted to the jury, a defendant may not be convicted under a theory of constructive breaking. *Helton*, 79 N.C. App. at 568, 339 S.E.2d at 816. Instead, the State is required to prove that the defendant personally committed the breaking. *Id.*; *see also State v. McCoy*, 79 N.C. App. 273, 274, 339 S.E.2d 419, 420 (1986) ("The court failed to instruct on acting in concert. Accordingly, defendant's conviction may be upheld only if the evidence supports a finding that he personally committed each element of the offense."). Even so, the State still contends that the evidence,

when viewed in the light most favorable to the State, was sufficient to show defendant personally broke into one of the exterior or interior doors of the house. We disagree.

The only evidence with regard to the alleged burglary came from two sources: (1) defendant's own confession, as read into evidence by Officer Vann Shaw, Jr., and (2) the testimony of Sherry Atwell, the owner of the house and daughter of the victim in this case. Defendant's confession read as follows:

> We walked up behind the house beside the graveyard and came up behind the house. We stood at the door and somebody turned the doorknob, but I don't remember who it was. Lawrence kicked the door twice, and it opened up. Everybody went in and I was the third or fourth one in the house. . . .
>
> I stood at the back of the house with the shotgun. I saw the bed was broke. I heard the door knob turn on the bathroom door. I didn't know who was in there or if they had a gun. I don't remember anybody saying anything. I was saying, "Get down. Get down." I was motioning with the gun when I was saying this. The second time I said that, the gun went off. That's when I heard the gun go off. That's when I saw the lady fall to the floor.
>
> Lawrence was standing beside me, next to the back door. Lawrence had opened the closet door and was looking for the safe.

(1 Tr. at 163.) This confession nowhere includes an admission by defendant that he broke down or otherwise opened any of the exterior or interior doors. Nonetheless, the State argues, because defendant was the individual carrying the shotgun, this confession establishes that defendant was the "strong man" of the operation. As such, the State contends the jury could have reasonably concluded that he was the one who broke down the outside door, notwithstanding the fact that his confession stated otherwise. We reject this argument. The State's theory asks us to adopt portions of defendant's confession but reject other parts and substitute inferences. We cannot do this in the absence of any evidence tending to support the inference that defendant was the one who knocked down the door.

The State also maintains that the testimony of Sherry Atwell established defendant committed a breaking. Ms. Atwell testified that she was hiding in her bedroom at the time of the alleged burglary but still heard the events transpire. Specifically, Ms. Atwell testified:

Q: And then what happened, ma'am?

A: I heard in my mother's room I heard them say, I just heard one voice, he said, "Open the door. Where's the safe?"

Q: And you heard that voice earlier in this series of events?

A: Yes.

Q: And what had you heard that same voice say earlier?

A: "Where's the safe?"

Q: So it was the same voice both times?

A: Yes.

. . . .

Q: And then you heard that person say what about the door?

A: "Open the door. Where's the safe?" Then I heard a sound. Sounded like a shot.

Q: . . . What was the time period between that, "Open the door. Where's the safe?" and when you heard the shot? What was the time span, if you know?

A: A couple of minutes.

. . . .

Q: What was it you heard right before your mother was shot?

A: "No."

(1 Tr. at 55-58.) The State offers the following theory to suggest this testimony establishes that defendant committed a breaking: The individual who said "Open the door. Where's the safe?" was speaking to the victim, Ms. Isom, at the time. By commanding her to open the door (presumably the closet door, behind which the safe was thought to be), that individual committed a constructive breaking. The State then contends that defendant was the one who issued that command, because the gunshot came shortly after this command and defendant had the shotgun.

This theory fails for two reasons. First, it makes several unwarranted, or at best, tenuous, assumptions. For instance, it automatically assumes that the words "Open the door. Where's the safe?" were being uttered to Ms. Isom and not to one of defendant's cohorts. It

also assumes that the person issuing the command was necessarily the same person who shot Ms. Isom, a weak assumption considering "[a] couple of minutes" elapsed between the time of the command and the gunshot. Second, and more important, the State's theory fails because it is a theory of constructive breaking, not actual breaking, because it requires the assumption that defendant forced *Ms. Isom* to open the closet door. As stated earlier, a defendant may not be convicted of burglary under a constructive breaking theory unless an instruction to that effect is given, and no such instruction was given here.

We therefore conclude that the State presented insufficient evidence of an actual breaking to withstand defendant's motion to dismiss. *See also Helton*, 79 N.C. at 567, 339 S.E.2d at 815 (dismissing burglary charge where evidence showed defendant's cohort broke down the door, defendant and his cohort went back and forth through the broken door, but "there was no evidence as to who opened the door on the subsequent occasions . . ., or as to whether the door had even been closed between entries"); *McCoy*, 79 N.C. App. at 275, 339 S.E.2d at 421 (dismissing burglary charge where evidence showed window screen had been removed but there was no specific evidence establishing that defendant, as opposed to his cohort, had been the one to remove it). Defendant's first-degree burglary conviction is hereby vacated. In light of our disposition, we need not address defendant's remaining arguments on appeal relative to the burglary conviction.

III. Defendant's Felony Murder Conviction

[5] Next, we must address the affect of this disposition on defendant's felony murder conviction, since the now-vacated burglary charge served as the only underlying felony for purposes of his felony murder charge. Our research has disclosed no cases in North Carolina or elsewhere involving this precise issue. The State argues the felony murder conviction should be upheld because a lesser-included felony of burglary can be substituted to meet the predicate felony requirement. Defendant, on the other hand, contends the conviction must be vacated, because there was insufficient evidence of one of the elements, namely the predicate felony. We find both positions unpersuasive.

When there is insufficient evidence of an actual breaking for purposes of burglary, a jury's conviction for burglary can automatically be reduced to one for the lesser-included offense of felonious break-

ing or entering, which only requires proof of a breaking *or* an entering, not both. *See, e.g., Helton*, 79 N.C. App. at 569, 339 S.E.2d at 816 ("Since there was insufficient evidence from which the jury could find that defendant committed an actual breaking under the court's instructions, the verdicts returned by the jury must be considered verdicts of guilty of felonious breaking or entering.") Furthermore, felonious breaking or entering can serve as an underlying felony for purposes of felony murder, so long as it was done with the use of a deadly weapon. N.C. Gen. Stat. § 14-17 (1999). Because the jury, in essence, did find defendant guilty of felonious breaking or entering, and because, in finding defendant guilty of attempted armed robbery with a dangerous weapon, the jury necessarily concluded that defendant was using a deadly weapon, the State contends felonious breaking or entering can substitute for burglary as the predicate felony, thereby preserving defendant's conviction for felony murder. We disagree.

"The Due Process Clause of the United States Constitution requires that the sufficiency of the evidence to support a conviction be reviewed *with respect to the theory of guilt upon which the jury was instructed.*" *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 511 (1996) (emphasis added) (citing *Presnell v. Georgia*, 439 U.S. 14, 16, 58 L. Ed. 2d 207, 211 (1978)). By adopting the State's argument, we would be upholding defendant's conviction for felony murder on a theory never submitted to the jury. The fact that this theory is a lesser-included offense of the theory that was submitted to the jury in no way entitles us to circumvent the Due Process Clause. We cannot uphold defendant's conviction for felony murder when the underlying felony now relied upon by the State was never submitted to the jury for consideration.

Defendant's position is equally unavailing. He argues the felony murder conviction must be vacated altogether because there was insufficient evidence of the underlying felony of burglary. However, there was sufficient evidence of a lesser-included felony. Had the trial judge dismissed the burglary offense at the conclusion of the State's case, the State would have then been able to submit to the jury the lesser-included offense of felonious breaking or entering as the predicate felony for felony murder. Because the trial court erroneously refused to dismiss the burglary charges, the State never had that opportunity.

Accordingly, we believe justice requires that defendant receive a new trial as to the offense of felony murder, with the limitation that

only felonious breaking or entering may serve as the underlying felony on re-trial, since we have found no error in the attempted robbery conviction. Upholding defendant's conviction here would force us to play fast and loose with the Due Process Clause. Instead, granting a new trial places the State and defendant in the place in which they would have been had the trial judge properly dismissed the burglary charge.

[6] Although we have granted defendant a new trial as to the charge of felony murder, we address one additional argument by defendant that may come up on re-trial. Defendant contends the trial court should have submitted either second-degree murder or involuntary manslaughter, or both, for the jury's consideration. "[W]here the law and the evidence justify the use of the felony murder rule, the State is not required to prove premeditation and deliberation, and neither is the court required to submit the offenses of second-degree murder or manslaughter unless there is evidence to support it." *Rinck*, 303 N.C. at 565, 280 S.E.2d at 923. Here, all the evidence showed that Ms. Isom was killed during the perpetration of a felony, namely felonious breaking or entering. Even if defendant did not intend to kill Ms. Isom, or the gun went off accidentally (as defendant claims), this is irrelevant for purposes of felony murder. *Thompson*, 280 N.C. at 213, 185 S.E.2d at 673. Accordingly, the trial court was not required to submit second-degree murder or involuntary manslaughter for the jury's consideration. *See also State v. Quick*, 329 N.C. 1, 28-29, 405 S.E.2d 179, 195-96 (1991) (holding that the trial judge was not required to instruct on second-degree murder because all the evidence showed the killing happened during the commission of a robbery); *State v. Covington*, 290 N.C. 313, 226, 346 S.E.2d 629, 651 (1976) (holding that the trial judge was not required to submit lesser-included offenses for the jury's consideration when all the evidence reflected the killing occurred during the perpetration of an armed robbery).

We uphold defendant's conviction of attempted armed robbery with a dangerous weapon, but vacate his conviction of first-degree burglary. As to the offense of felony murder, we grant defendant a new trial, but limit the State solely to the use of felonious breaking or entering as the predicate felony for that offense. Although, as pointed out earlier, we could also remand for entry of judgment as to felonious breaking or entering, we expressly decline to do so here so that the State will not be barred by Double Jeopardy principles from employing that theory on re-trial. *See generally State v. Williams*, 295 N.C. 655, 659, 249 S.E.2d 709, 713 (1978) ("[W]hen a criminal offense

in its entirety is an essential element of another offense a defendant may not be punished for both offenses . . . .").

No error in part, vacated in part, and new trial in part.

Judges WALKER and HUNTER concur.

STATE OF NORTH CAROLINA v. GEORGE TRUITT WALSTON

No. COA99-1119

(Filed 17 October 2000)

1. **False Pretense— false representation with intent to deceive—sufficiency of evidence**

The trial court did not err by denying defendant pastor's motion to dismiss the charge of obtaining property by false pretenses under N.C.G.S. § 14-100 from a church even though defendant contends there was insufficient evidence to establish that defendant made a false representation with intent to deceive, because the evidence viewed in the light most favorable to the State reveals that: (1) defendant obtained a check on the church's account for one stated purpose and then used it for another purpose the very same day; (2) defendant set up a new account by using the check to transfer almost all of the church's money to an account for which he had sole access; (3) defendant failed to tell anyone at the church about the new account; (4) defendant transferred church funds to his own account to reimburse his own company and others for work on the church which the church had not authorized; and (5) defendant used the church's money to purchase items for his own use.

2. **False Pretense— obtaining anything of value as a result of a false representation—sufficiency of evidence**

The trial court did not err by denying defendant pastor's motion to dismiss the charge of obtaining property by false pretenses under N.C.G.S. § 14-100 from a church even though defendant contends there was insufficient evidence to establish that defendant obtained anything of value as a result of a false representation, because the evidence viewed in the light most

favorable to the State reveals that: (1) defendant obtained, at least initially, sole access to $10,000 of the church's funds as a result of his misrepresentation; and (2) although the church may have ultimately benefitted in the form of remodeling done on the church, defendant spent to benefit his own company and himself.

3. False Pretense— obtaining or attempting to obtain value from another—sufficiency of evidence

The trial court did not err by denying defendant pastor's motion to dismiss the charge of obtaining property by false pretenses under N.C.G.S. § 14-100 from a church even though defendant contends there was insufficient evidence to establish that defendant obtained or attempted to obtain value from another, because the evidence viewed in the light most favorable to the State reveals that: (1) defendant did receive value, which was the initial sole access to $10,000 of the church's funds, and defendant did not have authorization from the church to use those funds; and (2) defendant did not set out any evidence that he acquired the $10,000 lawfully and later converted it, and the State's evidence shows defendant actually unlawfully acquired the $10,000 as a result of his false representation.

4. False Pretense— indictment—no fatal variance

The trial court did not err by denying defendant pastor's motion to dismiss the charge of obtaining property by false pretenses under N.C.G.S. § 14-100 from a church even though defendant contends there was a fatal variance between the indictment and the proof at trial based on the State's alleged failure to show that defendant obtained $10,000 in U.S. currency or that he had sole access to the church's checking account, because: (1) it is not legally significant whether the thing gained by the party perpetrating the criminal act is in the same form as it was when taken by false pretense from the owner; and (2) the purported variance did not go to an essential element of the offense since whether defendant received $10,000 in cash or deposited $10,000 in a bank account, he obtained something of monetary value which is the crux of the offense.

Appeal by defendant from judgment entered 18 March 1999 by Judge Henry V. Barnette, Jr. in Harnett County Superior Court. Heard in the Court of Appeals 23 August 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Jane L. Oliver, for the State.

L. Holt Felmet and Duncan B. McCormick for defendant-appellant.

HUNTER, Judge.

George Truitt Walston ("defendant") appeals his conviction of one count of obtaining property ($10,000.00 in United States currency) by false pretenses ("false pretenses") in violation of N.C. Gen. Stat. § 14-100. Defendant assigns as error the trial court's failure to (1) grant his motion to dismiss on the grounds that the State failed to present substantial evidence supporting each essential element of the offense of false pretenses; and (2) allow his motion to dismiss on the grounds that there was a fatal variance between the indictment and the proof at trial. We find no error.

The State's evidence at trial tended to show the following: Defendant was the pastor of the Mission Temple Community Baptist Church ("church") in Chalybeate Springs, North Carolina from 1994 to 1996. Defendant also owned a subcontracting business named W&W Sales. Defendant had prior convictions for larceny in Pitt County in 1992 and three counts of false pretenses in Wake County in April 1996.

On 12 August 1996, one week after the death of the church's treasurer, defendant approached Gail McLean, the church's new treasurer. Defendant asked Ms. McLean whether the premium for the church's insurance had been paid, but Ms. McLean did not know. Defendant offered to find out and said that he needed a check to do so. Defendant said that if the premium had not been paid, he would use the check to pay it. Ms. McLean signed a blank check from the church's Fidelity Bank account ("Fidelity account"), wrote "church insurance" on the memo line, and then gave the check to defendant to be used to pay the insurance premium if necessary. The church's insurance premium had, in fact, been previously paid in June 1996.

Later on 12 August 1996, defendant opened a BB&T checking account ("BB&T account #1") in the name of the church using the check, made payable to the church, that he had received from Ms. McLean. Defendant made an initial deposit in the amount of $10,000.00 by transferring that amount from the church's Fidelity account. Defendant listed the address for the new account as his own.

Defendant had an existing account at BB&T in the name of "George Truitt Walston, Jr., d.b.a. W&W Sales" ("W&W Sales' BB&T account"). The address for that account was also his own.

Over the course of the next few weeks, there were a series of withdrawals from the church's BB&T account #1 subsequently followed by deposits in W&W Sales' BB&T account, evidenced by successive bank transaction numbers. Defendant also wrote checks from the church's BB&T account #1 to pay people who did work on the church. The State's evidence tended to show that defendant wrote these checks made payable to his business and others without proper authorization. Work, i.e. remodeling, was being done at the church at this time, but the State introduced evidence that defendant had not been authorized to contract for the work.

When Ms. McLean discovered the $10,000.00 withdrawal from the church's Fidelity account, she notified the church members, and they immediately scheduled a meeting with defendant. At that meeting, defendant stated that he opened the account at BB&T because he thought the church's Fidelity account would be frozen as a result of the death of the church's treasurer. Soon after this meeting, Ms. McLean received the church's BB&T account #1 check book. She started writing checks on this account to pay the church's bills. Ms. McLean did not however notice that three checks had already been written on the account. Ms. McLean also never received the church's BB&T account #1 starter check book from defendant. Several starter checks from the church's BB&T account #1, written and cashed, matched deposits into W&W Sales' BB&T account both in time and amounts.

In October 1996, defendant opened another account at BB&T ("BB&T account #2"), under the name Mission Temple Community Church Building Fund, again using his own address. On 7 October 1996, a deposit of $2,500.00 was made into that account from funds from the church's BB&T account #1. During this period, defendant also wrote several counter-checks from the church's BB&T account #1. Ms. McLean never received bank statements or canceled checks from the church's BB&T account #1. The church members then held a second meeting with defendant. At this meeting, defendant promised to supply the bank records and receipts, but he failed to ever do so.

The State's evidence tended to show that the total amount transferred from the church's BB&T account #1 to the W&W Sales'

BB&T account was approximately $6,905.33. The total amount transferred from the church's BB&T account #1 to the church's BB&T account #2 was $2,500.00. There was also a $514.00 counter-check drawn on the church's BB&T account #1 made payable to BB&T that the bank could not trace. Defendant testified that he purchased a printer, a gas heater, heaters for the church, and a sound system during this time.

The State charged defendant with one count of obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100 by a true bill of indictment returned 21 July 1997. Defendant was tried before a jury at the 15 March 1999 Criminal Session of Superior Court of Harnett County, the Honorable Henry V. Barnette, Jr., presiding. On 18 March 1999, the jury returned a verdict finding defendant guilty of false pretenses, and he received a sentence of ten to twelve months imprisonment. Defendant gave notice of appeal on 18 March 1999.

[1] In his first assignment of error, defendant contends that the trial court erred by failing to grant his motion to dismiss on the grounds that the State failed to present substantial evidence supporting each essential element of the offense of false pretenses. We disagree.

In considering a motion to dismiss, "the question presented is whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, thereby warranting submission of the charge to the jury." *State v. Thomas*, 65 N.C. App. 539, 541, 309 S.E.2d 564, 566 (1983). "[T]he trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of such offense." *State v. Serzan*, 119 N.C. App. 557, 560, 459 S.E.2d 297, 300 (1995), *cert. denied*, 343 N.C. 127, 468 S.E.2d 793 (1996). "[T]he trial court must examine the evidence 'in the light most favorable to the State, and the State is entitled to every reasonable inference which can be drawn from the evidence presented; all contradictions and discrepancies are resolved in the State's favor.' " *State v. Forbes*, 104 N.C. App. 507, 510, 410 S.E.2d 83, 85 (1991), *review denied*, 330 N.C. 852, 413 S.E.2d 554 (1992) (quoting *State v. Morris*, 102 N.C. App. 541, 544, 402 S.E.2d 845, 847 (1991)). "The trial court's function is to decide whether the evidence will permit a *reasonable inference* that the defendant is guilty of the crime charged. The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying defendant's motion to dismiss." *State v. Serzan*, 119 N.C. App. at 560, 459 S.E.2d at 300 (citations omitted).

Pursuant to N.C. Gen. Stat. § 14-100, our Supreme Court has defined the offense of false pretenses as "(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).

First, defendant claims that the State failed to present substantial evidence of the first two elements of false pretenses evinced in *Cronin*: (1) that he made a false representation, (2) that was intended to deceive. We do not agree that is the case *sub judice*.

An essential element of the crime of obtaining property by false pretenses is, "that the act be done 'knowingly and designedly . . . with intent to cheat or defraud.' " *State v. Hines*, 54 N.C. App. 529, 532-33, 284 S.E.2d 164, 167 (1981) (quoting N.C. Gen. Stat. § 14-100 (Supp. 1998)). In deriving intent, this Court has stated that, "[a] person's intent is seldom provable by direct evidence, and must usually be shown through circumstantial evidence." *State v. Compton*, 90 N.C. App. 101, 104, 367 S.E.2d 353, 355 (1988). " '[I]n determining the presence or absence of the element of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged . . . .' " *State v. Hines*, 54 N.C. App. at 533, 284 S.E.2d at 167 (quoting *State v. Norman*, 14 N.C. App. 394, 399, 188 S.E.2d 667, 670 (1972)).

At trial, the State offered the following evidence of circumstances to establish that defendant made a false representation with intent to deceive: the recent death of the church's treasurer, defendant's act in obtaining a check on the church's account for one stated purpose and then using the check for another purpose the very same day, his setting up a new account by using the check to transfer almost all of the church's money to an account which he had sole access, his failure to tell anyone at the church about the new account, his transfer of church funds to his own account to reimburse his own company and others for work on the church which the church had not authorized, and his use of the church's money to purchase items for his own use. Considering the evidence in the light most favorable to the State, we find that the State established that defendant made a false representation with the intent to deceive.

[2] Defendant next raises causation and asserts that the State failed to present substantial evidence that he obtained anything of value as a result of a false representation. Again we disagree.

To show that a defendant committed the offense of obtaining property by false pretenses, the State must prove that there is a causal relationship between the alleged false representation and the obtaining of money, property, or something else of value. *State v. Davis*, 48 N.C. App. 526, 531, 269 S.E.2d 291, 294-95, *review denied and appeal dismissed*, 301 N.C. 237, 283 S.E.2d 134 (1980). The gist of the offense is the attempt to obtain something of value from the owner thereof by false pretense. *State v. Wilson*, 34 N.C. App. 474, 476, 238 S.E.2d 632, 634, *review denied and appeal dismissed*, 294 N.C. 188, 241 S.E.2d 72 (1977).

Defendant contends that he did not obtain anything of value merely by obtaining a blank check and using the check to open a church checking account. Defendant further argues that his subsequent use of the church's account was not value obtained as a result of the alleged false representation. The State's evidence tended to show that defendant obtained as a result of his misrepresentation sole access, at least initially, to $10,000.00 of the church's funds, which, although the church may have ultimately benefitted in the form of remodeling done on the church, he spent to benefit his own company and himself. Again, considering the evidence in the light most favorable to the State, we agree that the State proved causation.

[3] Finally, defendant asserts that the State failed to present substantial evidence that he obtained or attempted to obtain value from another, the fourth element of false pretenses set out in *Cronin*, above. Furthermore, defendant contends that the blank check had no material value; the new checking account was in the church's name; and he, as the church's pastor, continued to have an obligation to use those funds in a manner authorized by the church. Defendant's arguments are unpersuasive.

Obtaining or attempting to obtain value is an essential element of the charge of obtaining property by false pretenses. *State v. Cronin*, 299 N.C. at 242, 262 S.E.2d at 286. N.C. Gen. Stat. § 14-100 describes value rather broadly as, "any money, goods, property, services, chose in action, or other thing of value . . . ." N.C. Gen. Stat. § 14-100 (1999). Taken in light of defendant's earlier argument, we agree with the State that defendant did receive value, the initial sole access to $10,000.00

of the church's funds, and he did not have authorization from the church to use those funds.

In the alternative, defendant interjects the argument that he obtained the church's property pursuant to a trust relationship, and only later wrongfully converted it, thus is liable for embezzlement if any crime. Our Supreme Court has held "that to constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship, and then wrongfully converted." *State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 166 (1990). "On the other hand, to constitute false pretenses the property must be acquired unlawfully at the outset, pursuant to a false representation." *Id.* at 578, 391 S.E.2d at 166-67. "[S]ince property cannot be obtained simultaneously pursuant to both lawful and unlawful means, guilt of either embezzlement or false pretenses necessarily excludes guilt of the other." *Id.* at 578, 391 S.E.2d at 167. "Where . . . there is substantial evidence tending to support both embezzlement and false pretenses arising from the same transaction, the State is not required to elect between the offenses." *Id.* at 579, 391 S.E.2d at 167.

Here, defendant sets out no evidence that he acquired the $10,000.00 lawfully and later converted it. In the alternative, the State's evidence tended to show that defendant actually unlawfully acquired the $10,000.00 as a result of his false representation. The State pursued defendant under the theory of false pretenses, and the jury subsequently convicted upon that theory. Therefore, we find that the State proved each essential element of false pretenses, and the trial court did not err in denying defendant's motion to dismiss.

[4] Next, defendant combines two assignments of error, and assigns error to the trial court's failure to allow his motion to dismiss on the ground that there was a fatal variance between the indictment and the proof at trial in that the State failed to show that defendant obtained $10,000.00 in U.S. currency or that he had sole access to the church's BB&T checking account #1. Again, we find no error.

"It is an elementary rule in the criminal law that a defendant must be convicted, if at all, of the particular offense alleged in the bill of indictment." *State v. Gibson*, 169 N.C. 318, 320, 85 S.E. 7, 8 (1915). Specifically in regards to the crime of false pretenses, "[i]t is the general rule that the thing obtained . . . must be described with reasonable certainty, and by the name or term usually employed to describe it." *Id.* " '. . . [T]he evidence in a criminal case must correspond with

the allegations of the indictment which are essential and material to charge the offense. . . .' " *State v. Simmons*, 57 N.C. App. 548, 551, 291 S.E.2d 815, 817 (1982) (quoting 7 Strong's N.C. Index 3d *Indictment and Warrant*, § 17 at 162). "[A] variance which is not essential is not fatal to the charged offense." *State v. Qualls*, 130 N.C. App. 1, 8, 502 S.E.2d 31, 36 (1998), *aff'd*, 350 N.C. 56, 510 S.E.2d 376 (1999). " 'A variance will not result where the allegations and proof, although variant, are of the same legal signification.' " *State v. Simmons*, 57 N.C. App. at 551, 291 S.E.2d at 817-18 (quoting *State v. Craft*, 168 N.C. 208, 212, 83 S.E. 772, 774 (1914)).

The indictment which charged defendant in this case alleged that defendant had obtained "$10,000.00 in United States Currency." Defendant proclaims that the State did not present evidence to show that he ever cashed the $10,000.00 check at Fidelity Bank or that he ever obtained $10,000.00 in U.S. currency.

The closest similarity to the case at bar in North Carolina is *State v. Cronin*, 299 N.C. 229, 262 S.E.2d 277. In *Cronin*, the indictment stated that the defendant had received "currency of the United States in the value of . . . []$5,704.54[]," but the proof showed that the defendant received a bank loan, which included a $4,900.00 cashier's check, $500.00 to pay off a previous note, and $304.54 for credit life insurance. *Id.* at 234, 262 S.E.2d at 281. The indictment was challenged on other grounds, but the conviction was upheld. *Id.*

"It is not legally significant whether the thing gained by the party perpetrating the criminal act is in the same form as it was when taken by false pretense from the owner." *State v. Wilson*, 34 N.C. App. 474, 476, 238 S.E.2d 632, 634, *review denied and appeal dismissed*, 294 N.C. 188, 241 S.E.2d 72 (1977). In *Wilson*, this Court found that there was no variance where the bill of indictment charged that the defendant obtained money from his employer and the evidence disclosed that he received a color television set and a clothes dryer from another party in exchange for the money pursuant to a prior agreement. *Id.*

To support his contention, defendant puts much reliance on *State v. Gibson*, 169 N.C. 318, 85 S.E. 7. This reliance however is misguided. In *Gibson*, our Supreme Court reversed a conviction for obtaining money under false pretenses where the indictment alleged that the defendant had obtained $350.00 and the evidence was that the defendant signed and obtained a promissory note for that amount. *Id.* The Court reasoned that there was a substantial difference between

"money" and a "promissory note," and they concluded that the difference between the allegation and the evidence was fatal. *Id.* The outcome in *Gibson* can be distinguished from the case at bar, as that case was decided under prior North Carolina law. *Gibson* was decided in 1915 under Revisal of 1905, § 3432 (predecessor of N.C. Gen. Stat. § 14-100). This earlier false pretense statute made indictable the obtaining by a false pretense,

> any money, goods, property, or other thing of value, or any bank note, check, or order for the payment of money, . . . or on any treasury warrant, debenture, certificate of stock, or public security, or any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation . . . .

Revisal of 1905, § 3432. In *Gibson*, the Court found that the law, "classifies those things the obtaining of which by a false pretense is made criminal, and carefully distinguishes between them, and assigns to each its own proper name and designation, as something separate and distinct from the others." *Gibson*, 169 N.C. at 321, 85 S.E. at 9. Whereas Revisal of 1905, § 3432 specifically named and indicated each thing one could be indicted for obtaining by a false pretense, our statute today, N.C. Gen. Stat. § 14-100, has been broadened to make indictable the obtaining by a false pretense any "money, goods, property, services, chose in action, or other thing of value . . . ." N.C. Gen. Stat. § 14-100.

By his own admission, defendant states "[i]t is undisputed that [he] used the blank check to open a bank account rather than to obtain cash and that the funds were directly deposited into the new checking account." The fact that the $10,000.00 was in U.S. currency or in a bank account does not change the premise that in either form the sum represented a $10,000.00 value. The State's evidence showed that defendant had sole access to this value for at least the period that he opened the account until he turned over the check book to the church members a few weeks later. Therefore, the purported variance did not go to an essential element of the offense because whether defendant received $10,000.00 in cash or deposited $10,000.00 in a bank account, he obtained something of monetary value which is the crux of the offense. There was no fatal variance between the indictment and the proof at trial, thus the trial court did not err in denying defendant's motion to dismiss.

By failing to set out assignments of error four through six for argument in his appellate brief, defendant is deemed to have abandoned these assignments of error. N.C.R. App. P. 28 (b)(5).

No error.

Judges LEWIS and WALKER concur.

DALE E. TAYLOR, B. J. FORE; DILLARD A. BROWN, HARVEY R. COOK, JR., THOMAS P. DEIGHTON, JAMES M. FLOYD, CATHY ANN HALL, GRANT HAROLD, MARY ROSE HART, RAYMOND HIGGINS, KENNETH D. HINSON, ALLEN C. JONES, JAMES T. MALCOLM, III, RANDY W. MARTIN, RICHARD N. OULETTE, RALPH PITTMAN, SID A. POPE, DANIEL L. POWERS, II, DARYL D. PRUITT, LISA D. ROBERTSON, RICKY E. SHEHAN, GREGORY F. SNIDER, TIMOTHY C. STOKER, ANN R. STOVER, JOAN C. SMITH, INDIVIDUALLY, AND FOR THE BENEFIT OF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. CITY OF LENOIR, A MUNICIPAL CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, BODY POLITIC AND CORPORATE; O. K. BEATTY, JOHN W. BRITTE, JR., JAMES M. COOPER, RONALD E. COPLEY, CLYDE R. COOK, JR., BOB ETHERIDGE, JAMES R. HAWKINS, SHIRLEY A. HISE, WILMA M. KING, GERALD LAMB, W. EUGENE McCOMBS, WILLIAM R. McDONALD, III, DAVID G. OMSTEAD, PHILLIP M. PRESCOTT, JR., JAMES W. WISE, AS TRUSTEES; DENNIS DUCKER, AS DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION, AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA; HARLAN E. BOYLES, AS TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT RETIREMENT SYSTEM; AND THE STATE OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, DEFENDANTS

No. COA99-1228

(Filed 17 October 2000)

Appeal and Error— record—untimely filed—appeal dismissed

An appeal by class counsel from a class action final settlement order concerning attorney fees was dismissed where the record on appeal was not timely filed in violation of N.C. R. App. P. 12(a); class counsel's personal conflicts from a district court hearing, a $1.4 million real estate closing, a mayoral debate, and a tight mayoral race are by no means valid excuses for violation of the North Carolina Appellate Rules. Although Rule 2 permits the Court of Appeals to suspend the rules to prevent a manifest injustice, the Court chose not to do so as no manifest injustice to

a party was at stake, class counsel has a history of rules violations, and the individual plaintiffs will suffer no harm.

Judge WALKER dissenting.

Appeal by plaintiffs Dale E. Taylor, B. J. Fore, Dillard A. Brown, the Estate of James Floyd, Raymond Higgins, Thomas P. Deighton, and Ricky E. Shehan, from a class action final settlement order entered 5 March 1999 by Judge Claude S. Sitton in Caldwell County Superior Court. Heard in the Court of Appeals 23 August 2000.

Kuehnert Bellas & Bellas, PLLC, by Daniel A. Kuehnert and Steven T. Aceto, for plaintiff-appellants.

Wilson, Palmer, Lackey & Rohr, P.A., by David S. Lackey, for plaintiff-appellee Derek K. Poarch; Todd, Vanderbloemen, Brady & LeClair, P.A., by Bruce W. Vanderbloemen, for plaintiff-appellees Frank M. Hicks, Jr., Sid A. Pope, Tim Stoker, Sharon Cook Poarch and Arnold Dula; Potter, McCarl & Whisnant, P.A., by Lucy R. McCarl and Steve B. Potter, for plaintiff-appellees Jack Warlick, Jim Higgins, Mike Phillips, Gary Clark, Harold Brewer, Ronda Watts, Helen Gallardo and Michael Wayne Sutton.

Groome, Tuttle, Pike & Blair, by Edward H. Blair, Jr., for defendant-appellee City of Lenoir.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for defendant-appellees Board of Trustees of the North Carolina Local Government Employees' Retirement System and its individually named members or their successors, Jack W. Pruitt (Successor to Dennis Ducker), Harlan E. Boyles, and the State of North Carolina.

HUNTER, Judge.

Plaintiffs' class counsel ("class counsel") appeal from a class action final settlement accepting in part and denying in part their motion/petition ("motion") for attorney fees based upon the common fund doctrine. During the course of this litigation, class counsel agreed by stipulation not to seek to recover attorney fees from defendants the Board of Trustees of the North Carolina Local Government Employees' Retirement System and its individual trustees or successors, Dennis Ducker, Harlan E. Boyles, and the State of North Carolina. As part of the final settlement agreement, the

City of Lenoir agreed to pay $96,000.00 in full and complete satisfaction of any and all claims and causes of actions against it as to this litigation, thus freeing it from the obligation of paying any additional attorney fees directly.

In the final settlement agreement, the trial court found that the $96,000.00 cash settlement constituted a common fund procured as a direct result of this litigation and awarded twenty-seven and a half percent (27.5%) of said fund to class counsel as their sole attorney fees. Class counsel immediately made a motion for additional attorney fees claiming that their fees should be paid from an additional common fund based upon that portion of the City of Lenoir's accrued liability owed to the Local Government Employees' Retirement System ("LGERS") attributable to sixty-two class members who received full LGERS enrollment as a result of the City of Lenoir's 1995 conversion into LGERS. The trial court rejected the motion concluding that the plaintiff class members' interests in present and/or future LGERS benefits are not an identifiable amount of monies subject to sufficient control of the court, and therefore not a common fund. Class counsel appeals from the trial court's denial of their motion for additional attorney fees based upon the common fund doctrine from the group of sixty-two plaintiffs, and bring forward several assignments of error. However, we are unable to reach the merits of these arguments as class counsel's appeal must be dismissed.

"The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal." *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). The rules "are designed to keep the process of perfecting an appeal flowing in an orderly manner." *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979). " 'Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process.' " *Id.* (quoting *Ledwell v. County of Randolph*, 31 N.C. App. 522, 523, 229 S.E.2d 836, 837 (1976)).

In settling the record on appeal, N.C.R. App. P. 11(b) states in pertinent part:

> Within 21 days . . . after service of the proposed record on appeal upon him an appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of

> approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

In this case, class counsel served the proposed record on appeal by hand delivery on 19 August 1999 to appellees' counsel except Alexander McC. Peters, who was served via United States mail on that same date. All counsel for the appellees chose to neither stipulate to the proposed record, nor file any notice of approval, objections, amendments or proposed alternative record on appeal. Thus twenty-four (24) days (twenty-one (21) days per N.C.R. App. P. 11(b) plus three (3) days as per N.C.R. App. P. 27(b) because Mr. Peters was served by United States mail) after 19 August 1999, or on 13 September 1999 (12 September 1999 was a Sunday), the proposed record on appeal became the record on appeal.

According to N.C.R. App. P. 12(a), "[w]ithin 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken." This Court has not hesitated in the past to dismiss an appeal for failure to timely file the record on appeal as per N.C.R. App. P. 12(a). *See Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 519 S.E.2d 316 (1999) (appeal dismissed because *pro se* appellant violated the appellate rules, including failing to file the record on appeal within fifteen (15) days after it was settled in violation of Rule 12(a)); *see also Higgins v. Town of China Grove*, 102 N.C. App. 570, 402 S.E.2d 885 (1991) (violation of appellate rules led to dismissal in case where appellant failed to settle record and time for settling record had expired, thus record was not filed within fifteen (15) days as per Rule 12(a)).

Here, fifteen (15) days from 13 September 1999 was 28 September 1999, thus class counsel had until that date to file the record on appeal with this Court. Yet, they failed to do so. Instead, class counsel Daniel A. Kuehnert certified that he served a copy of a Rule 27 motion for extension of time on the appellees by United States mail on 28 September 1999. However, the envelope in which the motion was mailed to the appellees was postmarked 30 September 1999 and was not received until 1 October 1999. Furthermore, the motion for extension of time and the record on appeal were not filed with this Court until 5 October 1999. Defendants and several individual plaintiff class members ("plaintiff-appellees") immediately filed motions to deny the extension of time and to dismiss the appeal.

Simply stated, the record on appeal was not timely filed with this Court in violation of N.C.R. App. P. 12(a). The sole reasons offered for the late filing were personal conflicts of class counsel Mr. Kuehnert. A district court hearing, a $1.4 million real estate closing, a mayoral debate, and a tight race for the office of Mayor of Morganton are by no means valid excuses for the violation of the North Carolina Appellate Rules. Mr. Kuehnert has previously been before this Court after having been sanctioned by the trial court for rule violations in other matters. *See Dodd v. Steele*, 114 N.C. App. 632, 442 S.E.2d 363, *review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994); *see also Logan v. Logan*, 116 N.C. App. 344, 447 S.E.2d 485 (1994). We note that denial of class counsels' motion for extension of time and dismissal of this appeal will not prejudice any rights of the individual named class plaintiffs.

N.C.R. App. P. 25(a) states in pertinent part:

> If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed.

The time deadlines set out in our appellate rules are important and should be followed. Not only was class counsel late in filing the record on appeal in violation of N.C.R. App. P. 12(a), but they also failed to file their motion for extension of time within the deadline prescribed for the record on appeal. Class counsel also did not petition this Court for a writ of certiorari.

We are aware that, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, at our discretion, this Court could choose to suspend the requirements of the Rules of Appellate Procedure and thereby address the merits of defendant's argument. N.C.R. App. P. 2 ("[t]o prevent manifest injustice to a party, . . . appellate [court] may, . . . suspend or vary the requirements . . . of any of [the appellate] rules . . ."). However we choose not to do so with the case at bar as no "manifest injustice to a party" is at issue in this civil case. Here, class counsel, who has a history of disregard for the rules of our courts, violated the appellate rules, therefore class counsel should be held accountable for their actions. We note again that individual plaintiffs suffer no harm from our ruling, and in fact, several individual plaintiffs filed briefs during this appeal objecting to class counsel's claim for attorney fees.

This Court has recently dismissed appeals for appellate rules violations. *See Bowen v. N.C. Dep't of Health and Human Servs.*, 135 N.C. App. 122, 519 S.E.2d 60 (1999); *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 519 S.E.2d 316 (1999); *Talley v. Talley*, 133 N.C. App. 87, 513 S.E.2d 838, *review denied*, 350 N.C. 599, 537 S.E.2d 495 (1999); *Webb v. McKeel*, 132 N.C. App. 816, 513 S.E.2d 596 (1999); *Duke University v. Bishop*, 131 N.C. App. 545, 507 S.E.2d 904 (1998).

Class counsel's motion for extension of time is denied, and defendants' and plaintiff-appellees' motions to dismiss are granted.

Appeal dismissed.

Judge SMITH concurs.

Judge WALKER dissents in a separate opinion.

Judge WALKER dissenting.

I respectfully dissent from the majority's decision to dismiss the appeal in this case.

The record indicates that class counsel for the plaintiffs timely served the proposed record on appeal. Defendants-appellees did not file any objections. Class counsel asserts he realized the proposed record on appeal became the record on appeal the day it was due in this Court. That same day, class counsel states he conferred with the administrative counsel for this Court and determined that the appellate rules do not provide for an oral motion directed to this Court to extend the time to file the record on appeal. On the following day, 29 September 1999, class counsel states he placed in the mail to this Court the record on appeal and a motion to extend the time to file the record on appeal. However, this mailing was not postmarked until 30 September 1999.

This Court routinely suspends the rules in criminal cases in order to decide the appeal on the merits notwithstanding rule violations. In *State v. SanMiguel*, 74 N.C. App. 276, 328 S.E.2d 326 (1985), the record on appeal did not contain a copy of the notice of appeal nor an appeal entry showing that appeal was taken orally. This Court treated the purported appeal as a petition for a writ of certiorari in order to decide the case on its merits.

In civil cases, I find this Court to be inconsistent in enforcing rule violations as demonstrated by the following cases: In *Wiseman v. Wiseman*, 68 N.C. App. 252, 314 S.E.2d 566 (1984), this Court stated that the Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. However, even though the petitioner had violated at least four appellate rules, the *Wiseman* court suspended the rules stating, "it cannot be said that petitioner's various rule violations have markedly increased the difficulty of our task in evaluating this appeal. . . ."

In *Anderson v. Hollifield*, 123 N.C. App. 426, 473 S.E.2d 399 (1996), the judgment was filed on 1 March 1995 and plaintiff's appeal entries were filed 12 May 1995 (42 days late). This Court noted there were numerous rule violations by the plaintiff; however, the appeal was treated as a petition for writ of certiorari in order to "pass upon the merits of the questions raised." Judge Smith dissented on the grounds that this Court did not have jurisdiction, since the plaintiff had not petitioned for a writ of certiorari; thus, the rules could not be suspended. The Supreme Court agreed that this Court had jurisdiction to review the trial court's judgment and held the appellate court may issue a writ of certiorari in such a case. 345 N.C. 480, 480 S.E.2d 661 (1997).

In *Adams v. Kelly Springfield Tire Co.*, 123 N.C. App. 681, 474 S.E.2d 793 (1996), Judge Smith, writing for the Court, first noted:

> This appeal is flawed by numerous and substantial errors of appellate procedure. Our Rules of Appellate Procedure are mandatory and subject on appeal to dismissal.

This Court then enumerated the numerous errors by both parties to the appeal. However, this Court held:

> Notwithstanding the stark errors committed by defendant in presenting the appeal, we exercise our discretion, pursuant to N.C. R. App. P. 2, to suspend the rules and decide the case on the merits.

Later, in *Onslow County v. Moore*, 127 N.C. App. 546, 491 S.E.2d 670 (1997), Judge Smith, writing for the Court, held:

> Because the trial court's purported extension of time to file the records on appeal was ineffective, and because the records on appeal were not filed within the times mandated by the Rules of

> Appellate Procedure, both parties' appeals are dismissed. (J.J. Wynn and Walker concurring).

On appeal, our Supreme Court entered the following order:

> The opinion of the Court of Appeals dismissing the appeals is vacated and the matter is remanded to the Court of Appeals for consideration of the appeals on the merits. 347 N.C. 672, 673, 500 S.E.2d 88, 89 (1998).

The majority notes the record on appeal was not filed with this Court until 5 October 1999 (October 2 and 3 were a Saturday and Sunday). However, I find that the defendants-appellees were not prejudiced by the late filing of several days and such did not delay this Court's calendaring the case for argument.

Next, the majority cites two cases in which class counsel has been sanctioned by the trial court for rule violations. In both of the cases, the actions of class counsel occurred seven years ago and do not involve appellate rule violations. Furthermore, in one case, this Court reversed the sanctions imposed by the trial court and remanded the case for further action. We do not know the outcome of that matter. I find it particularly disturbing that this Court would cite this unrelated conduct on the part of class counsel as having been taken into consideration in the decision to dismiss this appeal.

Further, the majority states that class counsel did not petition this Court for a writ of certiorari. However, after appellees filed their motion to dismiss, class counsel moved this Court for "further order as may be just and proper in order to assure that this appeal is properly and fairly heard on its merits." This was sufficient.

I do not excuse class counsel's failure to timely file the record on appeal in this case. However, I vote to suspend the rules and decide the case on its merits as this case falls within the category of cases that Appellate Rule 2 is directed: "to prevent manifest injustice to a party or to expedite decision in the public interest. . . ." N.C. R. App. P. 2. I would further impose sanctions by taxing class counsel with the costs in this appeal.

Having determined that this appeal should be decided on its merits for the reasons stated, I would reverse the trial court's order of 5 March 1999 and remand the case for further proceedings.

It is apparent from the record and the trial court's comments that this class action lawsuit caused the City of Lenoir in 1995 to enroll its

then current and certain former employees, including 62 law enforcement officers (members of plaintiffs' class), in the North Carolina Local Government Employees' Retirement System (LGERS). On remand, the trial court should address this issue of causation in its order.

The trial court, in its order, concluded in part:

> 4. The Court concludes that the plaintiff members' interests in present and/or future LGERS benefits to be paid from or into the LGERS as [a] result of the effective July 1, 1995, conversion of the City of Lenoir Pension Plan to LGERS are not an identifiable amount of monies subject to sufficient control of this Court. The Court concludes as a matter of law, it does not exercise control over these benefits to make any disbursements from such benefits or monies, which therefore do not constitute a common fund from which this Court can order the payment of attorneys fees. . . .

I disagree. Based on recent decisions from this Court and our Supreme Court, and the federal courts, I conclude there is a "common fund" over which the trial court can exercise control and order the payment of attorney fees. *See Bailey v. North Carolina*, 348 N.C. 130, 500 S.E.2d 54 (1998); *Faulkenbury v. The Retirement System*, 345 N.C. 683, 483 S.E.2d 422 (1997); and *Simpson v. N.C. Local Gov't Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987), *affirmed per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988); *Herbert Newberg and Alba Conte*, Newberg on Class Actions §§ 13.52, 13.54 (1992).

JAMES W. STRAUSS, PLAINTIFF v. ROBBIE HUNT, DEFENDANT

No. COA99-1198

(Filed 17 October 2000)

1. Judgments— default—two-step process

A plaintiff should have filed a motion for entry of default, which the clerk or the court should have ruled upon, before the court ruled on plaintiff's motion for judgment by default. Obtaining a judgment by default involves a two-step process and the importance of following the correct procedure is emphasized.

2. Appeal and Error— adherence to Rules—pro se appellants

Although the Court of Appeals chose to consider an untimely appeal as a petition for writ of certiorari and to grant that petition to prevent manifest injustice, it was emphasized that even pro se appellants must adhere strictly to the Rules of Appellate Procedure or risk sanctions.

3. Appeal and Error— tolling time periods—authority of trial judge

Trial judges may not toll the time periods for serving and settling the record on appeal contained in the Rules of Appellate Procedure; they may only grant extensions of time for good cause shown to allow a court reporter an additional thirty days to produce the transcript or to allow the appellant to extend once for no more than 30 days the time permitted for service of the proposed record on appeal. Further deviations or extensions of time under the Rules can be granted only by the appellate division.

4. Appeal and Error— notice of appeal—order appealed from

Although a pro se defendant giving notice of appeal referred only to an 11 June 1999 order, it may be plainly inferred that she intended to appeal a 21 April 1999 order and the appeal was properly before the Court of Appeals.

5. Process and Service— conflicting evidence—determination by fact-finder

A trial court order holding that service was properly made on defendant was affirmed where defendant presented affidavits that service was made at defendant's place of business by handing the summons to her brother but an affidavit from the deputy making the service and the return of service indicate service upon defendant. The credibility and the weight of the evidence were for determination by the court.

6. Pleadings— default judgment—denial of motion to dismiss—time to file answer

The trial court erred by allowing plaintiff's motion for default judgment where nothing indicates that defendant had notice that a hearing on that motion would be held at the same time as the hearing on defendant's motion to dismiss. Furthermore, defendant should have been given twenty days to answer from the time of notice of the court's denial of her motion to dismiss. N.C.G.S. § 1A-1, Rule 12(a)(1).

Appeal by defendant from order entered 11 June 1999 by Judge Orlando Hudson in Durham County Superior Court. Heard in the Court of Appeals 22 August 2000.

Albert L. Willis, for plaintiff-appellee.

Robbie Hunt, pro se.

SMITH, Judge.

Defendant Robbie Hunt appeals an order of the trial court denying her motion to alter or amend judgment and ordering defendant evicted from 402 East End Avenue (the East End house) in Durham. We vacate in part, affirm in part, and reverse in part.

Plaintiff James W. Strauss filed suit against defendant 20 January 1999 alleging plaintiff was the lawful owner of the East End house and that defendant claimed an adverse interest in the property. Plaintiff asked the court to remove defendant's "cloud of . . . adverse claim" from plaintiff's title and award plaintiff "$700.00 monthly from July 15, 1998 until date of judgment, plus legal interest, as damage for loss of reasonable monthly rentals." According to the "Return of Service" included in the record, defendant was served with a copy of the summons and complaint on 4 February 1999.

Defendant did not file an answer, but rather filed a motion to dismiss on the grounds of insufficient service of process, N.C.G.S. § 1A-1, Rule 12(b)(5) (1999) (Rule 12), on 5 March 1999. Plaintiff filed a response 6 April 1999 alleging service was proper and asking the court to enter "default judgment against [d]efendant for failure . . . to file timely answer."

In an order filed 14 April 1999, the trial court found as a fact that proper service of process was made upon defendant and that defendant had failed to timely file answer. The court's order stated as follows:

> I. The defendant's motion to dismiss is denied.
>
> II. The plaintiff's motion for default judgment is allowed.
>
> III. That the adverse claim of defendant . . . is hereby removed from [p]laintiff['s] . . . title to . . . 402 East End Avenue . . . .
>
> IV. That the [p]laintiff is hereby awarded judgment against defendant . . . in the amount of $700.00 monthly from July 15, 1998 through date of this order . . . .

An amended order was entered 21 April 1999, identical in all respects to the 14 April 1999 order, but adding that plaintiff should be awarded "$700.00 monthly from July 15, 1998 through date of this order, *for a sum certain totaling $6304.74.*" (emphasis added).

Defendant filed a "Motion to Alter or Amend Judgment" 30 April 1999, N.C.G.S. § 1A-1, Rule 59(e) (1999) (Rule 59), which the trial court denied as untimely 11 June 1999. Defendant appeals, assigning error to the court's 21 April 1999 order finding service proper and entering default judgment against defendant, and to the court's 11 June 1999 order finding her motion to alter or amend untimely.

[1] Before proceeding, we note that plaintiff should have first filed a motion for entry of default, which the clerk, *see* N.C.G.S. § 1A-1, Rule 55(a) (1999) (Rule 55), or the trial court, *see Hasty v. Carpenter*, 51 N.C. App. 333, 336-37, 276 S.E.2d 513, 516-17 (1981), should have ruled on before the trial court ruled on plaintiff's motion for judgment by default, Rule 55(b)(2) ("party entitled to a judgment by default shall apply to the judge therefor"; judge may conduct hearing to determine damages). "[T]he obtaining of a judgment by default involves a two-step process," W. Brian Howell, *Howell's Shuford North Carolina Civil Practice and Procedure* § 55-1 (5th ed. 1998), the entry of default followed by the entry of default judgment, *see* Rule 55(a), (b), which does not appear to have been followed here. As defendant has not raised this issue in her appellate brief, and given the other errors committed herein, we decline to discuss further this error of civil procedure. However, we emphasize to both counsel and the trial court the importance of following the correct procedure to obtain a default judgment.

[2] We first address plaintiff's 15 October 1999 motion to dismiss defendant's appeal, which motion is nearly incomprehensible. Plaintiff is apparently arguing that the record on appeal was not timely filed in this Court; there also appears to be some dispute as to whether defendant timely filed notice of appeal, since the trial court ruled her Rule 59(e) motion untimely. *See* N.C.R. App. P. 3(c) (if "timely" Rule 59 motion is filed, time for filing notice of appeal is tolled). While there may be some merit in plaintiff's motion, we choose, in an exercise of our discretionary powers and "[t]o prevent manifest injustice to" defendant, N.C.R. App. P. 2, to consider defendant's appeal as a petition for writ of certiorari to review both the 21 April and 11 June 1999 orders of the trial court, *see* N.C.R. App. P. 21, which we hereby grant. However, we emphasize that even *pro se*

appellants must adhere strictly to the Rules of Appellate Procedure (the Rules) or risk sanctions. N.C.R. App. P. 25(b).

[3] We are also compelled to note an error committed by Judge Knox V. Jenkins, Jr., who ruled upon an earlier "Motion to Dismiss Appeal" filed by plaintiff on 28 July 1999. In an amended order filed 7 October 1999, Judge Jenkins found defendant had complied with the Rules by serving the record on appeal to plaintiff within thirty-five days, N.C.R. App. P. 11(b), and then held that plaintiff's motion to dismiss "tolled the time for plaintiff to serve approval, objections, amendments or [an alternative] record on appeal," *see id.* (appellee must "serve either notices of approval or objections, amendments, or proposed alternative records on appeal" within 21 days after service of appellant's proposed record on appellee).

Our trial judges may not toll the time periods for serving and settling the record on appeal contained in the Rules. Trial judges may only grant extensions of time for good cause shown to allow a court reporter an additional thirty days to produce the transcript, N.C.R. App. P. 7(b)(1), or to allow the appellant to "extend once for no more than 30 days the time permitted by Rule 11 . . . for the service of the proposed record on appeal," N.C.R. App. P. 27(c)(1). Further deviations or extensions of time under the Rules can only be granted by the appellate division. *See* N.C.R. App. P. 27(c)(2).

"The time schedules set out in the [R]ules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner." *State v. Gillespie*, 31 N.C. App. 520, 521, 230 S.E.2d 154, 155 (1976), *disc. review denied*, 291 N.C. 713, 232 S.E.2d 205 (1977). Once the defendant's notice of appeal was filed 18 June 1999, defendant's record on appeal should have been filed in this Court by 30 August 1999 (35 days to serve record on plaintiff; 21 days for plaintiff to respond; after no response, 15 days to file record with Court; *see* N.C.R. App. P. 11(b), 12). Instead, in large part because of the trial court's order "tolling" the time period for the appellee to serve his objections to the record, the record was not filed until 28 September 1999.

[4] We next address whether defendant's first two assignments of error, related to the trial court's 21 April 1999 order, are properly before this Court in that defendant's notice of appeal references only the trial court's 11 June 1999 order. Rule 3(d) requires that the notice of appeal "shall designate the judgment or order from which appeal is taken." N.C.R. App. P. 3(d). As we are treating defendant's appeal as a

petition for writ of certiorari, however, Rule 3 is not a bar to our hearing of defendant's appeal. *See Ice v. Ice*, 136 N.C. App. 787, 790, 525 S.E.2d 843, 846 (2000) (granting appellant's petition for certiorari and considering arguments relating to judgment not properly referenced in notice of appeal).

"Notice of appeal from denial of a motion to [alter or amend] a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). Further, the requirements of Rule 3(d) are jurisdictional, such that violation of the Rule should result in dismissal of the appeal. *See id.*

However,

> we may liberally construe a notice of appeal in one of two ways to determine whether it provides jurisdiction . . . . First, "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." Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine that the party complied with the rule if the party accomplishes the "*functional equivalent*" of the requirement.

Id. at 156-57, 392 S.E.2d at 424 (citations omitted); *see also Smith v. Insurance Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979) (notice of appeal sufficient if "content of the notice . . . is likely to put an opposing party on guard the issue will be raised"). Although defendant referred only to the 11 June 1999 order in her notice of appeal, we conclude the notice fairly inferred her intent to appeal from the 21 April 1999 order, and did not mislead plaintiff.

The 11 June 1999 order referenced in the notice of appeal is the order which denied defendant's motion to alter or amend the 21 April 1999 order. Defendant's motion was based on the same grounds as the two disputed assignments of error—that the court's 21 April 1999 order was in error. It can thus be plainly inferred that defendant intended to appeal the 21 April 1999 order. As plaintiff also knew the substance of defendant's motion to alter or amend, we conclude plaintiff was not misled by this *pro se* appellant's failure to cite the 21

April 1999 order in her notice of appeal. Thus, the appeal is properly before us.

[5] Defendant first assigns error to the court's finding and conclusion in the 21 April 1999 order that service of process was proper, arguing that a copy of the summons and complaint was not delivered personally to her or left at her "dwelling house or usual place of abode with some person of suitable age and discretion then residing therein" as required by N.C.G.S. § 1A-1, Rule 4(j)(1) (1999) (Rule 4(j)). In affidavits filed with her Rule 12(b)(5) motion to dismiss, defendant and her brother, Bruce Bridges (Bridges), both testified that service was made at defendant's place of business by handing the summons and complaint to Bridges, not defendant.

However, in his response to defendant's motion, plaintiff filed the affidavit of Deputy Sheriff R. Terrell, who testified he "made personal service of the [s]ummons and [c]omplaint in this action upon an adult female who identified herself as the [d]efendant." Also included in the record on appeal is the "Return of Service" signed by R. Terrell, which states service was made "[b]y delivering to the defendant . . . a copy of the summons and complaint." Such service complies with Rule 4(j). We emphasize that a second affidavit from R. Terrell, filed with defendant's motion to alter or amend judgment, was not before the trial court at the time of its initial 14 April 1999 order or its 21 April 1999 amended order. We thus may not consider it when passing upon the court's 21 April 1999 order.

"When the officer's return of the summons shows legal service, a presumption of valid service of process is created. However, this presumption is rebuttable." *Greenup v. Register*, 104 N.C. App. 618, 620, 410 S.E.2d 398, 400 (1991) (citation omitted). Defendant attempted to rebut this presumption by presenting her affidavit and that of Bridges. As the evidence presented by the parties was contradictory, "[t]he credibility of the witnesses and the weight of the evidence were for determination by the court below in discharging its duty to find the facts." *Harrington v. Rice*, 245 N.C. 640, 643, 97 S.E.2d 239, 241 (1957). We thus will not disturb the court's findings, and affirm that part of the court's order holding service was properly made on defendant. *Id.* at 644, 97 S.E.2d at 242.

[6] However, we reverse and vacate the remainder of the court's order. The court, after a hearing, concluded service was proper, "allowed" plaintiff's "motion for default judgment," and awarded judgment in the amount of $6,304.74 in favor of plaintiff. Nothing in the

record on appeal indicates defendant had notice that a hearing on plaintiff's "Motion for Default Judgment" would be held at the same time as the hearing on defendant's motion to dismiss. As defendant made an appearance in the action by filing her motion to dismiss, defendant was entitled to "written notice of the application for judgment at least three days prior to the hearing on such application." Rule 55(b)(2); *see also Stanaland v. Stanaland*, 89 N.C. App. 111, 115, 365 S.E.2d 170, 172 (1988) (movant must provide "three days' [written] notice of the default hearing").

Further, although Rule 12(a)(1) prescribes that "[a] defendant shall serve his answer within 30 days after service of the summons and complaint upon him,"

> [s]ervice of a motion permitted under [Rule 12] alters th[at] period[] of time as follows, unless a different time is fixed by order of the court:
>
> a. The responsive pleading shall be served within 20 days after notice of the court's action in ruling on the motion or postponing its disposition until the trial on the merits . . . .

Rule 12(a)(1). A motion to dismiss made under Rule 12(b)(5) thus tolls the time period, allowing a defendant twenty days, "unless a different time is fixed by . . . the court . . . after notice of the court's action in ruling on the motion" to serve his answer. *Id.*

In the instant case, the court denied defendant's motion to dismiss and purported to enter "default judgment" against defendant on the same date and in the same order. This was improper. Under Rule 12(a)(1), defendant should have been given twenty days to answer from the time of notice of the court's denial of her motion to dismiss. *Moseley v. Trust Co.*, 19 N.C. App. 137, 141, 198 S.E.2d 36, 39, *cert. denied*, 284 N.C. 121, 199 S.E.2d 659 (1973). " 'Although the motions provided for by Rule 12(b) . . . are not pleadings . . . , Rule 12(a) provides that the service of such a motion results in a postponement of the time for serving an answer, and, consequently, no default results pending disposition of these motions.' " *Id.* (citing 6 J. Moore's, *Federal Practice* § 55.02[3] (2nd ed. 1948)).

Plaintiff argues the trial court's order simply "fixed ['a different time[,' Rule 12(a)(1),] and disallowed additional time for filing answer." We cannot agree. We first note the court's order did not state it was fixing "a different time" in which defendant could file her

answer. The trial court simply stated "defendant has failed to timely file answer . . . within the time allowed by law and is subject to judgment by default." Though termed a finding of fact, this statement is actually a conclusion of law, fully reviewable on appeal, *Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984), which we hold is incorrect as a matter of law. Defendant was not required to file answer until twenty days after notice of the court's order was given; it was thus impossible for her to be in default on the day the court's order was entered.

Second, our discussion above demonstrates that even if the court had been attempting to do what plaintiff suggests, such attempt would be contrary to Rule 12. The court must give the party filing a Rule 12(b) motion additional time to file answer after notice is given of the court's disposition of the motion. We thus reverse that portion of the trial court's 21 April 1999 order granting plaintiff's "Motion for Default Judgment" and vacate the remainder of the order awarding judgment to plaintiff in the amount of $6,304.74.

Given our disposition herein, we also vacate the trial court's 11 June 1999 order. It is thus unnecessary to pass on defendant's third assignment of error related to that order. Defendant's fourth and fifth assignments of error, which are not discussed in her brief, are deemed abandoned. N.C.R. App. P. 28(b)(5) (assignments of error not set out in brief are taken as abandoned).

In sum, we deny plaintiff's 15 October 1999 motion to dismiss defendant's appeal; vacate the trial court's 11 June 1999 order denying defendant's motion to alter or amend; affirm that portion of the 21 April 1999 order finding service was proper, reverse that portion granting plaintiff's motion for default, and vacate the remainder of that order; and order the trial court on remand to, upon proper notice to both parties, give defendant twenty days to file answer to plaintiff's complaint.

Motion to dismiss appeal denied. 21 April 1999 order vacated in part, affirmed in part, and reversed and remanded in part. 11 June 1999 order vacated.

Judges GREENE and EDMUNDS concur.

JOAN L. TEPPER, PLAINTIFF v. RUDOLPH A. HOCH, DEFENDANT

No. COA99-1209

(Filed 17 October 2000)

1. **Child Support, Custody, and Visitation— foreign child support order—validity—failure to request hearing in timely manner**

Defendant father is not entitled to contest the validity or enforcement of a child support order entered in Illinois and sought to be registered in North Carolina pursuant to the Uniform Interstate Family Support Act, because: (1) confirmation of a registered order occurs by operation of law under N.C.G.S. § 52C-6-606(b) when the notice is served on the non-registering party and he fails to request a hearing within a timely manner; and (2) defendant failed to request a hearing within 20 days as required by N.C.G.S. § 52C-6-606(a).

2. **Child Support, Custody, and Visitation— foreign child support order—right to contest amount of arrears**

Defendant does not have the right to contest the amount of arrears of a child support order entered in Illinois and thereafter registered in North Carolina under the Uniform Interstate Family Support Act (UIFSA), because: (1) N.C.G.S. § 52C-6-608 provides that the confirmation of a foreign support order registered under UIFSA precludes further contest of that order with respect to any matter that could have been asserted at the time of registration; (2) the official comment to the statute provides the confirmation validates both the terms of the order and the asserted arrearages; and (3) defendant's failure to request a hearing within 20 days after service of notice precludes an attack on the amount of arrearages and entitles plaintiff to enforcement of the order and the alleged arrears.

3. **Child Support, Custody, and Visitation— foreign child support order—trial court set aside confirmation**

The trial court did not abuse its discretion in setting aside the confirmation of a foreign child support order under N.C.G.S. § 1A-1, Rule 60(b)(1), because: (1) the trial court on its own initiative found as a fact that defendant's failure to request a hearing within 20 days was inadvertent; (2) plaintiff does not specifically assign error to this finding of fact and it is therefore deemed to be

supported by evidence in the record, N.C. R. App. P. 10(a); and (3) there is evidence in the record to support this finding based on the notice containing conflicting instructions with the printed language informing defendant he was obligated to file a request for a hearing and handwritten language informing defendant a hearing had been set already.

4. Child Support, Custody, and Visitation— foreign child support order—non-registering party—any defense recognized in issuing state—apply law of state issuing order

A non-registering party is permitted to contest in the forum or responding state a registered child support order by asserting any defense recognized in the issuing state, and the forum or responding state is to apply the law of the state of the court that issued the order.

5. Child Support, Custody, and Visitation— foreign child support order—laches—prejudiced by delay

The trial court properly vacated the registration of the Illinois child support order based on the equitable doctrine of laches because: (1) plaintiff mother neglected to assert her claim for delinquent child support for a period of seven years; (2) during that time, defendant father voluntarily expended $50,000 in college expenses rather than pay the delinquent child support; and (3) defendant was prejudiced by plaintiff's delay.

Appeal by plaintiff from order dated 21 May 1999 by Judge Donald L. Boone in Guilford County District Court. Heard in the Court of Appeals 22 August 2000.

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

Adams Kleemeier Hagan Hannah & Fouts, by Trudy A. Ennis and Daniel W. Koenig, for defendant-appellee.

GREENE, Judge.

Joan L. Tepper (Plaintiff) appeals an order vacating her registration of an Illinois child support order. In addition to vacating the registration, it decreed that Rudolph A. Hoch (Defendant) owes nothing in child support arrears.

Plaintiff and Defendant were married on 5 March 1965 in Chicago, Illinois and had two children: David Hoch (David), born 10 September 1972, and Jonathon Hoch (Jonathon), born 15 December 1976. The parties separated on or about 31 July 1976 and the judgment for dissolution of the marriage (the Judgment) was entered on 2 March 1978 in the Circuit Court of Cook County, Illinois. Defendant and Plaintiff entered into a Marital Settlement Agreement (Agreement) on 7 February 1978, which was later incorporated and merged into the Judgment. Agreement awarded Joan custody and the support arrangements provided:

> [Defendant] is to pay to [Plaintiff] the sum of $110.00 per week as and for the support of the minor children of the parties. The parties agree that neither shall seek a modification of the maintenance and support to be paid to [Plaintiff] by reason of increased earnings of either [Plaintiff] or [Defendant].
>
> . . . .
>
> If the children are educable and commensurate with [Defendant's] financial ability, as determined by his then current net income, he shall provide for a four-year college education. The selection of a college for each child shall be by agreement of the parties . . . and in accordance with [Defendant's] financial ability at such time.

Defendant was current with his child support obligations until 10 September 1990, at which time David turned 18 years of age. At that point, Defendant reduced his payment to Plaintiff to $55.00 per week for the support of Jonathon. Over the course of the past eight years, Plaintiff has on occasion called to inquire as to whether the child support check was in the mail, never questioning Defendant's reduction in the amount of the payment made directly to her. Although Defendant did not participate in the selection of a college for David or Jonathon, as provided in Agreement, he paid approximately $50,000.00 toward the college educations of both in addition to other incidental expenses.

On 23 September 1997, approximately seven years after Defendant unilaterally reduced the child support amount, Plaintiff filed her statement of fact to have her Illinois support order registered in North Carolina, the current residence of Defendant, as provided in N.C. Gen. Stat. § 52C-6-601: a provision of the Uniform Interstate Family Support Act (UIFSA). Plaintiff alleged Defendant

owed $11,988.11 in child support arrears for the period September 1990 until December 1994. The Notice of Registration (the Notice) of a Foreign Support Order (the Order), which was filed on 26 January 1998, was served on Defendant on 19 March 1998. This printed form Notice included a handwritten notation at the top of the page stating: "Courtdate 4-15-98 Courtroom 21." The Notice also stated in the printed portion:

> If you want to contest the validity or enforcement of the registered Foreign Support Order, you **must** file a written request for hearing asking the Court to vacate registration of the order, asserting any defense regarding alleged noncompliance with the order, or contesting the amount of arrears allegedly owed under the order or the remedies that are being sought to enforce the order. Your request for hearing must be filed with the Clerk of Superior Court within twenty (20) days after the date of mailing or personal service of this notice. Failure to contest the validity or enforcement of the registered Foreign Support Order in a timely manner will result in confirmation of the order and the alleged arrears, and precludes further contest of the order with respect to any matter that could have been asserted.

On 15 April 1998, this matter was on the court calendar and Defendant filed a motion for continuance, a notice of objection to relief requested, and a request for hearing at a later date. On 22 April 1998, the matter was continued to 3 June 1998. At the 3 June 1998 hearing, Defendant objected to the registration of the Order and contested the relief sought. The Assistant District Attorney contended that the matter was before the court only for the purpose of registering the Order, and Defendant's arguments concerning the relief sought were premature. The matter was continued until 24 June 1998 so the parties could submit briefs concerning the registration of the Order.

After a hearing, the trial court made the following pertinent findings of fact: Plaintiff's delay and failure to make any complaint for nearly 8 years prejudiced Defendant and Defendant would have applied money he spent paying for the children's education to the child support payment had he anticipated this action; Defendant had been unemployed for nearly 2 years and during that time he continued to make child support payments and pay expenses related to David's college; Defendant "received a court date and did not realize that he had filing deadlines prior to his initial court date"; and Defendant's untimely response to the Notice was inadvertent. The

trial court concluded in pertinent part: grounds exist under N.C. Gen. Stat. § 1A-1, Rule 60 "to relieve Defendant of any prejudice as a result of his failure to contest the registration [of the Order] within 20 days of service of [the Notice]"; Agreement was void because it was unenforceable under Illinois law; full or partial payment had been made; the child support obligations had been satisfied; and the equitable doctrine of laches applies.

The issues are whether: (I) an order of child support entered in another state and sought to be registered in North Carolina, pursuant to UIFSA, is confirmed by operation of law when the Notice is served on the non-registering party and he fails to request a hearing within 20 days; (II) a child support order entered in another state and confirmed in North Carolina, pursuant to UIFSA, precludes the non-registering party from contesting the amount of arrears asserted in the Notice; (III) Rule 60 is appropriate to vacate the confirmation of a foreign support order entered when the non-registering party fails to request a hearing within 20 days of service of the Notice; (IV) a non-registering party may assert an equitable defense to the enforcement of the Order; and if so, (V) the equitable doctrine of laches, as recognized in Illinois, operates to bar Plaintiff's action for arrears.

I

[1] Plaintiff argues the Order is confirmed in North Carolina, by operation of law, because Defendant did not request a hearing within 20 days after receipt of the Notice. Defendant contends the Order is not confirmed in North Carolina, by operation of law, if he contests the Notice within "a timely manner," even if he fails to request a hearing within 20 days of receipt of the Notice. We agree with Plaintiff.

Confirmation of a registered order occurs by operation of law if the non-registering party "fails to contest the validity or enforcement of the registered order in a timely manner." N.C.G.S. § 52C-6-606(b) (1999). The non-registering party cannot contest the validity or enforcement of a registered order unless he first "request[s] a hearing within 20 days after notice of registration." N.C.G.S. § 52C-6-606(a) (1999).

In this case, Defendant was served with the Notice on 19 March 1998 and did not request a hearing until 15 April 1998. Defendant did not request a hearing within 20 days and was, therefore, not entitled to contest the validity or enforcement of the Order. It follows the Order was confirmed by operation of law.

II

[2] Defendant next argues even if the Order is confirmed, by operation of law, he nonetheless has the right to contest the amount of arrears. We disagree.

The confirmation of a foreign support order, registered pursuant to UIFSA, "precludes further contest of [that] order with respect to any matter that could have been asserted at the time of registration." N.C.G.S. § 52C-6-608 (1999). The official comment to this statute provides the confirmation "validates both the terms of the order and the asserted arrearages."[1] N.C.G.S. § 52C-6-608 official commentary (1999) (citations omitted). This comment correctly reflects the intent of the legislature and that intent is also reflected in N.C. Gen. Stat. § 52-6-605. *See Carver v. Carver*, 310 N.C. 669, 314 S.E.2d 739 (1984) (statutes related to the same matter must be construed together to ascertain legislative intent). North Carolina General Statute section 52C-6-605(b)(3) provides that the notice of registration must inform the non-registering party that the failure to contest the validity of the registered order "will result in confirmation of the order and enforcement of the order and the alleged arrears." N.C.G.S. § 52C-6-605(b)(3) (1999). Accordingly, Defendant's failure to request a hearing within 20 days after service of the Notice precludes an attack on the amount of arrearage and entitles Plaintiff to enforcement of the Order and the alleged arrears.

III

[3] A trial court, in its discretion, can relieve a party "from a final judgment, order, or proceeding" on the basis of "[m]istake, inadvertence, surprise, or excusable neglect." N.C.G.S. § 1A-1, Rule 60(b)(1) (1999). This relief can be provided in response to a motion of a party or upon the trial court's own initiative. *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 717, 220 S.E.2d 806, 811 (1975), *disc. review denied*, 289 N.C. 619, 223 S.E.2d 396 (1976).

In this case, there is nothing in the record to reflect Defendant moved the trial court to provide him relief from the confirmation of the Order. The trial court, however, apparently upon its own initiative, found as a fact that Defendant's failure to request a hearing

1. Although the commentary is not binding authority, it must be given "substantial weight" in this Court's "efforts to comprehend legislative intent." *State v. Hosey*, 318 N.C. 330, 337-38, n.2, 348 S.E.2d 805, 810, n.2 (1986).

within 20 days "was inadvertent." Plaintiff does not specifically assign error to this finding of fact and it is therefore deemed to be supported by evidence in the record. *See* N.C.R. App. P. 10(a) (the scope of appellate review is limited to assignments of error set out in the record). In any event, there is evidence in the record to support this finding. The Notice contained somewhat conflicting instructions and could lead a reasonable person to believe he did not have the obligation to request a hearing. The printed language informed Defendant he was obligated to file a request for a hearing within 20 days and yet the handwritten language informed Defendant a hearing had been set already. A finding that a judgment, or in this case a confirmation of a foreign support order, was entered due to the inadvertence of a party is sufficient to support a conclusion the confirmation is to be set aside. N.C.G.S. § 1A-1, Rule 60(b)(1). Accordingly, the trial court did not err in setting aside the confirmation of the Order.[2]

IV

[4] Under UIFSA, a party contesting the validity or enforcement of a registered order may assert certain defenses. N.C.G.S. § 52C-6-607(a) (1999) (listing seven defenses). The Full Faith and Credit for Child Support Orders Act (FFCCSOA), however, makes no provision for the limitation of defenses which may be asserted by one contesting the validity or enforcement of a registered order. 28 U.S.C. § 1738B (Supp. 1999). Because the provisions of the FFCCSOA are binding on all the states and "supersede any inconsistent provisions of state law," *Kelly v Otte*, 123 N.C. App. 585, 589, 474 S.E.2d 131, 134, *disc. review denied*, 345 N.C. 180, 479 S.E.2d 204 (1996), any inconsistencies between UIFSA and FFCCSOA must be resolved in favor of FFCCSOA. Thus a non-registering party is permitted to contest, in the forum or responding state, a registered order by asserting *any* defense recognized in the issuing state.[3] In evaluating these defenses, the forum or responding state is to apply "the law of the State of the court that issued the order." 28 U.S.C. § 1738B(h)(2) (Supp. 1999).

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2. There is no dispute in this case that the procedures of the forum state (*i.e.*, Rules of Civil Procedure), here North Carolina, apply to the enforcement of this Illinois child support order in this State. *State ex. rel. George v. Bray*, 130 N.C. App. 552, 558, 503 S.E.2d 686, 691 (1998).

3. There are some defenses recognized in the forum or responding state available to the non-registering party, *i.e.*, statute of limitations, enforcement remedies. N.C.G.S. § 52C-6-604(b); *Bray*, 130 N.C. App. at 558, 503 S.E.2d at 691.

This approach "lessen[s] the likelihood of forum shopping and relitigation." *Bray*, 130 N.C. App. at 559, 503 S.E.2d at 691.[4]

V

[5] Under Illinois law, "[l]aches is such neglect or omission to assert a right, taken in conjunction with a lapse of time and other circumstances causing prejudice to an adverse party, as will operate as a bar to a suit." *Gill v. Gill*, 290 N.E.2d 897, 899 (Ill. App. Ct. 1972), *aff'd*, 306 N.E.2d 281 (Ill. 1973). Where the delay in asserting a right has caused a change in the positions of the parties, to the detriment of the adverse party, courts will apply the doctrine of laches. *Id.*

In this case, the trial court found: Plaintiff had been in contact with Defendant several times after he reduced the child support payments; during that time, Plaintiff never questioned the reduction in child support payments, nor did she bring any action to collect past due child support payments until seven years after David's emancipation; Defendant had expended $50,000.00 paying for the college education of one child and the majority of the other child's college education despite his being unemployed for 2 years during this time; and Defendant would have applied the amount he expended toward educating the children to the ongoing monthly support had he anticipated Plaintiff would bring this current action. These findings are supported by competent evidence in the record.[5] Based on these findings, the trial court concluded the equitable doctrine of laches was applicable and barred recovery by Plaintiff. Consequently, the findings support the trial court's conclusion that Plaintiff neglected to assert her claim for delinquent child support for a period of some seven years and during that time, Defendant voluntarily expended $50,000.00 in college expenses rather than pay the delinquent child support. Defendant was thus prejudiced by her delay. Accordingly,

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4. This holding is not inconsistent with this Court's recent opinion in *Bray*. In that case, we simply held the non-registering party was precluded from seeking to "avoid enforcement of an out-of-state child support order by asserting equitable defenses [recognized] under the law of the responding state." *Bray*, 130 N.C. App. at 557, 503 S.E.2d at 690 (emphasis added). In *Bray*, there is no indication Defendant attempted to assert equitable defenses recognized in the issuing state.

5. The trial court's findings of fact are deemed conclusive on appeal if they are supported by competent evidence, regardless of whether there is evidence which could have supported findings to the contrary. *Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979).

based on laches, as construed by the Illinois courts, the trial court correctly vacated the registration of the Illinois child support order.[6]

Affirmed.

Judges EDMUNDS and SMITH concur.

CHARLES C. WILLIAMSON, PLAINTIFF v. ELIZABETH G. WILLIAMSON, DEFENDANT

No. COA99-1007

(Filed 17 October 2000)

Divorce— alimony—attorney fees—failure to make sufficient findings of fact and conclusions of law

The trial court erred by awarding defendant wife permanent alimony and attorney fees without making sufficient findings of fact and conclusions of law to support its order, because: (1) the trial court did not make specific findings of the ultimate facts as required by N.C.G.S. § 1A-1, Rule 52(a)(1), but instead made mere recitations of the evidence that do not reflect the processes of logical reasoning; (2) the trial court did not provide any reasoning as required by N.C.G.S. § 50-16.3A(c) for the $1,500 monthly amount, why the award was permanent, and why it would be paid directly to the clerk of court; (3) the trial court did not make findings of fact as to the nature and scope of legal services rendered, the skill and the time required upon which a determination of reasonableness of the attorney fees can be based; and (4) the trial court's conclusions of law constitute bare conclusions unaccompanied by supporting grounds in violation of N.C.G.S. § 1A-1, Rule 52.

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

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6. The trial court gave other reasons for vacating the registration and we need not address those reasons. If any of the trial court's conclusions provide a proper basis for the decision in this case, we must uphold the court's order. *See Danna v. Danna*, 88 N.C. App. 680, 683-84, 364 S.E.2d 694, 696, *disc. review denied*, 322 N.C. 479, 370 S.E.2d 221 (1988).

Appeal by plaintiff from order entered 15 January 1999 by Judge Kevin M. Bridges in Union County District Court. Heard in the Court of Appeals 18 May 2000.

Clark, Griffin & McCollum, L.L.P., by Joe P. McCollum, Jr., for plaintiff-appellant.

Weaver, Bennett & Bland, P.A., by William G. Whittaker, for defendant-appellee.

SMITH, Judge.

Plaintiff Charles C. Williamson appeals the trial court's order awarding defendant Elizabeth G. Williamson permanent alimony and attorney's fees contending in part that the trial court erred in failing to make sufficient findings of fact and conclusions of law to support its order. We agree.

The uncontested pertinent facts and procedural history include the following: Plaintiff and defendant were married 5 September 1970 and separated 1 February 1996. Plaintiff filed a complaint for divorce and equitable distribution on 26 June 1997. On 10 July 1997, defendant filed a counterclaim for alimony. Following a 19 November 1998 hearing on defendant's request for alimony, the trial court, on finding defendant to be a dependent spouse and plaintiff a supporting spouse, entered an order on 15 January 1999 awarding defendant $1,500.00 per month in alimony and $3,122.50 in attorney's fees. Plaintiff appeals.

By his fourteenth and fifteenth assignments of error, plaintiff contends the trial court erred in failing to make sufficient findings of fact and conclusions of law necessary to determine the issues raised. We agree and hold the trial court's factual findings, in large part, amount merely to recitations of the testimony of various witnesses, are not findings of fact, and provide little or no reasoning to support the conclusions of law.

N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (1990), governing actions for permanent alimony, provides: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Pursuant to Rule 52(a), the trial court's findings of fact must be more than mere evidentiary facts; they must be the "specific ultimate facts . . . sufficient for [an] appellate court to determine that the judgment is adequately sup-

ported by competent evidence." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977) (citations omitted). Evidentiary facts are simply "subsidiary facts required to prove the ultimate facts," *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951) (citations omitted), while "[u]ltimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts," *Appalachian Poster Advertising Co. v. Harrington*, 89 N.C. App. 476, 479, 366 S.E.2d 705, 707 (1988) (citation omitted). Thus,

> while Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Quick v. Quick, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982).

In the instant case, many of the trial court's findings of fact are not the "ultimate facts" required by Rule 52(a), *Montgomery*, 32 N.C. App. at 156-57, 231 S.E.2d at 28, but rather are mere recitations of the evidence and do not reflect the "processes of logical reasoning," *Appalachian Poster Advertising Co.*, 89 N.C. App. at 479, 366 S.E.2d at 707. This is indicated by the trial court's repeated statements that a witness "testified" to certain facts or other words of similar import. For example, the purported "findings" regarding the parties' respective monthly expenses read as follows in pertinent part:

> 12. From her *testimony* and her *financial affidavit* filed August 14, 1998, the Defendant has needs and expenses of approximately $3,010.00 per month. . . .
>
> 13. The Plaintiff *testified* to his family (new spouse, her daughters, and himself) having total needs and expenses of $6,861.00. *He estimated* his personal needs and expenses to be $4,394.00 per month. *Plaintiff testified* he took as his expenses 1/4 of household expenses, as 4 people were living in the house (the Plaintiff, his new wife, and her two children).

(Emphasis added.) These findings are mere recitations of the evidence and are not the ultimate facts required to support the trial court's conclusions of law regarding the needs of the parties.

Additionally, N.C. Gen. Stat. § 50-16.3A(c) (1995) requires the trial court, in making an alimony award, to set forth "the reasons for its amount, duration, and manner of payment." The trial court in the case at bar failed to provide any reasoning for the $1,500.00 monthly amount, why the award was permanent, or why it would be paid directly to the Union County Clerk of Court. *See Friend-Novorska v. Novoraka*, 131 N.C. App. 867, 870, 509 S.E.2d 460, 462 (1998) (holding that trial court violated N.C.G.S. § 50-16.3A(c) by failing to set forth reasoning to support the amount or duration of a thirty-month alimony award).

Additionally, in awarding attorney's fees, the trial court failed to "make findings of fact as to the nature and scope of legal services rendered, the skill and the time required upon which a determination of reasonableness of the fees can be based." *Owensby v. Owensby*, 312 N.C. 473, 475-76, 322 S.E.2d 772, 774 (1984) (citations omitted). This failure effectively precludes this Court from determining whether the trial court abused its discretion in setting the amount of the award.

We also hold the trial court's conclusions of law constitute "bare conclusion[s] unaccompanied by the supporting grounds for [such] conclusion," in violation of Rule 52(a). *Appalachian Poster Advertising Co.*, 89 N.C. App. at 480, 366 S.E.2d at 707. "A 'conclusion of law' is the court's statement of the law which is determinative of the matter at issue [and] . . . must be based on the facts found by the court . . . ." *Montgomery*, 32 N.C. App. at 157, 231 S.E.2d at 28-29 (citations omitted). Accordingly, the trial court was required to conclude on the basis of the ultimate facts whether alimony was proper. We hold the conclusions of law here constitute nothing more than general statements of the law and are not related in any way to the findings of fact.

Based on the foregoing, we reverse the trial court's order and remand with instructions that the trial court make appropriate findings of fact and conclusions of law to support its awards, if any. We leave it to the trial court to determine whether additional evidence is needed. Having determined the trial court's findings and conclusions will not support its decision, it is unnecessary for us to discuss the remaining assignments of error as the facts giving rise thereto may not occur on remand.

Reversed and remanded.

Judge WALKER concurs.

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

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

Because I believe that the order of the trial court contains appropriate findings of fact and conclusions of law to support the award of alimony, I respectfully dissent.

Under section 50-16.2 of the General Statutes, a spouse "who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse" is entitled to alimony. N.C. Gen. Stat. § 50-16.1A(2) (1999). A spouse is "actually substantially dependent" if he or she can demonstrate "actual dependence on the other in order to maintain the standard of living to which he or she became accustomed during the last several years prior to the spouses' separation." *Talent v. Talent*, 76 N.C. App. 545, 548, 334 S.E.2d 256, 258 (1985), *superseded on other grounds by* N.C. Gen. Stat. § 50-16.3A(a) (1999). An award of alimony based on dependency must contain " 'findings sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a determination of an alimony award.' " *Lamb v. Lamb*, 103 N.C. App. 541, 545, 406 S.E.2d 622, 624 (1991) (quoting *Shamarak v. Shamarak*, 81 N.C. App. 125, 128, 343 S.E.2d 559, 561 (1986) (citations omitted)).

In my opinion, the following pertinent findings of fact are sufficiently specific to determine dependency:

> 6. The Plaintiff is employed by the First Presbyterian Church of Monroe, North Carolina. He is under contract . . . and has a gross yearly income of $77,227.88 . . . .
>
> . . . .
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> 8. The Plaintiff supplements his income with honorariums for weddings and other services at a rate of approximately $100.00 per month. The Plaintiff has had gross income in excess of $70,000.00 since at least 1994.

9. During the marriage of the parties, the Defendant worked off and on as a teacher, never earning in excess of $16,000.00 per year.

. . . .

11. The Defendant is currently working four jobs, at approximately 52 hours per week to make ends meet. Defendant nets $1,422.00 per month. At the time of this hearing, she had not made her mortgage payment for three months.

12. From her testimony and her financial affidavit filed August 14, 1998, the Defendant has needs and expenses of approximately $3,010.00 per month. . . .

13. The Plaintiff testified to his family (new spouse, her daughters, and himself) having total needs and expenses of $6,861.00. He estimated his personal needs and expenses to be $4,394.00 per month. . . .

14. The Defendant has suffered from depression and anxiety attacks since at least 1991. She has seen Dr. John Humphries off and on since that time. Since [the] time of the parties' separation, the Defendant's depressed periods have increased in frequency and severity. When the Defendant is in a depressed state, she can do nothing. Her brain "turns off", and she cannot function, cannot bathe, buy groceries, cook, etc. She fatigues easily, and cries without warning. . . .

. . . .

17. Dr. Humphries testified that the Defendant should not work in a stressful environment or job, or a job requiring intense cognitive functions or judgment. In Dr. Humprhies' opinion, teaching is a very stressful environment, and although Defendant has improved her situation somewhat, for the past two years she was working at the level she was able to perform with efficiency, i.e. part-time retail work. . . .

18. Prior to the parties' separation, their lifestyle was not lavish, however, it was comfortable. The Plaintiff had income in excess of $50,000.00, and an additional $20,000.00 in benefits. The Defendant was able to go to lunch with friends, attend meetings, go to the theater, and travel. (Some of the trips were paid for by Plaintiff's mother, however, the parties still had to pay their food and entertainment expenses) The Defendant purchased clothing

at Belks and The Limited (spending approximately $200.00 per month). She spent $40.00 to $50.00 per month on personal care, $80.00 per month on her hair, and $500.00 to $1000.00 on Christmas and birthday gifts for the family and their children. The house the parties lived in prior to separation was over 3000 square feet.

19. The Defendant currently lives in a house with 1100 square feet. She cannot attend movies or go to lunch with friends. She purchases clothing when she does at the Goodwill Store and consignment shops. And, she spends approximately $5.00 per month on personal care (A neighbor cuts her hair). She would like to spend approximately $50.00 per person for Christmas and birthdays. The Defendant had a housekeeper before separation, and now cannot afford one, although the Plaintiff has a part time housekeeper.

20. The Plaintiff is remarried to a woman who was employed as a Registrar at Wingate College earning $31,000.00 per year. They live in his current wife's pre-marital house with a mortgage of $1215.00 per month, and with taxes and insurance an extra $1,000.00. It has 3500 square feet. . . .

21. The Plaintiff drives a 1993 Toyota Camry, and the Defendant drives a 1987 Honda automobile which does not have air conditioning because it is broken, and the Defendant has been unable to fix it since [the] summer of 1998.

Because there is competent evidence in the record to support these findings, they are conclusive on appeal. *See Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 541, 356 S.E.2d 578, 582, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987) (trial court's factual findings are binding if competent evidence exists to support them). I am also satisfied that these findings, in turn, support the following conclusions of law:

1. The Defendant is a dependant spouse as defined by N.C.G.S. § 50-16.1(a)(2).

2. The Plaintiff is the supporting spouse as defined by N.C.G.S. § 50-16.1(a)(5).

3. The Defendant is entitled to an award of alimony.

4. An award of alimony is equitable considering all of the relevant factors, including those set out in N.C.G.S. § 50-16.3(a)(b).

5. The Plaintiff, as the supporting spouse, has the ability to pay the designated amount.

6. That the amount awarded as alimony is fair and just to all parties based on a consideration of all the relevant factors, including those set out in N.C.G.S. § 50-16.3(a)(b).

Accordingly, I vote to affirm the order directing plaintiff to pay to defendant the sum of $1,500.00 per month as alimony, such payments to continue until the death of either party or until the remarriage or cohabitation of defendant. As to the matter of attorneys fees, I agree with the majority that there are insufficient findings of fact and conclusions of law to support the award. Therefore, I would reverse that portion of the award and remand for further appropriate findings.

MARGARET JOHNSON BARRETT, PLAINTIFF v. ANTHONY WILLIAM BARRETT, DEFENDANT

No. COA99-1288

(Filed 17 October 2000)

1. Divorce— alimony—dependent spouse classification—findings

The trial court correctly classified plaintiff as a dependent spouse in an alimony determination where the court found that plaintiff earns $2,666.50 in gross monthly income but has $3,450 in monthly expenses and considered the marital standard of living, plaintiff's relative earning capacity, and her relative estate. Although the court did not make specific findings as to the amount of marital expenditures, the court's findings were sufficient for an overall portrayal of the parties' accustomed standard of living.

2. Divorce— alimony—classification as supporting spouse

The trial court's classification of defendant as a supporting spouse for alimony purposes was more than adequately supported by findings that defendant earns $7,250 per month and has expenses in the amount of $6,216.66 per month, with a resulting income-expenses surplus.

3. Divorce— alimony—amount—ability of supporting spouse to pay

The trial court did not abuse its discretion in an alimony determination in the amount awarded where defendant contended that the award exceeded what he was able to pay, but overlooked clear statutory language which stated that income encompasses both earned and unearned income, including employment benefits. Taking into account all the statutory factors, defendant's income-expenses surplus is well in excess of that which the court actually ordered defendant to pay.

4. Divorce— alimony—attorney fees

The trial court properly exercised its discretion in awarding attorney fees in an alimony action where it was previously determined in this opinion that plaintiff is a dependent spouse and entitled to receive alimony; the trial court's findings suggest that plaintiff was forced to deplete her equitable distribution award to pay her debts and expenses; the amount awarded was within the range sought; and the court found that the hourly rates charged were reasonable and customary for that type of work.

Appeal by defendant from order entered 19 May 1999 by Judge David Brantley in Lenoir County District Court. Heard in the Court of Appeals 13 September 2000.

White & Allen, P.A., by David J. Fillipelli, Jr. and Delaina J. Davis, for plaintiff-appellee.

Wallace, Morris & Barwick, P.A., by Elizabeth A. Heath, for defendant-appellant.

LEWIS, Judge.

Plaintiff and defendant married on 11 September 1966 and had three children over the course of their marriage. On 2 February 1996, the parties separated, and plaintiff thereafter filed this action for equitable distribution, alimony, and absolute divorce. The trial court entered a decree of divorce on 23 June 1997. The parties later settled their claims for equitable distribution, leaving only the matter of alimony to be determined by the court. In an order entered 19 May 1999, the trial court awarded plaintiff $1750 per month in alimony and further ordered defendant to pay $3100 in attorney's fees.

Defendant first appeals from that portion of the order awarding plaintiff alimony. As our statutes outline, alimony is comprised of two separate inquiries. First is a determination of whether a spouse is *entitled* to alimony. N.C. Gen. Stat. § 50-16.3A(a) (1999). Entitlement to alimony requires that one spouse be a dependent spouse and the other be a supporting spouse *Id.* If one is entitled to alimony, the second determination is the *amount* of alimony to be awarded. N.C. Gen. Stat. § 50-16.3(b). We review the first inquiry de novo, *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972), and the second under an abuse of discretion standard, *Quick v. Quick*, 305 N.C. App. 446, 453, 290 S.E.2d 653, 658 (1982).

In his brief, defendant contests both plaintiff's entitlement to alimony and the amount she was awarded. However, his assignments of error only address the issue of *amount*. Nowhere in his assignments does he challenge the trial court's classification of him as the supporting spouse or plaintiff as the dependent spouse. Ordinarily failure to so assign error would constitute waiver of that argument for purposes of appeal. N.C.R. App. P. 10(a). However, pursuant to our discretionary authority, we will nonetheless address defendant's challenge to the issue of entitlement. N.C.R. App. P. 2.

[1] Entitlement to alimony is governed by N.C. Gen. Stat. § 50-16.3A(a). According to that section, a party is entitled to alimony if three requirements are satisfied: (1) that party is a dependent spouse; (2) the other party is a supporting spouse; and (3) an award of alimony would be equitable under all the relevant factors. Defendant argues plaintiff is not a dependent spouse and that he is not a supporting spouse. We begin with the dependent spouse classification.

To be a dependent spouse, one must be either "actually substantially dependent upon the other spouse" or "substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1A(2). A spouse is "actually substantially dependent" if he or she is currently unable to meet his or her own maintenance and support. *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980). A spouse is "substantially in need of maintenance" if he or she will be unable to meet his or her needs in the future, even if he or she is currently meeting those needs. *Id.* at 181-82, 261 S.E.2d at 855; *see also* 2 Suzanne Reynolds & Jacqueline Kane Connors, *Lee's North Carolina Family Law* § 9.5 (5th ed. 1999). The trial court concluded plaintiff was a dependent spouse because she was both actually

dependent upon defendant and substantially in need of his support. We uphold the trial court's classification of plaintiff as a dependent spouse.

Here, the trial court found that plaintiff earns $2666.50 in gross monthly income, but has $3450 in monthly expenses. Thus, she has an income-expenses deficit of $783.50 per month. This in and of itself supports the trial court's classification of her as a dependent spouse. *See, e.g., Phillips v. Phillips*, 83 N.C. App. 228, 230, 349 S.E.2d 397, 399 (1986) ("The trial court found that plaintiff had monthly expenses of $1,300 and a monthly salary of $978. That leaves her with a deficit of $322 a month. From these facts, the trial court could have found that plaintiff was both actually substantially dependent on defendant and substantially in need of defendant's support."); *see also Beaman v. Beaman*, 77 N.C. App. 717, 723, 336 S.E.2d 129, 132 (1985) ("[T]o properly find a spouse dependent the court need only find that the spouse's reasonable monthly expenses exceed her monthly income and that the party has no other means with which to meet those expenses."). *But see Knott v. Knott*, 52 N.C. App. 543, 546, 279 S.E.2d 72, 75 (1981) ("[A] mere comparison of plaintiff's expenses and income is an improperly shallow analysis."). Here, however, the trial court's order reflects that it considered other factors in addition to just plaintiff's income-expenses deficit. Specifically, the trial court considered the marital standard of living, plaintiff's relative earning capacity, and even her separate estate (a $600 savings account). We hold that the evidence and findings support the trial court's classification of plaintiff as a dependent spouse.

Defendant properly notes that the parties' needs and expenses for purposes of computing alimony should be measured in light of their accustomed standard of living during the marriage. *Williams*, 299 N.C. at 183, 261 S.E.2d at 856. To this end, defendant argues the trial court's findings are insufficient with respect to the parties' marital standard of living. Specifically, he points to the absence of any findings with respect to the parties' expenditures during the marriage. We disagree. The trial court made explicit findings as to the parties' respective incomes during the marriage, the type of home in which they lived, and the types of family vacations they enjoyed. Although the court did not make any specific findings as to the amount of marital expenditures, it did list various bills that defendant regularly paid prior to the parties' separation, including utilities, cable and television, telephone, newspaper, pest control, and yard service. We conclude these findings were sufficient for an overall portrayal of the

parties' accustomed standard of living. *See generally Adams v. Adams*, 92 N.C. App. 274, 279-80, 374 S.E.2d 450, 453 (1988) ("The judge's findings as to Mr. Adams' monthly gross income and his reasonable living expenses, coupled with the findings as to Ms. Adams' monthly income and her expenses during the last year of the marriage, satisfied the requirement . . . for findings regarding the Adamses' accustomed standard of living.").

[2] We next consider the court's classification of defendant as a supporting spouse. Just because one spouse is a dependent spouse does not automatically mean the other spouse is a supporting spouse. *Williams*, 299 N.C. at 186, 261 S.E.2d at 857. To be a supporting spouse, one must be the spouse upon whom the other spouse is either "actually substantially dependent" or "substantially in need of maintenance and support." N.C. Gen. Stat. § 50-16.1A(5). A surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification. *Beaman*, 77 N.C. App. at 723, 336 S.E.2d at 132. Here, the trial court found that defendant earns $7250 per month in income and has expenses in the amount to $6216.66 per month. The resultant income-expenses surplus more than adequately supports the conclusion that defendant is a supporting spouse.

[3] Defendant next contests the amount of alimony the court awarded to plaintiff. As stated earlier, a trial court's ultimate conclusion as to the amount of alimony will not be upset absent a manifest abuse of discretion. *Quick*, 305 N.C. at 453, 290 S.E.2d at 658. We find no such abuse here.

Specifically, defendant contends the alimony award exceeds that which he is able to pay. He points out that the court's findings reflect his income-expenses surplus is only $1033.34 per month ($7250 in salary less $6216.66 in expenses), which is well under the $1700 per month the court ordered him to pay. However, defendant overlooks the clear statutory language, which states that income encompasses both earned and unearned income, including "benefits such as medical, retirement, insurance, social security, or others." N.C. Gen. Stat. § 50-16.3A(b)(4). In this regard, the trial court also found that defendant receives from his employer $500 per month as an automobile allowance, $2000 per year (or $166.67 per month) in payments for his life insurance premiums, and a ten percent contribution to his IRA (i.e., $725 per month). Taking into account all the statutory factors, defendant's aggregate income is actually closer to $8641.67 per month. The resultant income-expenses surplus is thus closer to $2400

per month, well in excess of that which the court actually ordered defendant to pay.

Defendant also points out that the trial court's findings reflect plaintiff has a monthly deficit of only $783.50 and thus does not need nearly as much as the court awarded her. Defendant, however, overlooks the fact that the $783.50 figure only takes into account plaintiff's monthly *gross* income. Using her monthly *net* income (as was used for defendant's computations) results in an income-expenses deficit of nearly $1400 per month ($2048.98 net income less $3450 in expenses). Given that defendant had an income-expenses surplus of $2400 per month and plaintiff had an income-expenses deficit of $1400 per month, the trial court's intermediate award of $1700 a month did not constitute an abuse of discretion.

[4] Finally, defendant argues the trial court improperly ordered him to pay $3100 in attorney's fees. As with our analysis for alimony, an analysis for attorney's fees requires a two-part determination: entitlement and amount. This time, defendant did assign error to both issues, and each will be addressed in turn.

A spouse is entitled to attorney's fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation. *Clark v. Clark*, 301 N.C. 123, 135-36, 271 S.E.2d 58, 67 (1980). Entitlement, i.e., the satisfaction of these three requirements, is a question of law, fully reviewable on appeal. *Id.* at 136, 271 S.E.2d at 67. Our holding as to alimony disposes of the first two requirements: plaintiff is a dependent spouse and is entitled to receive alimony. Thus, our focus hinges on whether plaintiff had sufficient funds to defray the costs of litigation. With regard to this determination, a court should generally focus on the disposable income and estate of just that spouse, although a comparison of the two spouses' estates may sometimes be appropriate. *Van Every v. McGuire*, 348 N.C. 58, 62, 497 S.E.2d 689, 691 (1998). Here, the trial court's findings reflect plaintiff has negative disposable income and a separate savings account of only $600. This fact alone demonstrates that plaintiff had insufficient funds to defray the costs of litigation. Defendant nonetheless points to the $5000 cash she received pursuant to equitable distribution out of which her litigation costs could be paid. However, defendant has made no showing (either at trial or on appeal) that plaintiff even still has this money from which she could defray her litigation expenses, as opposed to being forced to spend it to pay off her monthly expenses. After all, the trial court

found that plaintiff's only source of savings was her $600 credit union account. Furthermore, the court noted that plaintiff's credit card obligation is currently $20,000, most of which was incurred after the date of separation in order to meet her monthly expenses. These findings suggest that plaintiff was in fact forced to deplete her equitable distribution award to pay off her debts and expenses. We therefore conclude plaintiff was without sufficient funds to defray the costs of litigation and was therefore entitled to attorney's fees.

Once a spouse is entitled to attorney's fees, our focus then shifts to the amount of fees awarded. The amount awarded will not be overturned on appeal absent an abuse of discretion. *Spencer v. Spencer*, 70 N.C. App. 159, 169, 319 S.E.2d 636, 644 (1984). Here, plaintiff's attorney submitted two affidavits averring his costs in this action amounted to $5446.55. The trial court's $3100 award was thus within the range sought. *Cf. id.* (holding no abuse of discretion when fees awarded fell within the range of costs testified to by wife's expert witnesses). The trial court also found that the hourly rates charged were reasonable and customary for that type of work. Defendant has not contested this specific finding or otherwise suggested that plaintiff's counsel has charged excessively. Accordingly, we conclude the trial court properly exercised its discretion in awarding $3100 in fees.

Affirmed.

Judges WALKER and HUNTER concur.

KENNETH J. DIEHL, PLAINTIFF v. DENNIS S. KOFFER, M.D., DEFENDANT

No. COA99-1114

(Filed 17 October 2000)

Medical Malpractice— res ipsa loquitur—not applicable

Plaintiff was not entitled to an instruction on res ipsa loquitur in a medical malpractice action arising from a gallbladder removal where the proper standard of care, the surgical procedure, and the attendant risks were not within the common knowledge or experience of a jury and there was conflicting expert testimony. Plaintiff must be able to show, without expert testimony,

that the injury was of a type not typically occurring in the absence of some negligence by defendant.

Appeal by plaintiff from judgment entered 5 February 1999 by Judge Donald W. Stephens in Johnston County Superior Court. Heard in the Court of Appeals 16 August 2000.

Snipes Law Office, by David W. Snipes, for plaintiff-appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Mark E. Anderson, for defendant-appellee.

HUNTER, Judge.

Kenneth J. Diehl ("plaintiff") appeals to this Court the trial court's judgment dismissing his complaint with prejudice after a jury concluded that Dennis S. Koffer, M.D. ("defendant") was not negligent in his rendering of medical care to plaintiff. (We note defendant Johnston Surgical Associates, P.A. was dismissed from the action upon summary judgment and is not party to this appeal.) Plaintiff brings forward only one assignment of error, that being, that the trial court erred by refusing to instruct the jury on the issue of *res ipsa loquitur*. We find no error.

The record before us reveals that on 20 December 1993, Dr. Koffer operated on plaintiff to remove his gallbladder. The procedure, known as a laparascopic cholecystectomy,

> involves the insertion of sharp instruments, known as trocars, into the belly of the patient, so that the gallbladder can be visualized with small cameras and removed without a large incision. [A few minutes into the operation,] [d]uring the insertion of the initial trocar, damage was done to the Plaintiff's mesentery, duodenum and aorta. . . .

The facts show:

> Plaintiff's blood pressure dropped to 57 over 32. . . . [A]n anesthesiologist[] was called to the operating room. . . . [A] general surgeon, . . . a pathologist, and two additional nurse anesthetists were also called to the operating room. Later, . . . a vascular surgeon . . . was also called to the operating room.
>
> . . .

> Defendant [Koffer] . . . made the decision that the laparoscopic surgical procedure had to be aborted and that Plaintiff had to be opened up.
>
> . . .
>
> After the surgery, Plaintiff was moved to the intensive care unit . . . where he remained for approximately nine days.

Plaintiff's claim in this case rests on the sole question of whether Dr. Koffer, in violation of the standard and accepted medical practices of the area, negligently inserted the trocar into plaintiff's abdomen, thus entitling plaintiff to the requested *res ipsa loquitur* jury instruction. Plaintiff argues that the

> evidence at trial established that during a laparoscopic gallbladder surgery, the standard and accepted practice at the time of Plaintiff's surgery was to introduce the trocar into the patient's abdomen in a downward angle toward the patient's feet, and that this practice was employed in order to avoid injuries to the patient such as those incurred by Plaintiff. . . . [Furthermore,] the evidence at trial supported a jury instruction on the doctrine of res ipsa loquitur and that, had the jury been so instructed, there was sufficient evidence from which the jury could find, in the absence of direct proof, that Plaintiff would not have been injured unless Defendant negligently inserted the trocar into Plaintiff's abdomen in an upward direction, contrary to standard and accepted practices.
>
> Thus, the only issue on appeal is whether Plaintiff introduced sufficient evidence at trial to require that the trial court instruct the jury on the doctrine . . . .

We hold that plaintiff was not entitled to such an instruction.

> We recognize that the doctrine of *res ipsa loquitur*,
>
> in its distinctive sense, permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the accident is sufficient to carry the case to the jury on the bare question of negligence. But where the rule does not apply, the plaintiff must prove circumstances tending to show some fault of omission or commission on the part of the defendant in addition to those which indicate the physical cause of the accident.

Harris v. Mangum, 183 N.C. App. 235, 237, 111 S.E. 177, 178 (1922). Therefore, " '*[r]es ipsa loquitur* (the thing speaks for itself) simply means that *the facts of the occurrence itself warrant an inference of defendant's negligence, i.e.*, that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking.' " *Sharp v. Wyse*, 317 N.C. 694, 697, 346 S.E.2d 485, 487 (1986) (emphasis in original) (quoting *Kekelis v. Machine Works*, 273 N.C. 439, 443, 160 S.E.2d 320, 323 (1968). However,

> *applicability of the res ipsa loquitur doctrine depends on whether* **as a matter of common experience** *it can be said the accident could have happened without dereliction of duty* on the part of the person charged with culpability.
>
> **The doctrine is grounded in the superior logic of ordinary human experience**; [and] it permits a jury, on the basis of experience or common knowledge, to infer negligence from the mere occurrence of the accident itself. *However*, ***application of the doctrine*** *based on common knowledge* ***is allowed only when*** *the occurrence clearly speaks for itself.*

57B Am. Jur. 2d, *Negligence* § 1826 (1989) (emphasis added) (footnotes omitted). Therefore, in order for the doctrine to apply, not only must plaintiff have shown that his injury resulted from defendant's insertion of the trocar into plaintiff's abdomen, but ***plaintiff must have been able to show—without the assistance of expert testimony—that the injury was of a type not typically occurring in absence of some negligence by defendant.*** *Id.* Thus, expert proof of the standard of care should not have been necessary for plaintiff to show a jury that defendant was negligent.

In his brief to this Court, plaintiff concedes that our Courts "have been somewhat restrictive in the application of the doctrine . . . in medical malpractice cases." Further, plaintiff states that he "is aware that . . . this Court has voiced disfavor at the practice of using expert testimony in res ipsa loquitur cases, stating that the facts must be such that the jury can infer negligence from common experience." Nevertheless, plaintiff argues that, although the trial court relied on *Prosser and Keeton on the Law of Torts* § 39 (5th ed. 1984) in establishing its view of disallowing medical testimony to prove the doctrine's applicability, he can "find[] nothing in th[e] [treatise's] passage to advocate a preclusion of the use of expert testimony in res ipsa loquitur cases." We are unpersuaded by plaintiff's argument, if for no other reason than that this Court has long held the position that in

order for *res ipsa loquitur* to apply, the negligence complained of must be of the nature that a jury—through common knowledge and experience—could infer. *Bowlin v. Duke University*, 108 N.C. App. 145, 149, 423 S.E.2d 320, 323 (1992) ("injury to the sciatic nerve during a bone marrow harvest procedure is peculiarly the subject of expert opinion, and a layman would have no basis for concluding that defendant was negligent in extracting the marrow"). *See also*, *Grigg v. Lester*, 102 N.C. App. 332, 335, 401 S.E.2d 657, 659 (1991) (any layman could properly infer the tear in plaintiff's abdomen sustained during caesarean section resulted from force applied by the physician; however, "in the absence of [expert] testimony . . . , a layman would have no basis for concluding that the force exerted was either improper or excessive"); and, *Jackson v. Stancil and Smith v. Stancil*, 253 N.C. 291, 297, 116 S.E.2d 817, 821 (1960) ("the doctrine of *res ipsa loquitur* does not apply, 'it being common knowledge that aeroplanes do fall without fault of the pilot' ") (quoting *Smith v. Whitley*, 223 N.C. 534, 535, 27 S.E.2d 442, 443 (1943)).

In the case at bar, plaintiff's expert, Dr. A. R. Moosa testified that the proper method for inserting the trocar into a patient's abdomen was at a downward angle, and "[i]t has to be inserted very, very carefully because if you push too forcefully or in the wrong direction you may perforate something that you don't intend to." Thus, it was Dr. Moosa's opinion that defendant was negligent in his insertion of the trocar into plaintiff's abdomen.

However, defendant presented evidence that "even with proper application of technique, the injury sustained by [plaintiff] was a complication of the procedure." Furthermore, another of plaintiff's experts, Dr. Alice Seldon, who was actually present at some point during plaintiff's surgery, testified that the trocar no doubt caused the injuries; however, the trocar "wasn't angled up. It was angled . . . like toward the middle and maybe a little bit toward the feet." "[T]he way you're taught to do it . . . ." Furthermore, in response to whether the injuries plaintiff sustained could happen even when the surgeon is doing exactly what they were taught to do, Dr. Seldon responded:

> Yes. In fact, it's happened. That's one of the reasons that it's not done that way anymore. That procedure has changed from a blind procedure to an open procedure. Because even if you did it the exact same way that you were taught, you ran into problems, mind you not often, but often enough that the procedure was changed [since the time plaintiff had his surgery].

This Court does not believe, that the proper standard of care or surgical procedure for gallbladder removal nor its attendant risks are within the common knowledge or experience of a jury. Thus, expert testimony was not only proper but necessary. As such, because there was conflicting expert testimony as to defendant's negligence, we cannot therefore hold that "the injury is one that [would] not ordinarily occur in the absence of some negligent act or omission" by defendant. *Grigg*, 102 N.C. App. at 333, 401 S.E.2d at 658. Our ruling is borne out by evidence reflecting that plaintiff's injuries are not all that uncommon but are known to occur when the operating physician utilizes the blind insertion technique—a technique that was commonly used at the time plaintiff had his surgery but which, has since changed, due to these types of injuries. "This Court has consistently reaffirmed that *res ipsa loquitur* is inappropriate in the usual medical malpractice case, where the question of injury and the facts in evidence are peculiarly in the province of expert opinion." *Bowlin*, 108 N.C. App. at 149-50, 423 S.E.2d at 323. *See also*, *Elliot v. Owen*, 99 N.C. App. 465, 393 S.E.2d 347 (1990). Thus, we cannot deviate from the precedent set. We therefore hold that plaintiff was not entitled to a jury instruction on the doctrine of *res ipsa loquitur*. Accordingly, we find no error in the trial court's decision to deny plaintiff's request for such instruction.

No error.

Judges LEWIS and WALKER concur.

MARY ELLISON LITTLE AND ROBERT J. ELLISON, PLAINTIFF v. JACK DOUGLAS STOGNER, INDIVIDUALLY, AND JACK DOUGLAS STOGNER, AS ADMINISTRATOR OF THE ESTATE OF PEGGY W. STOGNER AND JEFFREY W. MALICKSON, TRUSTEE, DEFENDANTS

No. COA99-1406

(Filed 17 October 2000)

Appeal and Error— appealability—interlocutory order—grant of a preliminary injunction—no substantial right

Defendant's appeal from a preliminary injunction enjoining defendant from proceeding with a foreclosure by power of sale on the pertinent property until the litigation is resolved is dismissed, because: (1) an order granting or refusing a preliminary

injunction is an interlocutory order; (2) the trial court did not certify the case for appeal; (3) a substantial right is not affected since defendant's right to a power of sale foreclosure still exists even though it has been delayed and must wait for resolution of the litigation; and (4) the trial court adequately protected defendant's right by requiring plaintiffs to post a significant security bond in the amount of $15,000.

Appeal by defendant Jack Douglas Stogner from a preliminary injunction entered 26 July 1999 by Judge Mark E. Klass in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 September 2000.

Erwin and Bernhardt, P.A., by Fenton T. Erwin, Jr. and Peter F. Morgan, for plaintiff-appellees.

Smith Helms Mulliss & Moore, L.L.P., by Thomas D. Myrick and Laura T. Beyer, for defendant-appellant.

HUNTER, Judge.

Jack Douglas Stogner ("defendant") appeals from a preliminary injunction entered by Judge Mark E. Klass enjoining the foreclosure under a power of sale contained in the deed of trust given by Mary Ellison Little and Robert J. Ellison ("plaintiffs") at the time of their purchase of real estate from defendant. Defendant brings forward several assignments of error. However, we are unable to reach the merits of these arguments as defendant's appeal is not immediately appealable and must be dismissed.

Plaintiffs commenced this action against defendant, individually and as Administrator of the Estate of Peggy W. Stogner, and Jeffrey W. Malickson, trustee, on 31 December 1998, alleging fraud, deception, and breach of an implied warranty arising from the sale of certain real property described as lots fifteen and sixteen of Lake Wylie Recreational Lots, section forty-three in Mecklenburg County, North Carolina. Plaintiffs sought rescission of the contract of sale, deed, promissory note, and deed of trust regarding said property; plaintiffs also prayed for a restraining order enjoining Malickson, trustee, or any successor trustee from initiating foreclosure proceedings on the property during the pendency of the suit.

Originally, the parties entered into an offer to purchase and contract for the property in question, and executed it on 1 June 1998. Defendant conveyed the property to plaintiffs via a general warranty

deed on 3 August 1998, for which plaintiffs paid defendant $75,000.00 in cash and $295,000.00 in the form of a promissory note which was secured by a deed of trust on the property. Believing that a fraud had been perpetrated against them by defendant, plaintiffs stopped making payments on the promissory note. In response, defendant began foreclosure proceedings on the property. On 29 June 1999, plaintiffs filed a motion for a temporary restraining order and preliminary injunction to stop the foreclosure. After a hearing, Superior Court Judge Jesse Caldwell granted the motion for the temporary restraining order on 30 June 1999. Then after a subsequent hearing, Superior Court Judge Mark E. Klass entered a preliminary injunction on 26 July 1999 enjoining defendant from proceeding with the foreclosure on the property during the entire pendency of this action. On 25 August 1999, defendant filed his notice of appeal.

"An order granting or refusing a preliminary injunction is an interlocutory order governed by the requirements of G.S. 1-277." *Gunkel v. Kimbrell*, 29 N.C. App. 586, 589, 225 S.E.2d 127, 129 (1976); *see also Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990). "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). Here, Judge Mark E. Klass issued a preliminary injunction enjoining defendant from proceeding with a foreclosure by power of sale on the property at issue until the litigation is resolved. Therefore, by its very nature, this preliminary injunction is an interlocutory order.

"Generally, there is no right of immediate appeal from an interlocutory order." *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998). There are two methods by which an interlocutory order can be immediately appealed. *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). First, an interlocutory order can be immediately appealed if the order is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-A, Rule 54(b). *Id.* Second, an interlocutory order can be immediately appealed under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. *Id.* Stated another way, review is allowed "if the right affected is 'substantial' and the right will 'be lost, prejudiced, or be less than adequately protected' if the

order is not reviewed before final judgment." *T'ai Co. v. Market Square Limited Partnership*, 92 N.C. App. 234, 235-36, 373 S.E.2d 885, 886 (1988) (quoting *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987)).

For a defendant "to have a right of appeal from a mandatory preliminary injunction, 'substantial rights' of the appellant must be adversely affected." *Dixon v. Dixon*, 62 N.C. App. 744, 744, 303 S.E.2d 606, 607 (1983). "Otherwise, an appeal from such an interlocutory order is subject to being dismissed." *Id.* at 744-45, 303 S.E.2d at 607. In determining what is a "substantial right," the North Carolina Supreme Court has stated that "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied." *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978); *see also Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 334, 299 S.E.2d 777, 780 (1983). "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters*, 294 N.C. at 208, 240 S.E.2d at 343; *see also Blackwelder*, 60 N.C. App. at 334, 299 S.E.2d at 780.

Here, defendant asserts that his statutory right to foreclosure by power of sale is a "substantial right," which is at risk as a result of the preliminary injunction, therefore giving him grounds for an immediate appeal to this Court. Viewing the facts in the light most favorable to the defendant and assuming that defendant's right to foreclosure by power of sale is a "substantial right," defendant's right is by no means " '. . . lost, prejudiced, or . . . less than adequately protected[.]' " *T'ai Co. v. Market Square Limited Partnership*, 92 N.C. App. at 236, 373 S.E.2d at 886 (quoting *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. at 6, 362 S.E.2d at 815). Defendant's right to a power of sale foreclosure still exists, however it has just been delayed and must wait for the resolution of the litigation. Furthermore, the trial court adequately protected defendant's right by requiring plaintiffs to post a significant security bond in the amount of $15,000.00. Therefore this appeal is dismissed because the issuance of the preliminary injunction at issue here is not properly before this Court for review.

Dismissed.

Judges LEWIS and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 3 OCTOBER 2000

ATKINSON v. FINCH No. 99-1117	Johnston (97CVS1119)	Affirmed
BARNES v. FOTHERINGHAM No. 99-1204	Catawba (98CVS1811)	Affirmed
CARTRETTE v. GREEN PROPERTIES, INC. No. 99-1045	Guilford (98CVS7287)	Affirmed
CUTHBERTSON v. HOECHST CELANESE, INC. No. 99-1357	Ind. Comm. (347787)	Dismissed
ELLIOTT v. BIRTH No. 99-1143	Lee (98CVD471)	Vacated and remanded
ELLIOTT v. BIRTH No. 99-1144	Lee (98CVD473)	Vacated and remanded
IN RE WERNEK No. 99-1591	Mecklenburg (98J163HWC)	Affirmed
LANIER v. LANIER No. 00-71	Onslow (99CVD581)	Affirmed
MARSHALL v. WILLIAMS No. 99-1626	Forsyth (99CVS3549)	Affirmed
MASTIN v. GRIFFITH No. 99-1170	Wilkes (96CVS1378) (96CVS1377)	Affirmed
STATE v. DOMINICK No. 00-316	Pitt (98CRS9727)	No error
STATE v. HOLSEY No. 99-1154	Mecklenburg (98CRS25959)	No error
STATE v. JACKSON No. 00-141	Mecklenburg (98CRS10653) (98CRS10655)	No error
STATE v. LEE No. 99-1309	Harnett (97CRS7209) (97CRS7210) (97CRS7211) (97CRS7212) (97CRS7213) (97CRS7214)	No error

STATE v. LYLES No. 00-54	Buncombe (98CRS63791) (98CRS63792) (98CRS63793)	Dismissed
STATE v. PARSONS No. 99-1581	Davidson (98CRS4052)	No error
STATE v. RAY No. 99-1029	Hertford (98CRS4605) (98CRS4606)	No error
STATE v. SMITH No. 99-1489	Davie (99CRS748) (99CRS749)	No error
STATE v. THOMPSON No. 00-256	Guilford (99CRS92008)	No error
WOOLARD v. WEYERHAEUSER CO. No. 99-1232	Ind. Comm. (528176)	Affirmed

FILED 17 OCTOBER 2000

ALVARNAS v. ENTWISTLE No. 00-177	Cabarrus (99CVS00589)	Appeal dismissed, petition for writ of certiorari denied.
CAMPBELL v. TORRES No. 99-1262	Johnston (97CVS2016)	Reversed in part and remanded
DAVEY v. PUTNAM No. 99-1064	Cleveland (96CVS116)	No error
EPISCOPAL CHURCH OF THE INCARNATION, INC. v. ZONING BD. OF ADJUST. No. 99-1314	Macon (98CVS390)	Affirmed
HUNT v. MEGA FORCE STAFFING SERVS. No. 00-324	Ind. Comm. (717878)	Affirmed
HYLTON v. BRIDGESTONE/ FIRESTONE, INC. No. 00-309	Ind. Comm. (248591)	Affirmed
IN RE BENITEZ No. 99-1390	Yadkin (93J83) (98J20)	Affirmed
IN RE HART No. 00-305	Cabarrus (98J96)	Vacated

IN RE MITCHELL No. 00-178	Buncombe (97J473)	Affirmed
IN RE THOMPSON No. 00-395	Bertie (98J18)	Affirmed
MORRIS v. R.J. REYNOLDS No. 00-42	Ind. Comm. (662718)	Affirmed
MYERS v. SHERWOOD PARKER TRUCKING CO. No. 99-1325	Ind. Comm. (512183)	Dismissed
PENLAND v. PENLAND No. 99-1612	Durham (96CVD0092)	Reversed
PETERSON v. ROBERTSON No. 99-1199	Forsyth (95CVS3518)	Reversed and remanded
RADFORD v. N.C. FARM BUREAU MUT. INS. CO. No. 99-1384	Wayne (98CVS264)	Affirmed
REYNOLDS v. WRIGHT No. 99-1298	Randolph (98CVD1945)	Reversed and remanded
SKUROW v. BROWN No. 00-174	Mecklenburg (98CVS9633)	Affirmed
STATE v. AUGUSTUS No. 00-61	Durham (98CRS28367) (98CRS28368)	No error
STATE v. BARNETTE No. 00-200	Alamance (99CRS50561)	No error
STATE v. BRYANT No. 99-1519	Rutherford (91CRS8250) (92CRS1375) (92CRS1471) (92CRS1472)	No error
STATE v. CHURCH No. 00-297	Alamance (99CRS3977) (99CRS3991) (99CRS4056)	No error
STATE v. CLARK No. 00-162	Guilford (98CRS098812)	No error
STATE v. CLOWERS No. 00-164	Forsyth (98CRS24294) (99CRS35817) (99CRS35821) (99CRS35822) (99CRS35823)	No error

STATE v. DOWNEY No. 99-1177	Forsyth (98CRS33531) (98CRS41168) (98CRS41169)	No error
STATE v. FRANKLIN No. 00-331	Buncombe (98CRS68007)	No error
STATE v. GRIFFIN No. 00-43	Moore (98CRS12933) (98CRS13583)	No error
STATE v. JACKSON No. 99-1571	Forsyth (98CRS50686) (98CRS42983)	No error
STATE v. JAMES No. 00-224	Cleveland (97CRS7870)	No error
STATE v. JONES No. 99-1593	Durham (97CRS34112)	No error
STATE v. KELLY No.99-1470	Vance (98CRS3948) (98CRS10593)	No error
STATE v. KING No. 00-168	Guilford (98CRS89815)	No error
STATE v. KINNEAR No. 99-1035	Pitt (98CRS23890)	No error
STATE v. LASSITER No. 99-1457	Nash (98CRS3964) (98CRS3965)	Appeal dismissed
STATE v. MARTIN No. 00-137	Randolph (98CRS06012)	No error
STATE v. McKINNON No. 99-1355	Anson (97CRS3538)	No error
STATE v. MILES No. 99-1041	Durham (98CRS12391) (98CRS12392) (98CRS12393) (98CRS12394) (98CRS12395) (98CRS12396) (98CRS12398) (98CRS12399) (98CRS12400) (98CRS12401) (98CRS12402) (98CRS12403)	As to defendant Miles' appeal, reversed and resentencing. As to defendant Thompson's appeal, reversed and remanded.

	(98CRS12404) (98CRS12405) (98CRS12406) (98CRS12407) (98CRS12408) (98CRS12409) (98CRS12410) (98CRS12411) (98CRS12412) (98CRS12413) (98CRS12429) (98CRS12430) (98CRS12431) (98CRS12432) (98CRS12433) (98CRS12434) (98CRS12435) (98CRS12436) (98CRS12437) (98CRS12438) (98CRS12439) (98CRS12440) (98CRS12441) (98CRS12442) (98CRS12502) (98CRS1972) (98CRS23960)	
STATE v. MOON No. 00-170	Guilford (99CRS032970)	No error
STATE v. NEWKIRK No. 00-69	Wayne (98CRS6616)	No error
STATE v. OXENDINE No. 00-191	Robeson (96CRS17304) (96CRS17305)	No error
STATE v. PIGFORD No. 00-139	New Hanover (98CRS35146)	No error
STATE v. RHODES No. 00-181	New Hanover (98CRS35145)	No error
STATE v. ROBINSON No. 99-1445	Warren (99CRS70) (99CRS71)	No error
STATE v. ROBINSON No. 00-78	Halifax (97CRS10587) (97CRS10588) (97CRS10589) (97CRS10590)	No error in defendant's trial; remanded for resentencing.

STATE v. SHEARS No. 99-1495	Gaston (98CRS19446)	Affirmed
STATE v. TARRANT No. 00-81	New Hanover (99CRS851) (99CRS852) (99CRS853)	No error
STATE v. TOBE No. 99-1292	Buncombe (98CRS062815) (98CRS062816)	No error
STATE v. TURNER No. 99-1028	Caswell (97CRS4124) (98CRS3182) (98CRS3183) (98CRS3184) (98CRS3185) (98CRS3186) (98CRS3187) (98CRS3188) (98CRS3189) (98CRS3190) (98CRS3191) (98CRS3192) (98CRS3193) (98CRS3194) (98CRS3195) (98CRS3196) (98CRS3197) (98CRS3198) (98CRS3199) (98CRS3200) (98CRS3201) (98CRS3202) (97CRS4295)	No error
STATE v. YOUNG No. 99-1386	Durham (96CRS8617) (96CRS23257)	Affirmed
STEADMAN v. STEADMAN No. 00-142	Halifax (98CVD1275)	Appeal dismissed

MARY JOHNSON NORMAN, CAROL NASH NORMAN HARE, RALPH W. NORMAN, JR., RALPH W. NORMAN, III, RALPH W. NORMAN, JR., AS GUARDIAN *AD LITEM* FOR CAROLINE E. NORMAN, RALPH W. NORMAN, JR., AS GUARDIAN *AD LITEM* FOR ANNE R. NORMAN, RALPH W. NORMAN, JR., AS GUARDIAN *AD LITEM* FOR MARY CATHERINE NORMAN, DAVID F. NORMAN, DAVID F. NORMAN, AS GUARDIAN *AD LITEM* FOR WALTER L. NORMAN, DAVID F. NORMAN, AS GUARDIAN *AD LITEM* FOR LAUREN T. NORMAN, MARY SUSAN NORMAN DUNCAN, MARY SUSAN NORMAN DUNCAN AS GUARDIAN *AD LITEM* FOR WILLIAM D. DUNCAN, MARY SUSAN NORMAN DUNCAN AS GUARDIAN *AD LITEM* FOR JOSHUA W. DUNCAN, MARY SUSAN NORMAN DUNCAN AS GUARDIAN *AD LITEM* FOR MATTHEW C. DUNCAN, GERALDINE JOHNSON CASHWELL, J. STEVEN CASHWELL, AND ELIZABETH ANN CASHWELL GASKILL, PLAINTIFFS-APPELLANTS V. NASH JOHNSON & SONS' FARMS, INC., HOUSE OF RAEFORD FARMS, INC., HOUSE OF RAEFORD FARMS OF MICHIGAN, INC., JOHNSON BREEDERS, INC., E. MARVIN JOHNSON, ROBERT COWAN JOHNSON, MARY ANNA JOHNSON CARR PEAK, DENNIS N. BEASLEY, DIANE CAROL JOHNSON BEASLEY, PRIVATEER FARMS, INC., AND JOHNSON INVESTMENT PARTNERSHIP, DEFENDANTS-APPELLEES

No. COA99-857

(Filed 7 November 2000)

1. Corporations— derivative action—family-owned, closely held company—individual claims

In an action by minority shareholders in a family-owned closely held corporation seeking an accounting and constructive trust where plaintiffs' claims were dismissed for failure to state a cause of action, the trial court erred by concluding that plaintiffs' claims were purely derivative in nature. Under the circumstances of this case, plaintiff minority shareholders may maintain their individual actions against the majority shareholders based upon their allegations of wrongdoing, including allegations of diversion of corporate assets and opportunities. Furthermore, the allegations of the amended complaint support the view that the business defendants are not third parties, but merely conduits and tools of the individual defendants. Even if the rationale of the cases involving third-party defendants applies, plaintiffs have alleged sufficient facts to demonstrate that they satisfy the requirements.

2. Corporations— derivative action—demand requirement—futility exception

The trial court erred by granting a Rule 12(b)(6) motion to dismiss derivative claims by the minority shareholders in a family-owned closely held corporation based upon a failure to allege a demand that the directors act. Although the enactment of

N.C.G.S. § 55-7-42 eliminated the futility exception to the demand requirement, that statute does not explicitly require that the complaint in a derivative proceeding state how the demand requirement was met. In the absence of a clear legislative mandate, Rule 9(c) of the Rules of Civil Procedure provides that it is sufficient to aver generally that all conditions precedent have been performed or have occurred and it appears that plaintiffs complied with that rule. Moreover, N.C.G.S. § 55-7-42 applies only to derivative proceedings based on actions which occurred on or after 1 October 1995 and the failure to make an adequate prelitigation demand would not bar claims based on actions prior to that date.

3. Conversion— derivative action—not applicable to real estate or business opportunities

The trial court did not err by dismissing a derivative claim for conversion against two business defendants in an action by the minority shareholders in a closely held family corporation where there was no specific allegation that either defendant made an unauthorized exercise of ownership rights over any of the personal property of the company. In North Carolina, only goods and personal property are properly the subjects of a claim for conversion; conversion does not apply to real property or intangible interests such as business opportunities.

4. Trusts— constructive—claim sufficiently stated

A complaint alleged facts sufficient to state a derivative claim by minority shareholders for a constructive trust and an accounting where there were numerous allegations of breach of fiduciary duty and enrichment by all but two business defendants, JIP and Privateer, and the trial court erred by dismissing the cause of action as to the other defendants.

5. Conspiracy— civil—statement of claim—alternate pleading

A complaint alleged facts sufficient to state a derivative claim by minority shareholders for civil conspiracy where it was replete with allegations of conspiracy, acts in furtherance of the alleged conspiracy, and injury to the company and to plaintiffs. Although defendants contend that plaintiffs could not rely on the same facts for conspiracy and the underlying claim, plaintiffs may plead alternate theories of recovery.

6. Unfair Trade Practices— statement of claim—use of business opportunities

The trial court erred by dismissing a derivative claim by minority shareholders for unfair and deceptive trade practices as failing to state a claim where plaintiffs alleged numerous breaches of fiduciary duty and, furthermore, that the business defendants were unfairly competing with the company through the use of assets and business opportunities which belonged to the company, causing injury and monetary loss to the company.

7. Unjust enrichment— derivative action—statement of claim

A complaint alleged facts sufficient to state derivative claims by minority shareholders for unjust enrichment where plaintiffs alleged that defendants breached fiduciary duties and received benefits for which they had not paid. Although labeled quantum meruit, the allegations were sufficient for unjust enrichment and the trial court erred by dismissing the claim.

Judge GREENE concurring in part and dissenting in part.

Appeal by plaintiffs from order entered 30 November 1998 by Judge Bradford L. Tillery in New Hanover County Superior Court. Heard in the Court of Appeals 9 May 2000.

Plaintiffs instituted this action on 28 August 1996, seeking the declaration of a constructive trust and an accounting; alleging causes of action for breach of fiduciary duty, conversion, unfair and deceptive trade practices, and *quantum meruit*; and seeking damages from defendants. Plaintiffs allege that the individual defendant majority shareholders have breached their fiduciary duty to plaintiff minority shareholders by using their control of Nash Johnson & Sons' Farms, Inc. (the Company), and their control of, and interests in, the cooperative, corporate, and partnership defendants to divert assets, benefits and corporate opportunities from the Company to themselves. Plaintiffs alleged their claims against all defendants both individually and derivatively on behalf of the Company. Defendants pled a number of defenses to plaintiffs' claims in their answer and moved to dismiss the complaint. The trial court granted defendants' motion to dismiss plaintiffs' derivative claims on the grounds that plaintiffs failed to verify their complaint in accordance with Rule 23(b) of the North Carolina Rules of Civil Procedure, which requires a shareholder bringing a derivative claim on behalf of a corporation to verify the

complaint, but allowed plaintiffs' motion to file an amended verified complaint.

Plaintiffs then filed an amended verified complaint adding Privateer Farms, Inc. (Privateer), and Johnson Investment Partnership (JIP) as parties and alleging a claim for civil conspiracy against all defendants. Defendants filed an answer which denied plaintiffs' claims, alleged several defenses, and moved to dismiss the action. The trial court granted defendants' motions to dismiss with prejudice and plaintiffs appealed.

The factual allegations of plaintiffs' complaint may be summarized as follows. The Company is a family owned poultry business in Duplin County. The plaintiffs and individual defendants are related to founder Nash Johnson by either blood or marriage. Plaintiffs Mary Johnson Norman and Geraldine Johnson Cashwell are Nash Johnson's daughters; the remaining plaintiffs are the children and grandchildren of Norman and Cashwell. Plaintiffs own a total of 713.86 shares in the Company, and thus are minority shareholders. Defendant E. Marvin Johnson is the son of Nash Johnson. Marvin Johnson is and has been the President, Chief Executive Officer, and a director of the Company. Marvin Johnson's son, defendant Robert Cowan Johnson, was and is an officer and director of the Company. The remaining individual defendants are the children and the son-in-law of Marvin Johnson. Collectively, the individual defendants own more than 2,200 shares and control a majority of the outstanding shares in the Company. At all relevant times, the individual defendants have controlled the Board of Directors of the Company. The grandchildren of Marvin Johnson, who own about 664 shares of the Company, are not parties to this litigation.

The remaining defendants are businesses with which the Company has business dealings. House of Raeford Farms, Inc. (Raeford Farms), is a North Carolina cooperative with its principal place of business in Hoke County; the members of the Raeford Farms cooperative are the Company and defendants Johnson Breeders, Inc. (Johnson Breeders). Marvin Johnson is the President of Raeford Farms. House of Raeford Farms of Michigan, Inc. (Raeford Farms of Michigan) is a Michigan corporation with its principal place of business in Athens, Michigan; its shareholders are the individual defendants who are the children of Marvin Johnson. Johnson Breeders, Inc. (Johnson Breeders), is a North Carolina corporation with its principal place of business in Duplin County; its shareholders are the defendants who are the children of Marvin Johnson. Privateer is a

North Carolina corporation with its principal place of business in Cumberland County, North Carolina; Marvin Johnson is a shareholder in said corporation. Johnson Investment Partnership (JIP) is a North Carolina partnership; the partners are Marvin Johnson and his son, defendant Robert C. Johnson. The cooperative, corporate and partnership defendants are sometimes referred to below as "business defendants." Other relevant facts are set out in the discussion below.

James, McElroy & Diehl, P.A., by G. Russell Kornegay, III, J. Mitchell Aberman, Katherine Line Thompson Kelly and Ann L. Hester, for plaintiff appellants.

Jordan Price Wall Gray Jones & Carlton, PLLC, by Henry W. Jones, Jr., Paul T. Flick, C. Marshall Lindsay and Emily W. Eisele, for Nash Johnson & Sons' Farms, Inc., House of Raeford Farms, Inc., House of Raeford Farms of Michigan, Inc., Johnson Breeders, Inc., E. Marvin Johnson, Robert Cowan Johnson, Mary Anna Johnson Carr Peak, Dennis N. Beasley and Diane Carol Johnson defendant appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr., James C. Adams, II, and Derek J. Allen, for Johnson Investment Partnership defendant appellee.

HORTON, Judge.

Plaintiffs appeal from the Rule 12(b)6) dismissal of their claims by the trial court. In reviewing the action of the trial court, we are to liberally construe the complaint and determine whether, as a matter of law, the allegations of the complaint, taken as true, are sufficient to state some legally recognized claim or claims upon which relief may be granted to plaintiffs. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). While the well-pled allegations of the complaint are taken as true, conclusions of law or "unwarranted deductions of fact" are not deemed admitted. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970).

Plaintiffs contend the trial court erred in (I) concluding that all allegations of wrongdoing in plaintiffs' amended complaint are derivative, not individual, in nature; (II) dismissing plaintiffs' derivative claims for failure to comply with statutory requirements; (III) concluding that some of plaintiffs' causes of action fail to state a claim; and (IV) denying plaintiffs' motion to amend their complaint.

I. Plaintiffs' Individual Claims

[1] Plaintiffs contend the trial court erred in concluding that allegations of wrongdoing in plaintiffs' first amended complaint are derivative, not individual, in nature. A "derivative proceeding" is a civil action brought by a shareholder "in the right of" a corporation, N.C. Gen. Stat. § 55-7-40.1 (1999), while an individual action is one a shareholder brings to enforce a right which belongs to him personally. *See Way v. Sea Food Co.*, 184 N.C. 171, 174, 113 S.E. 781, 782 (1922). Russell M. Robinson, II, *Robinson On North Carolina Corporation* Law § 17-2(a) at 333 (5th ed. 1995) (the distinction is drawn in terms of whose right is being enforced). It is not always easy to distinguish between a right of the corporation and a right belonging to an individual shareholder. "[T]he same wrongful conduct can give rise to both derivative and direct [individual] claims, for which courts have sometimes allowed shareholders to maintain derivative and direct actions simultaneously." *Id.* (footnotes omitted).

Here, plaintiffs alleged both individual and derivative claims for constructive trust and an accounting, breach of fiduciary duty, conversion, civil conspiracy, unfair and deceptive trade practices, and *quantum meruit*. The trial court dismissed all of plaintiffs' individual claims for the stated reasons that "[a]ll allegations of wrongdoing alleged in the Plaintiffs' Complaint and First Amended Complaint are derivative in nature and fail to fall within recognized exceptions to the general rule as stated in *Barger v. McCoy, Hilliard* [sic] *& Parks*, 346 N.C. 650, [488 S.E.2d 215 (1997)]." Although *Barger* states the North Carolina rule with regard to circumstances under which an individual shareholder of a corporation may bring an action against a *third party* whose conduct has given rise to a cause of action in favor of the corporation, it does not address the issue raised in this case: under what circumstances may minority shareholders in a closely held corporation properly assert individual claims on their own behalf in an action against the majority shareholders who control the corporation?

As a general rule, shareholders have no right to bring actions "in their [individual] name[s] to enforce causes of action accruing to the corporation[,]" *Fulton v. Talbert*, 255 N.C. 183, 185, 120 S.E.2d 410, 412 (1961), but must assert such claims derivatively on behalf of the corporation. *Robinson* § 17-2(a) at 333. A correct characterization of the shareholder's action as derivative or individual may be crucial, as there are certain mandatory procedural and pleading requirements for a derivative action. F.H. O'Neal & R. Thompson, *O'Neal's*

Oppression of Minority Shareholders § 7:07 (2d ed. 2000), p. 52. Some procedural restrictions proceed from concerns about prevention of a multiplicity of lawsuits and concern over "who should properly speak for the corporation." *Id.* Other restrictions arise from concerns that derivative actions will be misused by " 'self-selected advocate[s]' pursuing individual gain rather than the interests of the corporation or the shareholders as a group, bringing costly and potentially meritless 'strike suits.' " *Id.*

Thus, for example, a shareholder who brings a derivative action in North Carolina must show that he or she "[f]airly and adequately represents the interests of the corporation in enforcing the right of the corporation[,]" N.C. Gen. Stat. § 55-7-41 (1999), and may not commence the action until written demand on the corporation's directors has been made and the statutory period has elapsed. N.C. Gen. Stat. § 55-7-42 (1999). Further, the corporation may then determine by a majority vote of "independent" directors that maintenance of the derivative action "is not in the best interest of the corporation." N.C. Gen. Stat. § 55-7-44(a)(b)(1) (1999). "Independent" directors may include persons who have been nominated or elected by persons who are defendants in the derivative action, persons who are themselves defendants in the derivative action, and persons who approve of the act being challenged. N.C. Gen. Stat. § 55-7-44(c)(1)(2)(3) (1999). "If the corporation commences an inquiry into the allegations set forth in the demand or complaint, the court may stay a derivative proceeding for a period of time the court deems appropriate." N.C. Gen. Stat. § 55-7-43 (1999). Finally, the derivative suit may not be settled without the approval of the court. N.C. Gen. Stat. § 55-7-45(a) (1999). It is of obvious importance to the parties that the recovery in a derivative action goes to the corporation, not to the plaintiff personally. *Outen v. Mical*, 118 N.C. App. 263, 266, 454 S.E.2d 883, 885 (1995). Finally, the successful litigant in a derivative action may be awarded attorneys' fees by the court, N.C. Gen. Stat. § 55-7-46(1) (1999), while the plaintiff in an individual action bears his own fees. *See Miller v. Ruth's of North Carolina, Inc.*, 68 N.C. App. 40, 313 S.E.2d 849, *disc. review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984). Thus, derivative litigation is obviously more unwieldy and inspires more litigation of ancillary issues than an individual action by plaintiff minority shareholders.

Prior to the enactment of our statutory scheme with regard to derivative proceedings, it is not always clear from our decisional law whether an action was instituted as an individual or derivative suit.

Robinson discusses a group of cases decided in 1896, which involved the insolvent Bank of Hanover, where our Supreme Court allowed depositors to sue the directors of the insolvent Bank both for publishing false statements about the Bank's financial condition which induced them to make deposits—apparently an individual cause of action—and for mismanagement which resulted in the insolvency—clearly a derivative cause of action. *Tate v. Bates*, 118 N.C. 287, 24 S.E. 482 (1896); *Solomon v. Bates*, 118 N.C. 311, 24 S.E. 478 (1896); and *Caldwell v. Bates*, 118 N.C. 323, 24 S.E. 481 (1896). *Robinson* § 17-2 at 335. The Supreme Court did not characterize the *Bates* actions as individual or derivative, although later cases arising from corporate insolvency clearly make the distinction. See, for example, *Douglass v. Dawson*, 190 N.C. 458, 130 S.E. 195 (1925) (where the bank allegedly became insolvent through mismanagement by the directors, the wrong was to the corporation; and an action against the directors was derivative in nature, requiring a demand on the receiver prior to bringing the action).

Both our statutory and case law recognize a number of instances in which a shareholder may bring an individual claim:

1. to enforce his right to inspect the corporate books and records;

2. to recover a dividend already declared, or any other amount actually due him from the corporation on his shares or otherwise;

3. to compel the declaration of dividends;

4. to compel an involuntary dissolution;

5. to enjoin an ultra vires act by the corporation;

6. to enforce preemptive rights, to recover for damage done directly to his ownership interest in the corporation, or to preserve the rights of his particular class of stock against a prejudicial reorganization;

7. to recover damages from an "insider" or other party who induced him to buy or sell shares in the corporation either by actual misrepresentations or by failing to disclose pertinent information about the corporate affairs in breach of a fiduciary obligation; and

8. to enforce an agreement among the shareholders.

Robinson § 17-2 at 335-36 (footnotes omitted). *See also* 2 F. Hodge O'Neal & Robert B. Thompson, *O'Neal's Close Corporations*, § 8.16 (3d ed. 1998).

For more than a century, we have recognized the right of depositors in a bank to bring individual actions against officers and directors who induced them to make deposits in a bank by misrepresenting its financial condition, the losses being deemed to be peculiar to the plaintiffs as distinguished from the depositors in general. See *Coble v. Beall*, 130 N.C. 533, 537, 41 S.E. 793, 794 (1902), and the cases cited therein. Based on that same reasoning, our appellate courts allow shareholders to bring individual actions against third parties who induce them to make corporate investments which prove to be worthless. Thus, in *Howell v. Fisher*, 49 N.C. App. 488, 272 S.E.2d 19 (1980), *disc. review denied*, 302 N.C. 218, 277 S.E.2d 69 (1981), plaintiff shareholders were allowed to bring an individual action against defendants for negligently preparing a soil testing report which induced plaintiffs to invest in a corporation which had become insolvent. The *Howell* Court held that shareholders could "seek damages in their own right for negligent misrepresentations made to them before they were stockholders for the purpose of inducing their investment[,]" and the corporation was not a necessary party to the suit. *Id.* at 498, 272 S.E.2d at 26. *Accord*, *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658-59, 488 S.E.2d 215, 219 (1997) ("[A] shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show [1] that the wrongdoer owed him a special duty or [2] that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself."). *Compare*, *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 525 S.E.2d 441 (2000), where plaintiff limited partner was not permitted to maintain an individual action against third parties for alleged negligence, negligent misrepresentation, and breach of warranty, which induced their $16 million investment in another limited partnership, because plaintiff was already a member of the limited partnership and because "any misrepresentations were made not to [plaintiff] individually, but to the limited partnership as a whole." *Id.* at 337, 525 S.E.2d at 445.

Generally speaking, our decisions in *Howell* and *Barger* parallel the majority view among our sister states that a shareholder can maintain an individual action against a third party only if he can show

a special relationship with the wrongdoer and also show an injury peculiar to himself. During the last quarter of the Twentieth Century, however, there has been an "evolution" in the development of, and protection for, the rights of minority shareholders in closely held corporations. *Davis v. Hamm*, 300 S.C. 284, 288, 387 S.E.2d 676, 678 (S.C. App. 1989). The sheer scope of the problem nationally has led to some relaxation in the context of a closely held corporation of the traditional requirements for instituting individual actions. Dr. F. H. O'Neal, recognized as a national authority on the rights of minority shareholders, stated in 1987 that

> [u]nfair treatment of holders of minority interests in family companies and other closely held corporations by persons in control of those corporations is so widespread that it is a national business scandal. The amount of litigation growing out of minority shareholder oppression—actual, fancied or fabricated—has grown tremendously in recent years, and the flood of litigation shows no sign of abating.

F.H. O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*," 35 Clev. St. L. Rev. 121 (1986-87). In order to devise a remedy for the "national business scandal," appellate courts in our sister states have focused on the fiduciary relationship between majority and minority shareholders in a closely held corporation, as well as the similarity of small closely held corporations to partnerships. *O'Neal & Thompson* § 7:08 at 58. See, for example, *Johnson v. Gilbert*, 127 Ariz. 410, 412, 621 P.2d 916, 918 (1980) (plaintiff 50% shareholders had standing to sue both derivatively and directly for specific performance, breach of fiduciary duty, and for an accounting, because the closely held corporation operated more as partners than in strict compliance with corporate form); *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969) (minority shareholder allowed to bring suit on behalf of self and other similarly situated minority shareholders where defendant majority shareholders transferred controlling interest in closely held corporation to holding company, excluding minority shareholders from the transaction); *Yanow v. Teal Industries, Inc.*, 178 Conn. 262, 283, 422 A.2d 311, 322 (1979) (former minority shareholder in subsidiary corporation which was merged into parent corporation in "short-form" merger could bring individual claim against parent corporation and its officer based on allegations that defendants looted and dismantled subsidiary corporation, and thus deprived plaintiff of income and assets); *Steelman v. Mallory*, 110 Idaho 510, 513, 716 P.2d

1282, 1285 (1986) (one of three shareholders/directors allowed to file individual action against other two shareholders/directors for breach of fiduciary duty in management of small closely held corporation by trying to "squeeze him out"; court referred to relationship between shareholders as "similar to the relationship among partners"); *Barth v. Barth*, 659 N.E.2d 559, 562 (Ind. 1995) (adopting § 7.01(d) of the American Law Institute's Principles of Corporate Governance, and holding that, when a shareholder in a closely held corporation who alleges misuse of corporate assets sues the majority shareholder, the trial court may treat the action as a direct or individual action provided it will not lead to multiplicity of actions, harm the interests of creditors, or interfere with the fair distribution of recovery among interested persons); *Richards v. Bryan*, 19 Kan. App. 2d 950, 965, 879 P.2d 638, 647-48 (1994) (recognizing a new cause of action in Kansas for close corporation freeze-outs, and holding that oppressed minority shareholders may bring direct suit for breaches of fiduciary duty by majority shareholders, even though plaintiff's grievance is primarily based on damage to the corporation); *Webber v. Webber Oil Co.*, 495 A.2d 1215, 1225 (Me. 1985) (count of the complaint which alleged that defendant majority shareholders breached fiduciary duties to plaintiffs, particularly Mr. Webber, by reducing Mr. Webber's salary as treasurer and disproportionately reducing his dividend payments, stated an individual claim, separate from the accompanying derivative claim, although arising from the same factual matrix); *Horizon House-Microwave, Inc. v. Bazzy*, 21 Mass. App. Ct. 190, 196, 486 N.E.2d 70, 74 (1985) (to extent that gravamen of this action by minority shareholder was abuse of fiduciary duty by majority shareholder, it could be maintained as individual action); *Schumacher v. Schumacher*, 469 N.W.2d 793, 799 (N.D. 1991) (trial court abused its discretion in failing to allow plaintiffs to bring direct action, where the gravamen of their action was breach of fiduciary duty by majority shareholder of closely held corporation toward minority shareholder, and where a direct action would not expose corporation to multiple lawsuits, nor interfere with fair distribution of any recovery, nor prejudice the rights of creditors); *Crosby v. Beam*, 47 Ohio St. 3d 105, 109, 548 N.E.2d 217, 221 (1989) (when minority shareholders in close corporation allege breaches of fiduciary duty against majority shareholders, and allege that majority shareholders use their control to deprive minority shareholders of the benefit of their investment, the claim may be brought as a direct (individual) action, rather than a derivative action); *Noakes v. Schoenborn*, 116 Or. App. 464, 475, 841 P.2d 682, 688 (1992) (allegations that majority shareholders and direc-

tors squeezed minority shareholders out of their right to participate in business of closely held corporation, and appropriated business of corporation for themselves at grossly inadequate price, stated a claim for direct injuries to minority shareholders); and *DeBord v. Circle Y of Yoakum, Inc.*, 951 S.W.2d 127, 133 (Tex. App. 1997), *rev'd by Stary v. DeBord*, 967 S.W.2d 352, 41 Tex. Sup. Ct. J. 456 (1998) ("[C]laims of oppressive conduct arising out of the fiduciary duties owed by the majority shareholders to the minority shareholders [in a closely held corporation] are, in our opinion, individual claims of the minority shareholders.").

Further, the American Law Institute recommends that minority shareholders in a closely held corporation be allowed to file individual actions under certain circumstances:

> "If a corporation is closely held . . . , the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation . . . to a multiplicity of actions, (ii) materially prejudice the interests of creditors in the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons."

Richards, 19 Kan. App. 2d at 962, 879 P.2d at 647 (quoting *Principles of Corporate Governance: Analysis and Recommendations* § 7.01(d) (1992).

Although the recommendations of the American Law Institute have not been adopted in North Carolina, three of the decisions of this Court have allowed direct, or individual, actions by minority shareholders in a close corporation setting. In *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981), plaintiff Loy was a minority shareholder in Lorm, Inc., together with the three individual defendants. Loy and the defendants formed Lorm, Inc., in 1964, to operate the Port O' Call Restaurant; each owned 25% of the Lorm, Inc., stock. *Id.* at 429-30, 278 S.E.2d at 899. The three defendants formed another corporation known as Marl Corporation to finance the purchase of necessary land, to construct a restaurant and to purchase necessary equipment and supplies. *Id.* at 429, 278 S.E.2d at 899. Marl leased the land, building, and equipment to Lorm on a yearly basis. Plaintiff also alleged, and defendants denied, that defendants agreed to sell him a 25% interest in Marl when he could afford to purchase the interest. *Id.* at 430, 278 S.E.2d at 900. In 1975, plaintiff advised defendants that he

was able to purchase the promised 25% interest, but defendants refused to sell any interest in Marl to him, denying any agreement. *Id.* Plaintiff resigned as manager of the Port O' Call Restaurant, but maintained his stock interest. *Id.* Defendants formed a third corporation, Bar, Inc., and transferred without consideration the assets of Lorm to the new corporation. Defendants sold a large amount of Marl stock to a new owner, who operated the restaurant through his own corporation. *Id.* Plaintiff brought an individual action against the individual defendants, named Marl as an additional defendant, and also "brought a shareholders[']] derivative action against Lorm." *Id.* at 429, 278 S.E.2d at 899. Plaintiff alleged that the defendants breached their fiduciary duty to him as a minority shareholder, engaged in self-dealing which harmed Lorm, diverted profits from Lorm to Marl by having Lorm pay excessive rents to Marl, and breached their oral agreement to sell him a 25% interest in Marl. *Id.* at 430, 278 S.E.2d at 900. Plaintiff appealed to this Court from a grant of summary judgment in favor of Marl, and from a directed verdict in favor of the three defendants and Lorm. *Id.*

In writing for a unanimous panel of this Court to reverse the judgment of the lower court dismissing plaintiff's individual action against the defendants, Judge Becton "emphasize[d] that Lorm and Marl were closely-held corporations in which all three defendants were shareholders, directors and officers." *Id.* at 431, 278 S.E.2d at 900. Defendants conceded that under the decisions of our Supreme Court, "majority shareholders owe a fiduciary duty and obligation of good faith to minority shareholders as well as to the corporation." *Id.* at 432, 278 S.E.2d at 901. When a minority shareholder challenges the actions of the majority shareholders, "the burden shifts to the majority to establish that its actions were in all respects inherently fair to the minority and undertaken in good faith." *Id.* at 433, 278 S.E.2d at 901. The Court held that plaintiff presented evidence which made out a *prima facie* case that defendants were draining assets from Lorm without plaintiff sharing in them, and that in so doing defendants breached their fiduciary duty to plaintiff; the burden shifted to defendants to prove the fairness of the transfer of Lorm's assets to Bar, Inc. *Id.* at 435, 278 S.E.2d at 903. Thus, the trial court in *Loy* erred in granting defendants' motions for directed verdict both on plaintiff's individual action and his derivative suit. *Id.*

A few years later, another opinion by this Court demonstrated the difficulty in distinguishing between an individual and a derivative action. In *Miller*, 68 N.C. App. 40, 313 S.E.2d 849, *disc. review denied*,

311 N.C. 760, 321 S.E.2d 140 (1984), the plaintiff owned 20% of the stock in Ruth's Corporation and the defendant individuals owned the remaining 80% of the stock. *Id.* at 41, 313 S.E.2d at 850. Plaintiff's complaint alleged acts of mismanagement and oppression by the majority shareholder, and attempted to set out both derivative and individual actions. *Id.* The trial court found that plaintiff's rights as a minority shareholder had been violated and ordered the repurchase of plaintiff's shares at their fair market value. *Id.* The trial court denied plaintiff's request for attorneys' fees, however, and plaintiff appealed. *Id.* In affirming the trial court's denial of attorneys' fees, this Court noted in a divided opinion that plaintiff did not ask for any relief on behalf of Ruth's Corporation, and held that plaintiff's action was actually an individual action, not a derivative action. *Id.* at 42, 313 S.E.2d at 850. Because attorneys' fees may not be awarded in an individual action, the judgment of the trial court was affirmed. In a concurring opinion, Judge (later Chief Judge) Arnold opined that the action was actually in the nature of a derivative action, but upheld the exercise of discretion by the trial court in its denial of attorneys' fees. *Id.* at 43-46, 313 S.E.2d at 851-53.

Most recently, in *Outen*, 118 N.C. App. 263, 454 S.E.2d 883, we considered an appeal from an action involving a dispute over the affairs of a close corporation. Plaintiff secured a judgment which "[ran] in favor of plaintiff personally." *Id.* at 266, 454 S.E.2d at 885. We distinguished the situation from the usual minority-majority shareholder situation because plaintiff and defendant each owned a 50% interest in a closely held corporation. *Id.* In addition, the Court expressed concerns about the prejudice to the rights of possible creditors of the corporation if the recovery were held to run to the plaintiff, rather than to the corporation. *Id.* at 267, 454 S.E.2d at 886. In light of the equal ownership of stock in the corporation, we held that plaintiffs failed to show that "they maintained a direct action in addition to or in lieu of a derivative action." *Id.* at 267, 454 S.E.2d at 886. Consequently, the majority of a divided panel held that the recovery should have been awarded in favor of the corporation, rather than the defendant. *Id.*

We now analyze the allegations of the amended complaint in the case before us in light of the decisions of our Supreme Court regarding the fiduciary relationship of minority and majority shareholders, the decisions of our sister states, and the decisions of this Court; we simultaneously recognize that different rules may apply in the context of a dispute among shareholders of a closely held corporation.

At the heart of the amended complaint in this action are allegations by plaintiff shareholders, who collectively represent a minority ownership in the Company, that the individual defendants have used their majority stock ownership and control of the Company's Board of Directors to divert corporate funds and opportunities to themselves. It seems particularly appropriate to allow minority shareholders to file individual actions when a dispute arises within the context of a family owned corporation, or other corporation in which all shares of stock are held by a relatively small number of shareholders. Such a corporation, often termed a "close corporation" because its shares are "closely" held, has been defined as a

> "corporate entity typically organized by an individual, or a group of individuals, seeking the recognized advantages of incorporation, limited liability, perpetual existence and easy transferability of interests—but regarding themselves basically as partners and seeking veto powers as among themselves much more akin to the partnership relation than to the statutory scheme of representative corporate government."

Meiselman v. Meiselman, 309 N.C. 279, 289, 307 S.E.2d 551, 557 (1983) (quoting Israels, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. Chi. L. Rev. 778, 778-79 (1952)). In *Meiselman*, our Supreme Court noted that close corporations are often characterized as little more than "incorporated partnerships," such characterization "rest[ing] primarily on the fact that the 'relationship between the participants [in a close corporation], like that among partners, is one which requires close cooperation and a high degree of good faith and mutual respect . . . .' 2 F. O'Neal, *Close Corporations* § 9.02.' " *Id.* (alteration in original).

When the close relationships between the shareholders in a "family" or closely held corporation tragically break down, the majority shareholders are obviously in a position to exclude the minority shareholders from management decisions, leaving the minority shareholders with few remedies. "[T]he minority shareholder has neither the power to dissolve the business unit at will, as does a partner in a partnership, nor does he have the 'way out' which is open to a shareholder in a publicly held corporation, the opportunity to sell his shares on the open market. 2 F. Hodge O'Neal & Robert B. Thompson, *O'Neal's Close Corporation* § 9.02 (3d ed. 1998). Thus, the illiquidity of a minority shareholder's interest in a close corporation renders him vulnerable to exploitation by the majority shareholders."

Meiselman, 309 N.C. at 291, 307 S.E.2d at 559. Although Article 14, Part 3, Judicial Dissolution, of the North Carolina Business Corporation Act allows shareholders to seek dissolution of a corporation and liquidation of its assets when "corporate assets are being misapplied or wasted," or when "liquidation is reasonably necessary for the protection of [their] rights or interests . . .", such relief is not available to shareholders who wish to retain their interests in a family business such as the Company. N.C. Gen. Stat. § 55-14-30(2) (1999). Contrary to the defendants' argument, it does not appear on this record that plaintiffs are maintaining this action as a "strike suit" merely to obtain a higher price for their shares in the Company. Plaintiffs have not invited the defendant majority shareholders to purchase their shares, nor have plaintiffs sought involuntary dissolution of the Company.

We find support in our decisions in *Loy*, *Miller*, *and Outen*, which are based upon and supported by earlier decisions of our Supreme Court, for our view that minority shareholders in a closely held corporation who allege wrongful conduct and corruption against the majority shareholders in the corporation may bring an individual action against those shareholders, in addition to maintaining a derivative action on behalf of the corporation.

There are other compelling reasons for allowing the plaintiffs in the case before us to proceed directly against the individual defendants and the defendant companies they control, rather than requiring that they seek relief in a derivative action. First, the recovery in a derivative action goes to the corporation. *Outen*, 118 N.C. App. at 266, 454 S.E.2d at 885. Thus, disposition of the recovery in a derivative action based on wrongdoing by the directors of a corporation would be under the control of the wrongdoers, unless a court exercised its equitable discretion by "directing an individual recovery in order to achieve a fair distribution of the proceeds of the action." Russell M. Robinson, II, *Robinson On North Carolina Corporation Law* § 17-2(c) at 336 (5th ed. 1995). It would be unrealistic to expect the interests of plaintiff minority shareholders who prevail in a derivative action to be protected by defendant majority shareholders who have allegedly converted, appropriated, and wasted corporate assets.

Further, if an action by plaintiffs who are minority shareholders in a close corporation against the majority shareholders in the corporation is treated as a derivative action, the burdensome procedural requirements of derivative litigation discussed above would apply.

Still further, there is no indication in this record that the involved corporations are insolvent, or that the rights of corporate creditors are otherwise prejudiced by the possibility of an individual recovery in this case. There does not appear to be any danger of multiple lawsuits, since the Company's shareholders—with the exception of the minor children of defendants—are parties to this litigation.

For all the reasons stated above, we hold that the trial court erred in characterizing plaintiffs' claims against the individual defendants as solely derivative in nature. Plaintiffs may properly pursue their claims against the individual defendants both as individual and as derivative claims. As to the business defendants, plaintiffs allege that those defendants are under the control of some or all of the defendants or have entered into a conspiracy with the individual defendants to siphon off corporate assets from the Company, to deprive the Company of corporate opportunities, and to redirect those assets and opportunities to the individual defendants. For those reasons, we do not believe the business defendants are independent third parties but are inextricably wedded to the individual defendants. Plaintiffs can, therefore, maintain a direct action against the business defendants under the circumstances alleged in the amended complaint.

Even if we assume, however, that plaintiffs must show that they have standing to maintain a direct action against the business defendants under the rule set out in *Howell*, *Barger*, and the recent decision of our Supreme Court in *Energy Investors Fund*, 351 N.C. 331, 525 S.E.2d 441, we hold that plaintiffs have alleged facts which bring them within the requirements of those cases.

In *Barger*, the plaintiff shareholders personally guaranteed the corporation's loans after an accounting firm assured them that the corporation was financially solvent. *Barger*, 346 N.C. at 655, 488 S.E.2d at 217. The corporation became bankrupt and the shareholders sued the accounting firm and its members for the diminished value of their shares and for their losses as guarantors of the loan. *Id.* at 656, 488 S.E.2d at 218. Our Supreme Court held that there was a "genuine issue of material fact as to whether defendants owed them a special duty that was personal to them as guarantors and separate and distinct from the duty defendants owed the corporation." *Id.* at 662, 488 S.E.2d at 221. Thus, the plaintiffs could sue in their *individual* capacities as *personal guarantors* of the corporation's loans under the "special duty" exception. *Id.* at 663, 488 S.E.2d at 222.

However, the *Barger* Court also held that "plaintiffs may not proceed with their lawsuit as individual shareholders under the 'special duty' exception to the general rule" because "[a]ll of the allegations indicate that any duty defendants owed plaintiffs was purely derivative of defendants' duty to provide non-negligent services to [the corporation]." *Id.* at 660, 488 S.E.2d at 220. Here, there is ample evidence both that the defendants owed a "special duty" to the plaintiffs, and that plaintiffs have suffered a loss different in kind and degree from the individual defendant shareholders. First, as pointed out above, our cases have consistently held that majority shareholders in a close corporation owe a "special duty" and obligation of good faith to minority shareholders.

> "The devolution of unlimited power imposes on holders of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through them—the duty to exercise good faith, care and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. . . . It is the fact of control of the common property held and exercised, and not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation on the part of the majority stockholders in a corporation for the minority holders. Actual fraud or mismanagement, therefore, is not essential to the application of the rule."

Gaines v. Manufacturing Co., 234 N.C. 340, 344-45, 67 S.E.2d 350, 353 (1951) (quoting 13 Am. Jur. *Corporations* § 422-23 (1938)). *Accord*, *Hill v. Erwin Mills, Inc.*, 239 N.C. 437, 443, 80 S.E.2d 358, 362 (1954) (rights and powers vested in those holding a majority of the capital stock in a corporation imposes on them a fiduciary relationship, requiring them to exercise good faith, care, and diligence, and to protect the interests of the minority shareholders). Here, plaintiffs allege that defendants are acting in concert, that defendants own the majority of the stock in the Company, are the officers of the Company, and control the Company's Board of Directors. These allegations are sufficient to give rise to a fiduciary relationship between plaintiffs and the defendants and establish that defendants owed plaintiffs a "special duty" within the meaning of the *Barger* decision.

We also believe that plaintiffs have sufficiently alleged that they have suffered an injury "separate and distinct" from the injury sustained by the other shareholders or the corporation itself. Plaintiffs have alleged in great detail acts of the individual defendants and the business entities they control to divert assets and business opportunities from the Company to the business defendants (and thereby to the individual defendants) and thus enrich themselves at the expense of the Company and the plaintiffs. The gist of plaintiffs' allegations is that they have suffered substantial financial losses as the result of the defendants' actions, while the defendants have obviously profited from those same wrongful acts. Plaintiffs have sufficiently alleged that they have suffered injuries "separate and distinct" from the defendants, who have suffered no injuries at all. Such allegations meet the second prong of the *Howell* and *Barger* test.

In summary, we hold that under the circumstances of this case, the plaintiff minority shareholders in this closely held corporation may maintain their individual actions against the majority shareholders in the Company based on their allegations of wrongdoing, including the allegations of diversion of corporate assets and opportunities. Further, we believe the allegations of the amended complaint support the view that the business defendants are not third parties within the meaning of *Howell*, *Barger* and *Energy Investors*, but are instead merely conduits and tools of the individual defendants. However, even if the *Howell* and *Barger* rationale applies in these circumstances, the plaintiffs have alleged sufficient facts to demonstrate that they satisfy its dual requirements. The conclusion of the trial court that the plaintiffs' claims are purely derivative in nature is reversed.

II. Plaintiffs' Derivative Claims

[2] As a general rule regarding derivative suits, "a demand that the directors act is a prerequisite to a shareholder suing upon behalf of the corporation." *Roney v. Joyner*, 86 N.C. App. 81, 83, 356 S.E.2d 401, 402-03 (1987). Until 1995, North Carolina recognized an equitable exception excusing a shareholder from making demand where demand would be futile. *See id.* at 84, 356 S.E.2d at 403. The equitable exception, usually referred to as the futility doctrine or futility exception, was grounded in the ancient principle that the law does not require a person to do a vain, or futile, act. *See Seaboard Air Line R.R. v. Atlantic Coast Line R.R.*, 240 N.C. 495, 515, 82 S.E.2d 771, 785 (1954). " '[I]n the state courts there are occasions when the allegation that the stockholder has requested the directors to bring suit and they

have refused may be omitted, since the request itself is not required. This occurs when the corporate management is under the control of the guilty parties. No request need then be made or alleged since the guilty parties would not comply with the request; and even if they did the court would not allow them to conduct the suit against themselves.' Cook on Corporations, sec. 741." *Murphy v. City of Greensboro*, 190 N.C. 268, 275-76, 129 S.E. 614, 617-18 (1925).

Prior to its amendment in 1995, the Business Corporation Act provided with regard to derivative proceedings that the complaint

> shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort.

N.C. Gen. Stat. § 55-7-40(b) (1990). *See* 1995 N.C. Sess. Laws ch. 149, § 1.

In 1995, our General Assembly rewrote our statutes governing derivative proceedings. N.C. Gen. Stat. § 55-7-42 now provides that

> No shareholder may commence a derivative proceeding until:
>
> (1) A written demand has been made upon the corporation to take suitable action; and
>
> (2) 90 days have expired from the date the demand was made unless, prior to the expiration of the 90 days, the shareholder was notified that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

Id. Defendants contend that N.C. Gen. Stat. § 55-7-42 eliminated the futility exception by requiring demand in *all* derivative actions based on conduct occurring on or after 1 October 1995. 1995 N.C. Sess. Laws ch. 149, § 2 (Act became effective 1 October 1995, "and applies to actions upon which shareholder derivative suits are based occurring on or after that date"). Defendants argue that the statute requires plaintiffs to allege in their complaint that they made such demand; because they failed to do so, defendants contend, plaintiffs' derivative action must be dismissed. The trial court agreed with defendants' position and concluded in its order of dismissal that "[t]he futility exception has been replaced by the language of N.C.G.S. § 55-7-42, and the Plaintiffs' derivative claims must be dismissed for failure to

comply with the requirements of N.C.G.S. § 55-7-42." Plaintiffs assign error to the trial court's conclusion.

We note that the above holding by the trial court was a conclusion of law, and as such, it is reviewable *de novo* on appeal. *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000). The issue before this Court is one of statutory construction; that is, whether the enactment of N.C. Gen. Stat. § 55-7-42 has eliminated the futility exception to the demand requirement. We must then decide a second issue, whether the amended statute requires a shareholder to allege in his pleadings that he has complied with the demand requirement.

On the first issue, we agree with the conclusion of the trial court that the statutory amendment eliminates the futility exception. "The general rule in statutory construction is that '[a] statute must be construed as written.' " *Carrington v. Brown*, 136 N.C. App. 554, 558, 525 S.E.2d 230, 234, *disc. review denied*, 352 N.C. 147, —— S.E.2d —— (2000).

> "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

Id. (quoting 27 Strong's N.C. Index 4th *Statutes* § 28 (1994)). Further,

> "[W]here the Legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself."

Upchurch v. Funeral Home, 263 N.C. 560, 565, 140 S.E.2d 17, 21(1965) (quoting 50 Am. Jur. *Statutes* § 432, p. 453 (1944)).

Here, the language of the statute is clear and it is not necessary for us to resolve an ambiguity. Under the plain language of the statute, the demand requirement is a condition precedent to the institution of any and all derivative actions. Although a compelling argument can be made that such demand will accomplish little in the close corporation context, the Legislature did not create a "close corporation exception" to the statutory demand requirement. One of our leading commentators on North Carolina corporation law explains

that the 1995 amendment was necessary because the futility exception "caused excessive and unnecessary litigation on a preliminary point, which was the principal reason for repealing the futility exception rule and adopting a universal-demand rule." Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 17-3 at 340 (5th ed. 1995). Apparently, our Legislature sought to avoid an unnecessary layer of litigation by adding the requirement that a written pre-litigation demand be made in all cases. While the demand may not avoid litigation, it may be easily complied with.

We are further convinced that the Legislature intended to repeal the futility exception to the demand rule because it did not re-enact those portions of the previous demand statute which allowed a plaintiff to explain in detail the reasons for failure to make demand prior to filing the derivative proceeding. 1995 N.C. Sess. Laws ch. 149, § 2.

We hold, therefore, that the enactment of N.C. Gen. Stat. § 55-7-42 effected a repeal of the futility exception, and that plaintiffs in this case were therefore required to make demand on the Company's board of directors prior to instituting this derivative litigation. Plaintiffs argue, however, that even if we conclude that the futility doctrine is now repealed, there is no requirement in the amended statute that plaintiffs allege in their complaint that they have satisfied the demand requirement. We note that N.C. Gen. Stat. § 55-7-42 does not explicitly require that the complaint in a derivative proceeding state how the demand requirement was met, although its predecessor statute (§ 55-7-40) required that a plaintiff allege his efforts "with particularity." The fact that the Legislature did not carry over the requirement of pleading demand efforts with particularity is some evidence that such a requirement was not intended. 1995 N.C. Sess. Laws ch. 149, § 2; *Carrington*, 136 N.C. App. at 558, 525 S.E.2d at 234. Despite the rules of statutory construction, however, we are aware that the omission of the pleading requirement could have been a legislative oversight. Aware of the legislative omission, the author of our foremost treatise on corporation law in North Carolina opines that "the rule requiring such a description in the complaint is so well established that it undoubtedly still applies." *Robinson* § 17-3 at 339, n.5.

In the absence of a clear legislative mandate, our Rules of Civil Procedure seem to provide an answer to this issue. Rule 9(c) provides that "[i]n pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions prece-

dent have been performed or have occurred." N.C. Gen. Stat. § 1A-1, Rule 9(c) (1999). In the case before us, plaintiffs alleged in their complaint that "[a]ll conditions precedent to the filing of this action by Plaintiffs have been complied with." It appears that plaintiffs' allegation complies with the requirement of Rule 9(c). Consequently, the trial court erred in concluding in the context of a Rule 12(b)(6) motion that the plaintiffs did not comply with the statutory requirements of a derivative action, and erred in granting the motion to dismiss their derivative claims.

We also note that plaintiffs allege in their complaint that they "have brought the issues alleged in th[is] action to the attention of the Company and its President and, upon information and belief, no suitable action has been taken to effect a remedy." In light of our earlier holding, however, we need not reach the question whether that allegation sufficiently complies with the requirements of N.C. Gen. Stat. § 55-7-42.

Finally, even if we assume for the sake of argument that plaintiffs did not adequately comply with the demand requirement of N.C. Gen. Stat. § 55-7-42, that statute by its own terms applies only to derivative proceedings based on actions which occurred on or after 1 October 1995. Thus, the failure to make an adequate pre-litigation demand would not bar plaintiffs' claims insofar as they are based on defendants' actions prior to that date.

III. Validity of Claims for Relief

Plaintiffs contend the trial court erred in concluding that certain of plaintiffs' derivative claims failed to state causes of action against some or all of the defendants. The trial court ruled that all of plaintiffs' claims "are derivative in nature," and thus did not rule on whether any of the claims stated valid *individual* causes of action. Specifically, the trial court ruled as follows with respect to the motions to dismiss urged by all of the individual defendants and all of the business defendants *except* for JIP and Privateer:

> 3. The futility exception has been replaced by the language of N.C.G.S. § 55-7-42, and the Plaintiffs' derivative claims must be dismissed for failure to comply with the requirements of N.C.G.S. § 55-7-42.
>
> 4. In addition to dismissing all derivative claims for failure to satisfy statutory requirements as set out in paragraph 3 above,

the Court addresses separately the allegations of each derivative claim and rules as follows:

a. To the extent the Plaintiffs rely upon a constructive trust as a separate cause of action, it is insufficient and it is dismissed;

b. Except as set out in paragraph 3 above, the Plaintiffs have sufficiently pleaded the elements of a claim for breach of fiduciary duty;

c. Except as set out in paragraph 3 above, the Plaintiffs have sufficiently pleaded the elements of a claim for conversion;

d. The Plaintiffs' claim for civil conspiracy is insufficient and it is dismissed;

e. The Plaintiffs' claim for unfair and deceptive trade practices is insufficient and it is dismissed;

f. The Plaintiffs' claim for unjust enrichment is insufficient and it is dismissed.

Further, the trial court ruled that with respect to JIP and Privateer, all claims were dismissed with prejudice.

Because the trial court did not rule on whether any of plaintiffs' causes of actions stated valid *individual* claims, we will consider only whether the trial court erred in dismissing plaintiffs' *derivative* claims for failure to state a claim.

Breach of Fiduciary Duty

Plaintiffs acknowledge that they did not attempt to state a claim for breach of fiduciary duty against either JIP or Privateer. The other defendants did not appeal from the trial court's ruling that, as to them, the elements of a claim for breach of fiduciary duty were sufficiently pled. Therefore, we need not further consider that cause of action.

Conversion

[3] The trial court ruled that the allegations of the complaint sufficiently stated a claim for conversion against all defendants except JIP and Privateer. Therefore, we will consider the viability of a claim for conversion only against those defendants.

Conversion is defined as

> "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition *or the exclusion of an owner's rights.*"

Spinks v. Taylor and Richardson v. Taylor Co., 303 N.C. 256, 264, 278 S.E.2d 501, 506 (1981) (quoting *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956)). Plaintiffs generally allege in their amended complaint that the individual defendants have caused the Company to "transfer . . . business opportunities, assets and income streams through the formation of other companies" including JIP and Privateer. Plaintiffs then allege specific actions taken by the individual defendants. They allege, among other things, that "Privateer[] . . . grows and sells turkeys to the Company, a service which the Company formerly and presently performs for itself"; that JIP was formed and operated for the purpose of raising chickens and turkeys, a service the Company formerly performed for itself; that the Company loaned money to JIP to purchase property, and transferred real property to JIP at less than market value; and that the Company guaranteed substantial bank loans to Privateer. Plaintiffs also allege that some of the business defendants, including JIP and Privateer, "have been utilizing the Company's businesses and business concepts despite the knowledge that the Company developed" them, and have "utilized and profited from property belonging to the Company, including, but not limited to, the Company's assets, the Company's income streams and the Company's business opportunities." Finally, plaintiffs allege that the actions of JIP and Privateer, among others, "constitute an unauthorized assumption in exercising the rights of ownership over personal property rightfully belonging to the Company and/or the Plaintiffs."

We hold that the above allegations do not state a valid cause of action for conversion against either JIP or Privateer. In North Carolina, only goods and personal property are properly the subjects of a claim for conversion. A claim for conversion does not apply to real property. *McNeill v. Minter*, 12 N.C. App. 144, 146, 182 S.E.2d 647, 648 (1971). Nor are intangible interests such as business opportunities and expectancy interests subject to a conversion claim. *In re Silverman*, 155 B.R. 362 (Bankr. E.D.N.C. 1993). Broadly construed, the allegations of the complaint allege wrongdoing on the part of the *individual defendants* who have caused the Company to do the acts complained of above. There is no specific allegation that either JIP or

Privateer have made an unauthorized exercise of ownership rights over any of the personal property of the Company. Thus the trial court did not err in dismissing the claim for conversion against JIP and Privateer.

Constructive Trust and Accounting

[4] The trial court ruled that "[t]o the extent the Plaintiffs rely upon a constructive trust as a separate cause of action, it is insufficient . . . ." Our Supreme Court has described a constructive trust as

> a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. Unlike the true assignment for benefit of creditors, which is an express trust, intended as such by the creator thereof, a constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. It is an obligation or relationship imposed irrespective of the intent with which such party acquired the property, and in a well-nigh unlimited variety of situations. Nevertheless, there is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty or other wrongdoing by the holder of the property, or by one under whom he claims, the holder, himself, not being a bona fide purchaser for value.

Wilson v. Development Co., 276 N.C. 198, 211-12, 171 S.E.2d 873, 882 (1970) (citations omitted). Here, there are numerous allegations of breach of fiduciary duty on the part of all defendants except for JIP and Privateer, against whom plaintiffs did not allege a breach of fiduciary duty. There are also allegations that the defendants profited by the breaches of the fiduciary duty they owed plaintiffs. In order to prevent defendants from being unjustly enriched by their breaches of duty, equity could impose a constructive trust on property the defendants obtained as a result of their wrongful conduct and force them to give up that property. *Booher v. Frue*, 86 N.C. App. 390, 394, 358 S.E.2d 127, 129 (1987), *aff'd*, 321 N.C. 590, 364 S.E.2d 141 (1988) ("If a fiduciary has made a profit through the violation of a duty owed to a plaintiff 'he can be compelled to surrender the profit to the plain-

tiff.' "). Plaintiffs have sufficiently stated a claim for imposition of a constructive trust as to all defendants except for JIP and Privateer, and the decision of the trial court dismissing this cause of action is reversed as to the remaining defendants.

Civil Conspiracy

[5] In order to state a claim for civil conspiracy, a complaint must allege "a conspiracy, wrongful acts done by certain of the alleged conspirators, and injury." *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984). *See also Holt v. Holt*, 232 N.C. 497, 61 S.E.2d 448 (1950); and *Muse v. Morrison*, 234 N.C. 195, 66 S.E.2d 783 (1951). Here, the complaint is replete with allegations of a conspiracy by and between the defendants, acts done by some or all of the defendants in furtherance of that alleged conspiracy, and injury both to the Company and to the plaintiffs.

Defendants rely on the decision of this Court in *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562 (1981), in which we held that in a summary judgment context the plaintiff could not use the same facts to form both the basis of a claim for conspiracy to commit certain torts *and* the basis for claims based on the underlying torts. We distinguish *Jones*, however, because there a divided panel upheld the trial court's decision to dismiss plaintiff's action for conspiracy on defendant's motion for summary judgment, not on a motion to dismiss for failure to state a claim pursuant to the provisions of Rule 12(b)(6).

As a general rule, a plaintiff may plead "alternative theories of recovery based on the same conduct or transaction and then make an election of remedies." *Stanley v. Moore*, 339 N.C. 717, 724, 454 S.E.2d 225, 229 (1995). See also Rule 8 of the North Carolina Rules of Civil Procedure, which provides that a pleading may demand "relief in the alternative or of several different types," N.C. Gen. Stat. § 1A-1, Rule 8(e)(2), and also provides that "[a] party may set forth two or more statements of a claim or defense alternatively or hypothetically," and "may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both." N.C. Gen. Stat. § 1A-1, Rule 8(e)(2) (1999). Plaintiffs' complaint sets out a valid cause of action for civil conspiracy against all defendants, and the trial court erred in ruling otherwise.

Unfair and Deceptive Trade Practices

[6] To set out a valid claim for unfair and deceptive trade practices, a plaintiff must allege that (1) defendant has committed unfair or deceptive acts or practices; (2) defendant's conduct was in commerce or affected commerce; (3) defendant's conduct caused injury to plaintiff. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998).

We have previously held that allegations of fraud or breach of fiduciary duty will support a claim for unfair or deceptive trade practices. *HAJMM Co. v. House of Raeford Farms*, 94 N.C. App. 1, 14, 379 S.E.2d 868, 876 (1989), *aff'd in part and rev'd in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991). Here, plaintiffs alleged numerous instances of breach of fiduciary duty by the defendants, and the trial court found that plaintiffs had alleged a valid claim for breach of fiduciary duty. Those allegations support plaintiffs' claim for unfair or deceptive trade practices. Further, plaintiffs allege that the Company's competitors (the business defendants) were unfairly competing with the Company through use of assets and business opportunities which belonged to the Company, and that the acts of the defendants have injured the Company and have caused it monetary loss. Those allegations are sufficient to set out a claim for unfair or deceptive trade practices within the meaning of Chapter 75, and we reverse the ruling of the trial court to the contrary.

Unjust Enrichment

[7] In order to properly set out a claim for unjust enrichment, a plaintiff must allege that property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received, but that the defendant has failed to make restitution for the property or benefits. *Adams v. Moore*, 96 N.C. App. 359, 362, 385 S.E.2d 799, 801 (1989), *disc. review denied*, 326 N.C. 46, 389 S.E.2d 83 (1990). Here, plaintiffs allege that the defendants breached their fiduciary duties and received benefits for which they have not paid, thereby injuring the Company and depriving it of such benefits. Although plaintiffs incorrectly label the claim as one in the nature of *quantum meruit*, such allegations are sufficient to state a claim for unjust enrichment. The ruling of the trial court on this point is reversed.

IV. Plaintiffs' Motion to Amend

Finally, plaintiffs contend the trial court erred in denying their motion to amend their complaint. Plaintiffs contend that because the trial court concluded that they failed to state a claim upon which relief may be granted, they should have been allowed to amend their complaint to plead any additional facts which might give rise to a valid claim for relief. In light of our previous holdings herein which are favorable to the plaintiffs, we need not address this assignment of error.

In summary, we reverse the order of the trial court insofar as it concludes that the "allegations of wrongdoing alleged in the Plaintiffs' . . . First Amended Complaint are derivative in nature" and hold that plaintiffs, who are minority shareholders in a closely held corporation, may assert claims against defendant majority shareholders both on their own behalf as well as derivatively on behalf of the Company. We affirm the conclusion of the trial court that the "futility exception" to the demand requirement has been repealed by the express language of N.C. Gen. Stat. § 55-7-42, but hold that plaintiffs sufficiently alleged their compliance with the demand requirement. Third, we hold that the complaint alleges facts sufficient to state derivative claims against all defendants for civil conspiracy, unfair and deceptive trade practices, unjust enrichment, and imposition of a constructive trust; the complaint also alleges facts sufficient to state derivative claims against all defendants, except for JIP and Privateer, for breach of fiduciary duty and for conversion. We do not reach plaintiffs' last assignment of error with regard to denial of their motion to amend the complaint.

Affirmed in part and reversed in part.

Judge TIMMONS-GOODSON concurs.

Judge GREENE concurs in part and dissents in part with separate opinion.

GREENE, Judge, concurring in part and dissenting in part.

I disagree with the majority that plaintiffs' individual claims against the majority shareholders and business defendants are not governed by *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 488 S.E.2d 215 (1997). I, therefore, dissent from section I of the majority's opinion.

Individual claims against majority shareholders

Plaintiffs allege in their complaint individual claims against the majority shareholders of the Company for constructive trust and accounting, breach of fiduciary duty, conversion, civil conspiracy, unfair or deceptive trade practices, and quantum meruit. The majority states *Barger* has no application to these claims because the majority shareholders are not "third parties" within the meaning of *Barger*.[1] I disagree.

In *Barger*, the North Carolina Supreme Court created two exceptions to the general rule that "shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Barger*, 346 N.C. at 658, 488 S.E.2d at 219. First, a shareholder may bring an individual action against a third party when the third party "owed him a special duty." *Id.* at 658-59, 488 S.E.2d at 219. Second, a shareholder may bring an individual action against a third party when the shareholder suffered a "separate and distinct" injury as a result of the alleged wrongful conduct of the third party. *Id.* Although the Supreme Court did not define the meaning of "third party" in *Barger*, the authority cited in support of its opinion suggests "third party" refers to any party other than the corporation and includes officers, directors, and shareholders of the corporation. In support of its statement of the general rule that "shareholders cannot pursue individual causes of action against *third parties* for wrongs or injuries to the corporation," *Barger* relies on *Jordan v. Hartness*, 230 N.C. 718, 55 S.E.2d 484 (1949), which involved an action by one shareholder against another shareholder. *Barger*, 346 N.C. at 658, 488 S.E.2d at 219 (emphasis added) (citing *Jordan v. Hartness*, 230 N.C. 718, 55 S.E.2d 484 (1949)). Moreover, *Barger* relies in part on an article in the American Law Reports that defines "third parties" to include officers and directors of a corporation. *Barger*, 346 N.C. at 658, 488 S.E.2d at 219 (citing H.A. Wood, Annotation, *Stockholder's Right to Maintain (Personal) Action Against Third Person as Affected by Corporation's Right of Action for the Same Wrong*, 167 A.L.R. 279 (1947)). Accordingly, the majority shareholders in this case are "third parties" within the meaning of *Barger*, and plaintiffs may bring individual claims against these parties if they owed plaintiffs a "special duty" or plaintiffs suffered a "separate and distinct injury" as a result of their alleged wrongful conduct.

1. The majority suggests "third parties," within the meaning of *Barger*, are parties other than shareholders, officers, and directors of the corporation.

A "special duty" is a duty "the alleged wrongdoer owed directly to the shareholder as an individual." *Id.* at 659, 488 S.E.2d at 220. A "special duty" does not arise unless defendants owed a duty to plaintiffs that was "personal to plaintiffs as shareholders" and the duty was "separate and distinct" from the duty defendants owed to the corporation. *Id.*

In this case, plaintiffs allege in their complaint that the majority shareholders owe a fiduciary duty to them based on their status as minority shareholders in the Company. Plaintiffs acknowledge in their complaint, however, that the fiduciary duty owed by the majority shareholders to plaintiffs is the same fiduciary duty of "good faith, due care and/or loyalty" that the majority shareholders owe to the Company. Plaintiffs, therefore, have not alleged in their complaint a "special duty" owed to them by the majority shareholders that is separate and distinct from the duty owed to the corporation. Accordingly, plaintiffs may bring an individual action against the majority shareholders only if they suffered a "separate and distinct injury" as a result of the majority shareholders' alleged wrongful conduct.

A shareholder suffers a "separate and distinct injury" when " 'a legal basis exists to support plaintiffs' allegations of an individual loss, separate and distinct from any damage suffered by the corporation.' " *Id.* (quoting *Howell v. Fisher*, 49 N.C. App. 488, 492, 272 S.E.2d 19, 23 (1980), *disc. review denied*, 302 N.C. 218, 277 S.E.2d 69 (1981)). A diminution or destruction of the value of a plaintiff's shares is not an injury "separate and distinct" from injury to the corporation. *Id.*

In this case, plaintiffs allege in their complaint the majority shareholders injured the Company by "diverting opportunities, assets and/or income streams of the Company for their own personal benefit." Plaintiffs, however, do not allege any individual loss "separate and distinct from any damages suffered by the corporation." The only loss suffered by plaintiffs is loss caused by the diminution of the value of their shares. Plaintiffs, therefore, may not maintain an individual action against the majority shareholders of the Company pursuant to the *Barger* exceptions. Accordingly, the trial court properly dismissed plaintiffs' individual claims against the majority shareholders.

Individual claims against business defendants

In addition to their claims against the majority shareholders, plaintiffs also allege in their complaint individual claims for constructive trust and accounting, conversion, civil conspiracy, unfair and deceptive trade practices, and quantum meruit against several businesses with which the Company engaged in business dealings. As with the claims against the majority shareholders, these claims against the business defendants are claims against "third parties" and are governed by *Barger*.[2] These claims may therefore be brought only if the business defendants owed plaintiffs a "special duty" or plaintiffs suffered a "separate and distinct injury" as a result of the alleged wrongful conduct of the business defendants.

In this case, plaintiffs do not allege in their complaint any duty owed to them by the business defendants that is separate and distinct from the duty these business defendants owed to the Company. Rather, plaintiffs' sole relationship with the business defendants arose from the business defendants' dealings with the Company. Plaintiffs, therefore, may not maintain an individual action against the business defendants based on the "special duty" exception of *Barger*. Additionally, plaintiffs do not allege in their complaint that they suffered any "separate and distinct injury" from the Company as a result of the alleged wrongful conduct of the business defendants. Instead, plaintiffs allege injury resulting from the diversion to the business defendants of "opportunities, assets and/or income streams of the Company." Any alleged injury to plaintiffs, therefore, arises from the diminution of the value of their shares. Accordingly, plaintiffs may not maintain an action against the business defendants under the *Barger* exceptions. I, therefore, would affirm the trial court's order dismissing plaintiffs' individual claims against the majority shareholders and business defendants.

I fully concur in sections II, III, and IV of the majority's opinion.

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2. The majority states the business defendants in this case are not "third parties" and plaintiffs' claims against them are, therefore, not governed by *Barger*. Nevertheless, the majority states, assuming the business defendants are "third parties" and plaintiffs' claims are consequently governed by *Barger*, the complaint sufficiently alleges both a "special duty" owed to plaintiffs and "separate and distinct injury" to plaintiffs. I believe the business defendants in this case are "third parties" within the meaning of *Barger* and plaintiffs' claims against the business defendants are, consequently, governed by *Barger*.

STATE OF NORTH CAROLINA v. HENRY MICHAEL McKEITHAN

No. COA99-872

(Filed 7 November 2000)

1. Confessions and Incriminating Statements— voluntariness—juvenile

The trial court did not err in a double first-degree murder case by denying defendant juvenile's motion to suppress his confession, because: (1) defendant was advised both orally and in writing of his rights under Miranda, and the warning fully satisfied the requirements of N.C.G.S. § 7A-595 (now N.C.G.S. § 7B-2101); and (2) defendant stated he understood his rights, was willing to waive his rights, and executed a written waiver.

2. Criminal Law— joinder—no abuse of discretion

The trial court did not abuse its discretion in a double first-degree murder case by joining defendant's case with that of one of his two accomplices under N.C.G.S. § 15A-926(b)(2) even though parts of defendant's statement were redacted under N.C.G.S. § 15A-927(c)(1)(b), including the omissions from his statement that defendant was not in the car while his two accomplices talked, that they were just messing around laughing and stuff, and that at first they were going to take one of the victims swimming, because: (1) the State's evidence reveals that defendant had conversations with one accomplice about killing the victim and his father, defendant accompanied that accomplice to kill the victim, and defendant actively participated in the murders; and (2) the inclusion of the deleted statements would have actually strengthened the State's case since they were made during a discussion of how to murder the victims.

3. Confessions and Incriminating Statements— accomplice's redacted confession—failure to give limiting instruction

The trial court did not violate defendant's rights under the Confrontation Clause in a double first-degree murder case by failing to instruct the jury that it could use an accomplice's statement against the accomplice only, because: (1) the State redacted the accomplice's confession carefully, and the statement retained a natural narrative flow; (2) there are no indications that the State altered the confession or that defendant was incriminated

by the accomplice's confession; and (3) even if there was error, the error was harmless beyond a reasonable doubt based on the overwhelming evidence of defendant's guilt including his own confession.

4. Burglary and Unlawful Breaking or Entering— first-degree burglary—nighttime

The trial court erred by failing to give an instruction on the definition of nighttime for a first-degree burglary and a new trial must be held on this charge, because: (1) N.C.P.I., Crim. 214.10 fn. 3 provides that the trial judge must instruct the jury on the definition of nighttime if there is doubt as to whether it was nighttime; and (2) the conflicting evidence was sufficient to create a jury issue as to whether defendant broke and entered the house during the nighttime.

5. Homicide— first-degree murder—alternative grounds—premeditation and deliberation—felony murder

Although defendant must receive a new trial on his first-degree burglary conviction and this charge was one of the grounds under the felony murder rule for defendant's two first-degree murder convictions, this disposition does not affect defendant's two first-degree murder convictions because: (1) the jury found defendant guilty of first-degree murder on three alternative grounds; (2) the jury also based its convictions on premeditation and deliberation and the felony murder rule with the underlying felony of first-degree arson; and (3) either of the remaining two grounds would be sufficient on their own.

6. Jury— peremptory challenges—excusal of eight African-American jurors—nondiscriminatory basis—conclusory allegations insufficient to establish prima facie case

The trial court did not err in a double first-degree murder case by allowing the State to use peremptory challenges to exclude eight African-American potential jurors and by concluding that defendant failed to establish a prima facie case of discrimination, because: (1) defendant has alleged nothing but conclusory allegations of discriminatory conduct and has not cited to any place in the record where the prosecutor's comments may be interpreted as discriminatory; and (2) defendant has not argued that the prosecutor struck a disproportionate number of African-American jurors.

7. Discovery— copies of State's photographs—testing performed by SBI

The trial court did not err in a double first-degree murder case by denying defendant's request for copies of the State's photographs and for information and data related to testing performed by the SBI, because: (1) N.C.G.S. § 15A-903(d) requires only that the State make the photographs available to defendant for inspection and copying, and defendant does not point to anything in the record to show the State failed to comply with the statute; and (2) any error in failing to give defendant the information concerning the SBI lab results revealing the presence of gasoline on most of the items tested was harmless beyond a reasonable doubt based on the overwhelming evidence of defendant's guilt and defendant's confession that he doused the beds in gasoline.

8. Criminal Law— prosecutor's argument—propriety of accomplice's confession

The trial court did not abuse its discretion in a double first-degree murder case by allowing the prosecutor to comment during closing arguments that an accomplice's attorney attempted to cast doubt upon the accomplice's confession based on the fact that the confession sinks their client just as surely as an iceberg sunk the Titanic, because: (1) the prosecutor made his argument in direct response to an argument that the accomplice's confession resulted from unconstitutional police conduct; (2) the prosecutor did not make a degrading comment about the defendant or his counsel; and (3) the prosecutor's comments were explicitly directed as a response to the accomplice's counsel, rather than to defendant's counsel.

9. Criminal Law— trial court's failure to order transcript—no prejudicial error

The trial court did not commit prejudicial error in a double first-degree murder case by failing to order defendant a transcript of the 24 July motion to suppress hearing, because: (1) the hearing on the motion to suppress took place approximately one week prior to trial; (2) defendant had the same counsel for the hearing and trial, and the same judge presided; (3) both counsel and defendant were present for both proceedings; and (4) a review of the transcripts shows that the testimony was substantially the same.

10. Accomplices and Accessories— accessory before the fact—jury instruction—no prejudicial error

The trial court did not commit prejudicial error by reading defendant's name in its instruction to the jury on accessory before the fact with respect to defendant's accomplice, because the State presented overwhelming evidence of defendant's guilt.

11. Homicide— first-degree murder—jury instructions—deadly weapon—premeditation and deliberation

The trial court did not err in a double first-degree murder case by its instructions to the jury on the definition of a deadly weapon and the definition of premeditation and deliberation, because the jury charge as a whole was correct and the error and omissions pointed out by defendant were not prejudicial.

12. Conspiracy— one guilty verdict—judgment on two counts error

The trial court erred by entering judgment on two counts of conspiracy to commit murder when the jury only returned one guilty verdict as to conspiracy.

Appeal by defendant from judgments entered 28 August 1998 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 14 August 2000.

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

Bain & McRae, by Alton D. Bain, for the defendant.

EAGLES, Chief Judge.

This appeal arises out of the joint trial and conviction of defendant and one of his two accomplices for two brutal murders. The second accomplice was tried and convicted separately.

The State's evidence showed that seventeen year-old defendant Henry Michael McKeithan participated with Vera Lee (Lee) and Robby Brewington (Robby) in the murders of Frances and Brian Brewington. Eighty-two year old Frances was Robby's grandmother and Brian's great-grandmother. Eight-year-old Brian was Robby's nephew and the son of Robby's brother Patrick. Robby, Brian and Frances lived together in Dunn.

The genesis of these murders was an intimate relationship between Robby and Lee. The couple planned to marry and purchase a trailer. However, their lack of funds and poor credit prevented them from fulfilling their dream. In order to obtain the necessary money, Robby and Lee conceived a plan to kill Brian and Patrick and collect life insurance benefits on their lives. Accordingly, Robby fraudulently acquired life insurance policies on Brian and Patrick by falsifying Patrick's signature. The face value of the policy on Patrick was $75,000.00 while the policy on Brian was for $58,552.00.

Shortly after Robby obtained the insurance policies, Lee began to solicit individuals to kill Brian and Patrick. Her friend Chris Wilson testified that Lee talked constantly of killing Brian and harbored great resentment for Frances. At one point, Lee offered Wilson $10,000 to kill Brian. Lee also attempted to recruit Wilson's roommate Danielle to participate in the killings.

In mid-May of 1997, Lee approached the defendant. According to the defendant's statement, Lee offered him $1300.00 to murder Patrick. The two searched for Patrick on three separate occasions to commit the crime. Apparently, Lee then became disenchanted with the idea of killing Patrick and focused her attention on Brian. Defendant told the SBI that he was hesitant about this idea and had suggested to her that they kidnap Brian for ransom instead. However, Lee rebuffed defendant's suggestion.

On 1 June 1997, Robby and Lee began to plan the murders. Robby told Lee to make it look like a robbery, to stab "Grandma" and Brian and set the house on fire. On 11 June 1997, Robby talked to Lee on the phone and they finalized plans for that night. Around midnight, defendant and Lee went to Wilson's apartment. Lee again began to talk about killing either Brian or Patrick. Lee and Wilson argued and Lee angrily left the house with the defendant.

After leaving Wilson's apartment, Lee and the defendant drove past Robby's house honking the horn to wake him up. According to Robby's statement, he heard the horn at approximately 3:00 a.m. Upon hearing the car horn, Robby got up and began dressing for work. He "got (his) Sunday shoes and (his) Sunday best for Brian and grandma's funeral." He took these belongings along with the insurance policies and drove to Hardee World to meet with Lee and the defendant. While Robby was preparing, the defendant and Lee were buying two gallon jugs at Winn-Dixie and filling them with gasoline. In the Hardee World parking lot, Robby placed some of his belongings in the back of Lee's car.

Lee and the defendant then started back to the Brewington home. On their way, the two decided that "it would be nice if we made it look like a burglary, like they had got up and we freaked out and we stabbed them." Defendant and Lee parked behind the Brewington house. Each put on rubber gloves and took a gallon jug of gasoline. The pair entered the house through the back screen door and went to the bedroom where Brian and Frances both slept.

Once in the bedroom, Lee handed the knife to the defendant and told him to kill Brian. However, defendant hesitated and told Lee that he could not do it. Instead he grabbed a jug of gasoline and began pouring it around the bedroom. When he finished, Lee handed the defendant another knife and told him to kill "the old lady" and that she would handle Brian. Lee placed the knife to Brian's throat waking him up. Brian began to scream awaking Frances. Frances shrieked, "[w]ho are you" and then began yelling "[o]h, Lord." Oh Lord." Defendant then began to stab Frances repeatedly.

When defendant stopped stabbing Frances, he began to look for his lighter. Realizing that he had left his lighter outside, defendant ran to the car. While defendant was outside, Lee ignited a dishrag in the heater and when the defendant returned, she threw the lighted rag onto the gasoline. As defendant ran out of the burning bedroom, he heard Frances scream, "[o]h, help me. Help me. Oh." Defendant and Lee raced to the defendant's house where they burned their clothes and gloves and buried the knife.

On the morning of the murders, Harnett County Sheriff's Deputy Jerry Edwards was reporting to work at approximately 6:15 a.m. Edwards saw smoke coming from Frances' residence and called his dispatch officer to contact the Harnett County Fire Department. After the firefighters extinguished the fire, officers conducted a preliminary investigation. The officers concluded that the fire was deliberately set. The officers based this conclusion on the following factors: (1) the color of the smoke and flames; (2) the elimination of the appliances and electrical wiring as possible causes; (3) the "pour pattern" of the gasoline; (4) the odor of gasoline and (5) the presence of the half full gallon jug of gasoline.

Detective Billy Wade of the Harnett County Sheriff's Department, along with SBI Special Agents Gail Beasley and John Hawthorne, began a criminal investigation that included an interview with Robby. During the interview, Robby confessed his involvement and implicated both Lee and the defendant.

On 13 June 1997, Wade and Hawthorne obtained arrest warrants for defendant and arrested him at his house. Wade read defendant his Miranda and juvenile rights at that time. Once at the Dunn Law Enforcement Center, Wade readvised defendant of his rights and completed the juvenile rights form. Defendant waived his rights and made a statement admitting his involvement in the murders. A jury convicted the defendant of two counts of first degree murder, one count of first degree arson, one count of first degree burglary, and one count of conspiracy to commit murder. Defendant received consecutive life sentences for the two murders, and incarceration for 64-86 months for first degree arson, 64-86 months for first degree burglary, and 157-198 months for conspiracy to commit murder. Defendant appeals.

I. Juvenile Rights Form

[1] Defendant first assigns error to the trial court's denial of his motion to suppress his confession. Defendant claims that he did not knowingly, willingly and voluntarily waive his rights under G.S. § 7A-595 (1995) (repealed by N.C. Sess. Laws 1998-202 s.5 eff. July 1 1999), *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966) and *State v. Miller*, 344 N.C. 658, 477 S.E.2d 915 (1996). The trial court found as a fact that Special Agent Billy Wade advised defendant both orally and in writing of his rights under *Miranda* and G.S. § 7A-595. We note that G.S. § 7A-595 has been repealed and replaced with G.S. § 7B-2101 (1999) which offers juvenile defendants similar guarantees effective 1 July 1999. *See* S.L. 1998-202 s.6. Defendant stated that he understood his rights, was willing to waive his rights and executed a written waiver. The record establishes that Agent Wade read defendant the following warning:

> You have the right to remain silent . . . Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer one will be appointed for you before questioning if you wish. You have the right to have your parent, guardian, or custodian with you during questioning. If you decide to answer questions now without a lawyer, parent, guardian or custodian present, you will still have the right to stop answering questions at any time until you talk to a lawyer, parent, guardian, or custodian.

Defendant argues that there is no requirement of indigency or financial need in order for an attorney to be appointed under the juvenile

statute. Defendant contends that the warning here is contrary to G.S. § 7A-595's mandate that a juvenile is always entitled to an attorney regardless of financial stature. Accordingly, defendant contends that because defendant did not know his rights, defendant could not have knowingly, voluntarily and willingly waived his rights.

Obedient to *State v. Flowers*, 128 N.C. App. 697, 497 S.E.2d 94 (1998), we hold that the trial court committed no error and that the warning given fully satisfied the requirements of G.S. § 7A-595. In *Flowers*, this Court considered the following warning given to a juvenile.

> You have the right to remain silent. Do you understand this right? Anything you say can be and may be used against you. Do you understand this right? You have the right to have a parent, guardian, or custodian present during questioning. Do you understand? You have the right to talk with a lawyer for advice before questioning and to have that lawyer with you during any questioning. If you cannot afford to hire a lawyer, one will be appointed to represent you at no cost before any questioning, if you wish.

Flowers, 128 N.C. App. at 700, 497 S.E.2d at 96. This warning is nearly identical to the warning given here. While not directly addressing the arguments advanced here, the *Flowers* Court pronounced that "this warning fully satisfied the requirements of N.C. Gen. Stat. § 7A-595(a) (1995) and *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966)." *Id.*

In *State v. Miller*, 344 N.C. 658, 477 S.E.2d 915 (1996), our Supreme Court considered a case where the arresting officers could not locate a juvenile rights form before questioning a juvenile murder suspect. Instead, the officers used an adult *Miranda* form and inserted the additional clause, "[d]o you wish to answer questions without your parents/parent present?" *Miller*, 344 N.C. at 664, 477 S.E.2d at 919. Again, this warning is nearly identical to the warning given in the instant case. Our Supreme Court upheld the reading of this warning as sufficient to satisfy both *Miranda* and G.S. § 7A-595. *Id.* at 666, 477 S.E.2d at 921.

In light of these cases, we hold that the warnings here were sufficient to satisfy G.S. § 7A-595 and *Miranda*. While we urge law enforcement agencies to comply literally with the provisions of the new juvenile interrogation procedures statute, G.S. § 7B-2101

(1999), on this record, we find no error in the denial of the motion to suppress.

II. Joinder

[2] Defendant argues that the trial court erred by joining his case for trial with defendant Brewington's case. Our State "has a strong policy of favoring consolidated trials of defendants accused of collective criminal behavior." *State v. Roope*, 130 N.C. App. 356, 364, 503 S.E.2d 118, 124, *disc. review denied*, 349 N.C. 374, 525 S.E.2d 189 (1998). A trial court's decision on joinder and severance rests within its discretion and absent an abuse of that discretion, this Court will not overturn it. *Id.* at 364-65, 503 S.E.2d at 125. To overturn the trial court's joinder decision, the defendant must show that joinder has deprived him of a fair trial. *Id.* at 365, 503 S.E.2d at 125 (citing *State v. Carson*, 320 N.C. 328, 335, 357 S.E.2d 662, 666-67 (1987)). Under G.S. § 15A-926(b)(2) (1999), the trial court may join defendants for trial

> a. When each of the defendants is charged with accountability for each offense; or
>
> b. When even if all of the defendants are not charged with accountability for each offense, the several offenses charged:
>
> 1. Were part of a common scheme or plan; or
>
> 2. Were part of the same act or transaction; or
>
> 3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

However,

> (1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a co-defendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:
>
> a. A joint trial at which the statement is not admitted into evidence; or
>
> b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or

c. A separate trial of the objecting defendant.

(2) The court, . . . on motion of the defendant other than under subdivision (1) above must deny a joinder for trial or grant a severance of defendants whenever:

a. If before trial, it is found necessary to protect a defendant's right to a speedy trial, or it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants; or

b. If during trial, upon motion of the defendant whose trial is to be severed, or motion of the prosecutor with the consent of the defendant whose trial is to be severed, it is found necessary to achieve a fair determination of the guilt or innocence of that defendant.

G.S. § 15A-927(c) (1999). This statute substantially codifies the decision of *Bruton v. U.S.*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968).

Here, defendant claims that his statement, redacted pursuant to G.S. § 15A-927(c)(1)(b), was inadequate to meet the constitutional and statutory requirements. According to defendant, the omissions from his statement distorted his statement and unfairly magnified his participation in the crimes. Specifically defendant objects to the omission that he was not in the car at Hardee World while Brewington and Lee talked. He also objects to the deletion of his comment that "we were just messing around laughing and stuff" and that there was only one discussion of the murders. Further, defendant argues that the statement should not have excluded his comment that "at first we were going to take [Brian] swimming."

In these arguments, defendant ignores the State's evidence that he had conversations with Lee about killing Patrick and Brian, that he accompanied Lee to Fayetteville to kill Patrick and that he actively participated in the murders. Additionally, defendant made the swimming comment during a discussion of how to murder the victims. Accordingly, the redaction of these statements did not prejudice the defendant. Indeed, their inclusion would have actually strengthened the State's case.

[3] Next, defendant argues that the trial court committed reversible error by failing to instruct the jury that it could use defendant Brewington's statement against Brewington only. In the recent case of *State v. Brewington*, 352 N.C. 489, 532 S.E.2d 496 (2000), our

Supreme Court held that it is not proper to determine whether the introduction of a co-defendant's statements violated defendant's rights under the Confrontation Clause unless we first conclude that the co-defendant's statement implicated the defendant. Here, we hold that the State redacted Brewington's confession carefully and that it retained a "natural narrative flow." *Brewington*, 352 N.C. at 512, 532 S.E.2d at 510. Additionally, there are no indications that the State altered the confession. *Id.* Accordingly, we hold that the defendant was not incriminated by Brewington's confession, and the trial court's failure to give a limiting instruction was not prejudicial error. However, even if the trial court's failure to instruct was error, we hold that any error was harmless beyond a reasonable doubt. *Roope*, 130 N.C. App. at 367, 503 S.E.2d at 126 (citations omitted). The State presented overwhelming evidence of the defendant's guilt including his own confession. Accordingly, although the better practice would be to include a limiting instruction, the alleged error does not require a new trial. *Id.*

We hold that defendant's remaining assignments of error as to joinder have no merit.

III. First Degree Burglary

[4] Defendant next challenges the trial court's failure to give an instruction on the definition of nighttime.

Our Courts have 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. Surcey*, 139 N.C. App. 432, 434, 533 S.E.2d 479, 481 (2000). *See* N.C.G.S. § 14-51 (1999). North Carolina provides no statutory definition of nighttime. However, our courts "adhere to the common law definition of nighttime as that time after sunset and before sunrise 'when it is so dark that a man's face cannot be identified except by artificial light or moonlight.' " *State v. Barnett*, 113 N.C. App. 69, 74, 437 S.E.2d 711, 714 (1993) (quoting *State v. Ledford*, 315 N.C. 599, 607, 340 S.E.2d 309, 315 (1986)). Under the North Carolina Pattern Jury Instructions, the trial judge must instruct the jury on the definition of nighttime, "**if there is doubt as to whether it was nighttime.**" N.C.P.I., Crim. 214.10 fn. 3 (emphasis added).

We begin by taking judicial notice that on 12 June 1997, in Harnett County, that civil twilight began at 5:29 a.m. and the sun rose at 5:59

a.m. See Sun and Moon Data for Dunn, Harnett County, North Carolina computed by the Astronomical Applications Department U.S. Naval Observatory; *Barnett*, 113 N.C. App. at 75, 437 S.E.2d at 714. The evidence showed that during the night, defendant and Lee rode by Brewington's house honking the horn. The honking roused Brewington from sleep and the three met at Hardee World later. After the meeting, defendant and Lee went back to the Brewington home and committed the murders. An officer saw smoke rolling out of the house at 6:15 a.m. and had his dispatcher call the Fire Department.

Greg Maitland testified that a noise aroused him at 4:00 a.m. He saw nothing out of the ordinary and testified that Robby Brewington's car was at the house across the street. Lena Edwards testified that she drove by the Brewington house at 4:45 a.m. and saw an unfamiliar dark car parked behind the house. However, evidence obtained from Winn-Dixie showed that two gallon water jugs were purchased at 4:49 a.m. The cashier from Winn-Dixie testified that these were the only water jugs the store had sold between 2 and 5 a.m. on the day in question. Therefore, defendant contends that this evidence shows defendant and Lee must have purchased those jugs at 4:49 a.m. and creates a conflict with the testimony of Ms. Edwards. Since defendant could not have been in two places at once, defendant argues that the break-in could have occurred after Ms. Edwards saw the strange car at the Brewington house and the jury could have concluded that the break-in did not occur during the nighttime.

We agree and hold that the defendant presented sufficient evidence entitling him to an instruction on the definition of nighttime. Evidence at trial showed that the defendant and Lee drove around the Brewington house before even going to Winn-Dixie and could have been seen while merely riding by the Brewington home. The evidence went on to show that defendant and Lee did not enter the house until after they had purchased jugs at Winn-Dixie, filled them with gas and then met with Brewington at Hardee World. The State's only witness testified that she saw a strange car at the same time that the water jugs were being purchased at Winn-Dixie. According to the State's argument, Ms. Edwards saw the defendant's car at the time of the break-in and not while the defendant was simply riding by the house. The only other evidence that the State presented as to the time of the break-in was Officer Edwards who saw smoke at 6:15 a.m. By that time, nighttime had ended.

We hold that this conflicting evidence is sufficient to create a jury issue as to whether defendant broke and entered the Brewington

house during the nighttime. Since the trial court failed to give the requested instruction, defendant is entitled to have his conviction for first degree burglary reversed and a new trial ordered on the first degree burglary charge.

[5] Finally, we note that one of the grounds for defendant's two first degree murder convictions was first degree burglary under the felony murder rule. However, our disposition of defendant's burglary conviction does not affect those convictions. The jury found the defendant guilty of first degree murder on three alternative grounds. In addition to the burglary charge the jury based its convictions on premeditation and deliberation and the felony murder rule with the underlying felony of first degree arson. Since either of those grounds would be sufficient on their own, we hold that the defendant's two convictions for first degree murder must stand.

IV. Jury Selection

[6] Defendant claims that the trial court erred by allowing the State to use peremptory challenges to exclude eight African-American potential jurors for racial discriminatory reasons. Both the U.S. and North Carolina Constitutions bar the use of peremptory challenges solely on the basis of race. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986); *State v. Smith*, 351 N.C. 251, 262, 524 S.E.2d 28, 37 (2000). In *Batson*, the Supreme Court established a three-part test to determine if a prosecutor has engaged in racial discrimination in the selection of jurors. *State v. Braxton*, 352 N.C. 158, 179, 531 S.E.2d 428, 440 (2000). First, defendant must establish a *prima facie* case that a peremptory challenge was exercised on the basis of race. *Smith*, 351 N.C. at 262, 524 S.E.2d at 37. If the defendant fulfills that threshold requirement, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case. *Id.* The trial court must then determine whether defendant has proved purposeful discrimination. *Id.*

Here, the trial court concluded that the defendant did not establish a *prima facie* case of discrimination. Therefore, our review is limited to whether the trial court erred in finding that the defendant failed to make a *prima facie* showing. *Id.*

Our Supreme Court has described the factors to be considered in the evaluation of whether defendant established a *prima facie* case. *Braxton*, 352 N.C. at 180, 531 S.E.2d at 441. Among the relevant factors is whether the prosecutor used a disproportionate number of

peremptory challenges to strike African-American jurors. *Id.* The court may also consider the prosecutor's questions and statements made during jury selection. *Id* at 180-81, 531 S.E.2d at 441. Finally, the Court may look at the race of the defendant, victims and witnesses. *Id.*

Here, the defendant has alleged nothing but conclusory allegations of discriminatory conduct. He has not cited this Court to any place in the record where we may interpret the prosecutor's comments as discriminatory. Further, defendant has not argued that the prosecutor struck a disproportionate number of African-American jurors. Simply put, the defendant's argument is that the prosecutor struck eight African-American jurors and therefore acted with impermissible racial intent. We hold that these conclusory allegations without more do not state a *prima facie* case.

V. Discovery

[7] Defendant also assigns error to the trial court's denial of his request for information and data related to testing performed by the SBI and for copies of the State's photographs. In his brief, defendant concedes that our Supreme Court has held that the State does not have to furnish a defendant with copies of photographs. *State v. James*, 321 N.C. 676, 685, 365 S.E.2d 579, 585 (1988). Instead, G.S. § 15A-903(d) (1999) requires only that the State make the photographs available to the defendant for inspection and copying. Here, the defendant can point to nothing in the record to support his assertion that the State failed to comply with the statute. Accordingly, this assignment of error is overruled.

Additionally, defendant sought information concerning the SBI lab results. Specifically, defendant asked for the State to identify the names of all machines used, the standards in testing, any containers used to transport the samples, and the procedures used in transporting these containers. Additionally, defendant requested that the State produce copies of chromatograms.

Under G.S. § 15A-903(e) (1999),

> the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case or copies thereof within the possession, custody, or control of the State.

We decline to address whether the defendant was entitled to the requested information because we hold that any error was harmless beyond a reasonable doubt. *State v. Cunningham*, 108 N.C. App. 185, 423 S.E.2d 802 (1992). Here, the SBI reports in question revealed the presence of gasoline on most of the items tested. The State's evidence at trial showed that the defendant confessed that he and Lee doused the beds in gasoline that they purchased earlier in the evening. Additionally, officers testified that they found a one-half full jug of gas on a chair in the house and firefighters testified that the bedroom smelled of gasoline. Defendant cannot in good faith question the presence of gasoline here. Further, because the evidence of defendant's guilt is overwhelming, we overrule the assignment of error as harmless.

VI. Prosecutor's Closing Argument

[8] Next, defendant assigns error to the propriety of the prosecutor's closing argument. Defendant claims that the prosecutor's comments impugn the defendant, defense counsel and the judicial process in a manner that requires a new trial. The following exchange took place during the prosecutor's closing argument.

> And counsel for the defendant Brewington attempts to cast doubt upon the defendant's confession because they know that that [sic] confession sinks their client just as surely as an iceberg sunk the Titanic. That's why Mr. Gilchrist yesterday spent almost his entire argument attacking this confession.
>
> You know, one of my political heroes was the late Senator Sam Ervin. Before he became a [S]enator, Sam Ervin was renowned across this state as a great trial lawyer, and he once said, when talking about defending a guilty client in a criminal case, that if the facts are against you—
>
> Mr. Bain: Objection.
>
> The Court: Overruled.
>
> Mr. Lock: —argue the law. And if the law is against you well then you talk about the facts, and if both the facts and the law are against you, well then you pound on the lectern and you talk about the Constitution and you just argue like hell.
>
> Yesterday, Mr. Gilchrist did a whole lot of arguing, and he even talked a little bit about the Constitution, but he did not shake the confession of Robby Brewington.

"It is well settled that arguments of counsel rest within the control and discretion of the presiding trial judge." *State v. Worthy*, 341 N.C. 707, 709, 462 S.E.2d 482, 483 (1995). Our courts have granted counsel wide latitude in hotly contested cases. *Id.* On a number of occasions, our Supreme Court has stated that,

> "for an inappropriate prosecutorial comment to justify a new trial, it 'must be sufficiently grave that it is prejudicial error.' " In order to reach the level of "prejudicial error" in this regard it now is well established that the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Id. at 709-10, 462 S.E.2d at 483 (citations omitted). In analyzing a prosecutor's comments, we do not examine them in a vacuum. *Id.* at 710, 462 S.E.2d at 483. Rather, this Court must view the remarks in the context in which the prosecutor made them. *Id.*

Here, we cannot hold that the prosecutor's comments, while arguably inappropriate, "so infected the trial with unfairness as to make the conviction a denial of due process." *Id.* First, the district attorney made his argument in direct response to counsel for Brewington's argument that Brewington's confession resulted from unconstitutional police conduct. Further, this is not a case in which the prosecutor has made a degrading comment about the defendant or his counsel. *See State v. Davis*, 45 N.C. App. 113, 262 S.E.2d 329 (1980). Finally, we note that the prosecutor's comments were explicitly directed as a response to counsel for Brewington and not the defendant's counsel. Therefore, the prosecutor did not even relate these arguments to this defendant. While we do not approve of the prosecutor's comments, we hold that on these facts they did not deny the defendant a fair trial.

VII. Transcript Request

[9] Next, defendant alleges that the trial court's failure to issue him a transcript of the 24 July motion to suppress hearing was error and violated his constitutional rights. While the better practice would have been to order a transcript, our review does not disclose any prejudicial error. Under *Britt v. North Carolina*, 404 U.S. 226, 30 L. Ed. 2d 400 (1971), the U.S. Supreme Court stated that a trial court does not always have to provide an indigent defendant with a transcript of a prior proceeding. Instead, availability is determined by looking at (1) whether the transcript was necessary for preparing an

effective defense and (2) whether there are alternative devices available to the defendant. *State v. Rankin*, 306 N.C. 712, 716, 295 S.E.2d 416, 418-19 (1982). Here, the hearing on the motion to suppress took place approximately one week before trial. Defendant had the same counsel for the hearing and trial and the same judge presided. Further, both counsel and the defendant were present for both proceedings. Finally, our review of the transcripts shows that the testimony was substantially the same. Under these circumstances we hold that the trial court's failure to order a transcript of the suppression hearing was not prejudicial error warranting a new trial.

VIII. Jury Instructions

[10] Next, defendant contends that the trial court made several prejudicial errors in its jury instructions. We disagree. First, defendant argues that the court's instructions on accessory before the fact with respect to co-defendant Brewington prejudice the defendant. The trial court gave substantially the following instruction as to accessory before the fact on every offense charged,

> [i]f you find from the evidence beyond a reasonable doubt that on or about the date alleged that the defendant Henry Michael McKeithan acting by himself or acting together with Vera Sue Lee . . . and that before the crime was committed the Defendant Robert Brewington counseled, procured, commanded, knowingly aided McKeithan and Lee to commit the crime and in so doing Robert Brewington's actions or statements caused or contributed to the commission of the crime . . . and that the defendant Robert Brewington was not present when the crime was committed your duty would be to return a verdict of guilty.

Defendant claims that this instruction permitted the jury to conclude that it could convict Brewington only if it had first convicted McKeithan of the underlying crime.

In order to convict Brewington of accessory before the fact, the State had to show:

> (1) [Brewington] must have counseled, procured, commanded, encouraged, or aided the principal to murder the victim;
>
> (2) the principal must have murdered the victim; and
>
> (3) [Brewington] must not have been present when the murder was committed.

State v. Davis, 319 N.C. 620, 624, 356 S.E.2d 340, 342 (1987). If the principal is acquitted then the accessory is also acquitted. *State v. Suites*, 109 N.C. App. 373, 427 S.E.2d 318, *disc. review denied*, 333 N.C. 794, 431 S.E.2d 29 (1993). Here, the State presented overwhelming evidence of defendant's guilt. Therefore, the trial court did not commit prejudicial error by reading defendant's name in the accessory charge involving Brewington.

[11] Next, defendant objects to the definition that the trial court gave for "deadly weapon." The court started its instruction by giving verbatim N.C.P.I., Crim. 206.14 for the definition of deadly weapon. The court then added that "you may consider the size of the knife and its use thereof. You may also consider the pouring of gasoline into an occupied dwelling house and the ignition thereof." Defendant also assigns error to the trial court's instruction on premeditation and deliberation. In this instruction, the trial court made the following statement, "[p]remeditation and deliberation may be proved by a group of circumstances from which they may be inferred; circumstances such as . . . infliction of lethal wounds." N.C.P.I., Crim. 206.14 states that premeditation and deliberation may be proved by circumstances such as the "infliction of lethal wounds after the victim was felled." Defendant argues that the elimination of "after the victim was felled" amounts to error requiring a new trial.

Our Supreme Court has held that we must construe a trial court's charge to the jury in context. *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984). We will not hold the charge to be prejudicial error where it is correct as a whole. *Id.* "Where the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous affords no grounds for reversal." *State v. Jones*, 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978). Here, we hold that the jury charge as a whole is correct and the errors and omissions pointed out by the defendant were not prejudicial.

IX. Conspiracy

[12] Defendant argues that the trial court erred by entering judgment on two counts of conspiracy to commit murder when the jury only returned one guilty verdict as to conspiracy. The State concedes that this Court should return this case to the trial court to arrest judgment on one conspiracy count. We agree that the trial court erred in this respect and remand the case to the trial court to arrest judgment as to one of the counts of conspiracy and to reverse the burglary verdict and remand the burglary charge for a new trial.

Case Number 97CRS7216 First Degree Murder no error.

Case Number 97CRS7217 First Degree Murder no error.

Case Number 97CRS7218 First Degree Arson no error.

Case Number 97CRS7219 Conspiracy to Commit Murder no error.

Case Number 97CRS7220 Conspiracy to Commit Murder judgment arrested.

Case Number 97CRS7221 First Degree Burglary new trial.

Reversed and remanded in part, no error in part.

Judges MARTIN and HORTON concur.

TAMMY LYNN McCOWN, ADMINISTRATRIX OF THE ESTATE OF JAMES ROBERT McCOWN, DECEASED EMPLOYEE, PLAINTIFF v. CURTIS HINES, EMPLOYER, DEFENDANT, AND MIKE HINES D/B/A MIKE HINES HEATING AND AIR CONDITIONING, EMPLOYER, AND N.C. HOME BUILDERS SELF-INSURED FUND, INC., DEFENDANTS

No. COA99-1120

(Filed 7 November 2000)

Workers' Compensation— employer-employee relationship— jurisdiction

The Industrial Commission erred by concluding that plaintiff roofer was an employee rather than an independent contractor at the time of his accident and by awarding plaintiff permanent and total disability compensation under the Workers' Compensation Act, because: (1) plaintiff's occupation as a roofer required special skill and training, and plaintiff had independent use of his skill and training in the execution of his work; (2) although defendant employers required plaintiff to use mismatched shingles and instructed plaintiff as to the placement of those shingles, the fact that a worker is supervised to make sure his work conforms to plans and specifications does not change his status from independent contractor to employee; (3) supervision over plaintiff's work was minimal; (4) although defendants provided nails

and tarpaper, plaintiff furnished his own truck, ladder, and several tools including a hammer and nail apron for the job; (5) plaintiff failed to establish he was paid on a per hour basis, and plaintiff was paid on a per square or flat fee basis as was the person who completed the roofing job after plaintiff's accident; (6) plaintiff essentially set his own hours and determined his own working schedule, and defendants set forth no requirements that plaintiff be present at certain times or on certain days; and (7) although plaintiff performed flooring and roofing work for defendants in 1995, there was no indication that defendants retained the right of control over plaintiff during the course of these projects.

Judge WALKER dissenting.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission entered 18 May 1999. Heard in the Court of Appeals 16 August 2000.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr. and Tivey E. Clark, and Wilkins & Wellons, by Allen Wellons, for the plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart, for the defendant-appellants.

LEWIS, Judge.

Defendants Mike Hines d/b/a Mike Hines Heating and Air Conditioning and N.C. Home Builders Self-Insured Fund, Inc. appeal from an Opinion and Award of the North Carolina Industrial Commission granting plaintiff James Robert McCown permanent and total disability compensation. Defendants contend the Commission erred in (1) classifying plaintiff as an employee rather than an independent contractor, and (2) setting plaintiff's average weekly wage at $400. We reverse the decision of the Industrial Commission.

On 8 April 1996, plaintiff James McCown was re-roofing a rental house on Sixth Street in Smithfield, North Carolina. As he attempted to leave the roof by a ladder leaning against the house, he fell, suffering a spinal cord injury which paralyzed him from the waist down. Although Mike Hines owned the rental house on Sixth Street, plaintiff had been contacted by defendant Curtis Hines, Mike Hines' father, to do the roofing work. Plaintiff had installed several roofs for Curtis

Hines in 1995, and in 1995 and 1996, did roofing work for numerous persons in the Smithfield area. At the time of the accident, plaintiff had been in the construction business for twenty years, and roofing work for ten.

Following his injury, plaintiff filed a Workers' Compensation claim with the Industrial Commission in March 1997, ultimately seeking coverage from the defendants. On 5 March 1998, a compensation hearing was held before Deputy Commissioner Edward Garner, Jr. At the parties' request, the Deputy Commissioner ruled only on the issue of compensability and not on the issue of plaintiff's medical condition. On 19 June 1998, the Deputy Commissioner filed an Opinion and Award dismissing plaintiff's claim for lack of jurisdiction. In his opinion, the Deputy made findings of fact and concluded as a matter of law, that plaintiff was not an employee of Curtis Hines, Mike Hines or Mike Hines Heating and Air Conditioning at the time of the accident. Plaintiff appealed to the Full Commission. On 18 May 1999, the Full Commission reversed this determination, finding that Mike Hines' heating and air conditioning business and his rental properties were one company, that Curtis Hines was an agent of Mike Hines, that defendants retained the right to control the details of plaintiff's work, and concluding plaintiff was an employee of Mike Hines d/b/a Mike Hines Heating and Air Conditioning.

Defendants first contend the Commission erred in concluding that, at the time of the accident, plaintiff was an employee rather than an independent contractor. It is well established that in order for a claimant to recover under the Workers' Compensation Act, an employer-employee relationship must exist at the time of the claimant's injury. *Askew v. Tire Co.*, 264 N.C. 168, 170, 141 S.E.2d 280, 282 (1965).

> Whether an employer-employee relationship exists is a jurisdictional issue and unlike most findings by the Commission, "findings of jurisdictional fact . . . are not conclusive, even when supported by competent evidence." This Court thus must "review the evidence of record" and make an independent determination of plaintiff's employment status, guided "by the application of ordinary common law tests."

Barber v. Going West Transp., Inc., 134 N.C. App. 428, 430, 517 S.E.2d. 914, 917 (1999) (citations omitted). Thus, this Court "has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the

record." *Lucas v. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976). The burden of proof on this issue falls on the claimant. *Id.*

Our courts have defined an independent contractor as "one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384, 364 S.E.2d 433, 437 (1988). Where the party for whom the work is being done retains the right to control and direct the manner in which the details of the work are to be performed, the relationship is one of employer and employee. *Id.* There are generally eight factors which indicate classification as an independent contractor:

> The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Hayes v. Elon College, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944). No one factor is determinative. *Id.* Considering several of the foregoing factors in light of this case, we conclude plaintiff was an independent contractor at the time of the accident.

Most notably, plaintiff's occupation as a roofer required special skill and training, and plaintiff had independent use of his skill and training in the execution of his work. Neither Curtis nor Mike Hines had any personal experience in the installation of roofs, and plaintiff was given almost no instruction to that effect. Although Curtis Hines required plaintiff to use mismatched shingles and instructed him as to the placement of these shingles, "the fact that a worker is supervised to the extent of seeing that his work conforms to plans and specifications does not change his status from independent contractor to employee." *Ramey v. Sherwin-Williams Co.*, 92 N.C. App. 341, 345, 374 S.E.2d 472, 474 (1988). In all, supervision over the plaintiff's work was minimal. Plaintiff had "very little" conversation with Mike Hines before and during the roofing project. He was allowed full discretion as to placement of tow boards, the correct number and positioning of

the nails into the shingles and the proper overlapping of the shingles. While Curtis Hines viewed plaintiff's work from the ground, neither Curtis nor Mike ever got on the roof to inspect plaintiff's work.

Additionally, although Curtis Hines provided nails and tarpaper, plaintiff furnished his own truck, ladder, and several tools, including a hammer and nail apron, for the job. *See, e.g., Barber*, 134 N.C. App. at 432, 517 S.E.2d at 918 ("When valuable equipment is furnished for use of a worker, an employee relationship almost 'invariably' is established.") (citation omitted).

As to payment for the roofing job, plaintiff failed to establish he was paid on a per hour basis. *See, e.g., Youngblood*, 321 N.C. at 384, 364 S.E.2d at 437 ("[P]ayment by a unit of time . . . is strong evidence that [plaintiff] is an employee."). Plaintiff testified he "would assume that [he and Curtis Hines] probably did not" discuss payment. (Tr. at 39.) Mike Hines also maintained there was no discussion as to payment. Mike Hines ultimately compensated plaintiff in the amount of $170 for 17 hours of work; however, there was never any discussion as to the derivation of this amount. Significantly, in the past, plaintiff had been consistently compensated on a per square or flat fee basis in performing roofing work for Curtis Hines and others in the community. Gary Beasley, who completed the roofing job after plaintiff's accident, was paid on a per square basis.

Additionally, plaintiff essentially set his own hours and determined his own working schedule. Defendants set forth no requirements that plaintiff be present at certain times or on certain days. Neither has plaintiff made any showing that he was in the regular employment of either Mike or Curtis Hines. Although plaintiff performed flooring and roofing work for Curtis Hines in 1995, Curtis Hines paid plaintiff on a per square basis and there was no indication that Curtis Hines retained the right of control over plaintiff during the course of these projects.

Absent any other direct evidence of control over plaintiff, we conclude plaintiff has failed to meet his burden of establishing that an employer-employee relationship existed at the time of the accident. Accordingly, the Opinion and Award of the Industrial Commission is reversed. We need not address defendant's remaining arguments.

Reversed.

Judge HUNTER concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent from the majority opinion concluding that plaintiff was an independent contractor at the time of the accident. While there are some factors under *Hayes v. Board of Trustees*, 224 N.C. 11, 29 S.E.2d 137 (1944) which would establish that plaintiff was an independent contractor, I believe the greater weight of the evidence supports an employer and employee relationship.

The majority correctly states that whether a worker is an independent contractor or employee depends on the employer's retaining "the right to control and direct the manner in which the details of the work are to be executed" and one who is accountable to his employer only for the result of his work and not his judgment or methods used. *Youngblood v. North State Ford Truck Sales*, 321 N.C. at 380, 384, 364 S.E.2d at 433, 437, *rehearing denied*, 322 N.C. 116, 367 S.E.2d 923 (1988). The test is further elaborated upon in *Cook v. Morrison*, 105 N.C. App. 509, 514, 413 S.E.2d 922, 925 (1992), in which this Court stated:

> An owner, who wants to get work done without becoming an employer, is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result from the contractor that he bargained for. In other words, there may be a control of the quality or description of the work itself, *as distinguished from the control of the person doing it*, without going beyond the independent contractor relation.

Id., *citing* 1C A. Larson, The Law of Workers' Compensation § 44.21 (1991) (emphasis added).

Under the second factor of the eight factor *Hayes* test, the majority first concludes that plaintiff's independent use of his "special skill and training" in roofing work, and defendants' lack of the same supports plaintiff's status as an independent contractor. *Hayes*, 224 N.C. 11, 29 S.E.2d 140. However, a different result was reached in *Youngblood*, where our Supreme Court held that employers don't lose their right to ". . . control the [worker's] conduct and to intervene" because the worker is a "specialist" and has "extensive experience." *Youngblood*, 321 N.C. at 387, 364 S.E.2d at 439. Likewise in the instant

case, plaintiff had done various jobs for twenty years, including carpentry, roofing and painting. However, being known in his community as a roofing "specialist" with "extensive experience" did not render him an independent contractor. *Id.*

Moreover, the record indicates that plaintiff's use of his independent skill, knowledge, or training was limited while roofing for defendants. First, each time shingles arrived at the work site, plaintiff was ordered by Curtis Hines to stop what he was doing and help unload the shingles from the trailer. Second, plaintiff was told that because the shingles were old and of different types and colors, he needed to help sort them out. Third, once sorted, he was told to use only certain ones, even though it would result in an unsightly, mix-matched pattern. Fourth, Curtis Hines instructed plaintiff as to where to place the shingles. Another example of the close supervision plaintiff received took place on the day of his injury: When inclement weather was approaching, Curtis Hines ordered plaintiff to rush and "get it [tar] papered before it rains on you." Defendants' control over plaintiff therefore exceeded the mere result of his work, as he was accountable to defendants for the details and method of his work. Thus, the measure of control defendants exerted over plaintiff evidenced a relationship of employer and employee. *Youngblood*, 321 N.C. at 384, 364 S.E.2d at 437.

Moreover, the majority cites *Cf. Ramey v. Sherwin-Williams Co.*, 92 N.C. App. 341, 374 S.E.2d 472 (1988) for the proposition that supervision to the extent a laborer's work conforms to plans and specifications does not indicate that the laborer is an employee. However, the defendant in *Ramey*, who was found to be an independent contractor, exercised much more freedom as to the details and method of his work than the plaintiff in this case. *Id.* For example, this Court found in *Ramey* that ". . . plaintiff's occupation as a carpet and vinyl installer required special skill and training, and plaintiff had *considerable leeway* in the manner in which he did his job. He chose the materials to attach the carpet to the floor, and selected and purchased his own tools. Plaintiff also had some discretion in how the carpet was to be laid as long as he met basic industry standards. . . ." *Ramey*, 92 N.C. App. at 345, 374 S.E.2d at 474 (emphasis added).

This case is also distinguishable from *Ramey* because the plaintiff here could not use his own best judgment when he was instructed to mix-match shingles of different types, shapes and colors. At trial,

plaintiff expressed the following reservations regarding the methods that defendants insisted on:

> Q: . . . Did you have any concerns about the shingles?
>
> A: Yeah. I didn't like putting on three different kinds. There was three. There was brown shingles and [the] black and then there was, you know, dimensional shingles, and I don't—That's something I've never done, and it kind of looks bad on my job, you know. If somebody comes by and looks at it and [says], '[w]ell, who did this house,' it [doesn't] really help you, if you know what I'm talking about.

Furthermore, the plaintiff in this case did not furnish valuable equipment to the work site as opposed to the plaintiff in *Ramey*. *Id.* The record indicates that plaintiff did not own a truck, but used a borrowed one. Further, the truck was not used for the roofing job other than to transport plaintiff to and from the job site. Although plaintiff brought his own hammer and nail apron to the job site, he did not purchase or bring any roofing shingles, as is the custom for independent roofing contractors. Defendants selected, purchased and delivered the shingles to the job site. Moreover, whenever plaintiff ran out of roofing materials, he would inform defendant Curtis Hines who would arrange for another delivery.

Even if the majority is correct in finding that plaintiff received "minimal" supervision from defendants, such conclusion is not fatal to plaintiff's status as an employee. Our Supreme Court in *Youngblood* stated "the fact that a claimant is skilled in his job and requires very little supervision is not in itself determinative" of whether the claimant is an employee or an independent contractor. *Youngblood*, 321 N.C. at 387, 364 S.E.2d at 439, *citing Durham v. McLamb*, 59 N.C. App. 165, 296 S.E.2d 3 (1982) (held that plaintiff carpenter was an employee despite his being highly skilled and not requiring specific instructions on how to do the job); *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E.2d 35 (1980) (where plaintiff painter and carpenter was held to be an employee, even though his level of skill required very little supervision). It was further explained in *Youngblood* that "[i]f the employer has the right of control, it is immaterial whether he actually exercises it." *Id.* Moreover, "[n]onexercise [of right of control] can often be explained by the lack of occasion for supervision of the particular employee, *because of his competence or experience*." *Id.* (emphasis added) (citation omitted).

As to the first prong of the *Hayes* test, plaintiff did not operate an independent business notwithstanding his work of doing various jobs around the community, many of which involved the installation of roofs. *Hayes*, 224 N.C. 11, 29 S.E.2d 137. The record indicates that he had no office, no business telephone number, no employer tax identification number, no continuing business obligations, no equipment specifically for roofing, no advertising, and did not incur any significant expenses. Plaintiff's only equipment consisted of a hammer and nail apron. He had previously worked for Curtis Hines numerous times doing various jobs, such as carpentry, roofing, flooring, and ripping out windows. The fact that plaintiff did not work exclusively as a roofer and did not hold himself out as having a roofing business supports his status as an employee.

As to the third prong of the *Hayes* test, the evidence in the record contradicts the majority's conclusion that defendants never hired workers by the hour. *Hayes*, 224 N.C. 11, 29 S.E.2d 137. Notwithstanding testimony of Gary Beasley (Beasley) that he was paid on a quantitative basis per square and that roofers seldom get paid on an hourly basis, Beasley also admitted that he had worked a few hourly roofing jobs "last year." In addition, plaintiff testified that Curtis Hines had paid him $11.00 per hour in the past but that on some roofing jobs he was paid by the square. Furthermore, when Mike Hines was asked to explain at trial how he arrived at the $170.00 amount paid to plaintiff after the injury, he was unable to relate this amount to any quantitative basis, stating that he did not know the exact number of squares plaintiff had installed.

The facts in this case as applied to the sixth prong of the *Hayes* test also indicate that plaintiff was an employee. *Hayes*, 224 N.C. 11, 29 S.E.2d 137. In *Cook*, a worker who was found by this Court to be an independent contractor, testified that he normally used his own employees to assist him in his job and that he had hired several employees for the job giving rise to plaintiff's injury. *Cook*, 105 N.C. App. 509, 413 S.E.2d 922. This is in contrast to the instant case where plaintiff did not hire any workers to help in the roofing job. Further, the evidence supports the Commission's finding that: ". . . plaintiff did not have the ability to hire [workers]. . . without getting the express consent of Curtis or Mike Hines because he did not have the financial ability to pay [workers]."

As to the eighth prong of the *Hayes* test, plaintiff testified that although he was not told specific hours to follow, he did not feel that

he had the freedom to come and go as he pleased, since he "would have been fired." *Hayes*, 224 N.C. 11, 29 S.E.2d 137.

Based on the foregoing, plaintiff sufficiently carried his burden of proof in establishing that at the time of this accident, an employer and employee relationship existed between him and defendants. *Id.*

Because of the foregoing conclusion, I next address whether the award granted plaintiff by the Full Commission (Commission) was proper. The Commission's computation of the average wage is conclusive and binding on appeal if there are any facts to support its findings. *Munford v. Constr. Co.*, 203 N.C. 247, 165 S.E. 696 (1932); *see also McAnich v. Buncombe County Schools*, 347 N.C. 126, 489 S.E.2d 378 (1997). "Appellate review of opinions and awards of the Industrial Commission is strictly limited to the discovery and correction of *legal* errors." *Godley v. County of Pitt*, 306 N.C. 357, 359-60, 293 S.E.2d 167, 169 (1982) (citations omitted); *see also* N.C. Gen. Stat. § 97-86 (1999).

In granting plaintiff's award, the Commission concluded:

> 8. Due to the short period of employment by the plaintiff, traditional methods of computation of the average weekly wage would be unfair to the parties; therefore, the average weekly wage is based on the testimony of Mr. Beasley, in which he stated an hourly rate of $10.00 per hour for work similar to that of the plaintiff, for an average weekly wage rate of $400.00 per week. N.C. Gen. Stat. § 97-2(5).

Thus, it appears that the Commission used the third method of computation under N.C. Gen. Stat. § 97-2(5), which provides in part:

> . . . 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 fifty-two 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.

N.C. Gen. Stat. § 97-2(5) (1999).

Our Supreme Court has held that "[u]ltimately, the primary intent of this statute is that results are reached which are fair and

just to both parties." *McAnich*, 347 N.C. at 130, 489 S.E.2d at 378 (1997) (citations omitted). Otherwise, the fifth method must be used, which provides:

> 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.

Id.; N.C. Gen. Stat. § 97-2(5).

In the instant case, the Commission used an hourly rate of a similarly employed person. However, our Supreme Court has held that the computation of an award based upon average weekly wages is limited to only ". . . the earnings of the injured employee in the employment in which he was working at the time of the injury[,]" and thus bars the inclusion of wages or income earned in other employment or work. *McAnich*, 347 N.C. at 133, 489 S.E.2d at 379. In the instant case, it appears that the Commission's computation was not limited to the work plaintiff performed for defendants, but was also based on the average hourly wage of roofers. I would vacate the award and remand the matter for a rehearing on benefits due plaintiff. The Commission should determine the total wages plaintiff earned from defendants during the 52-week period preceding his injury, as there was evidence that he worked for defendants in 1995. The emphasis in this statute is that the award must be fair and just to both parties. *Id.* at 130, 489 S.E.2d at 378.

STATE OF NORTH CAROLINA v. ROBERT ANTHONY McNEILL

No. COA99-1172

(Filed 7 November 2000)

1. Evidence— witness refusing to testify—prior testimony—admission under hearsay exception

The trial court did not err in a prosecution for two counts of first-degree murder, one count of armed robbery, and one count of conspiracy to commit armed robbery by admitting the prior testimony of defendant's brother under N.C.G.S. § 8C-1, Rule 804(b)(5) where the brother had testified at his own trial that he

had not committed these crimes but refused to testify at defendant's trial. The trial court's findings of fact and conclusions of law were supported by evidence that the brother had personal knowledge of the underlying events, that his prior testimony was material and (in light of his refusal to testify at defendant's trial) more probative than any evidence the State could procure through reasonable efforts, and that the brother's testimony possessed equivalent circumstantial guarantees of trustworthiness.

2. Constitutional Law— confrontation clause—witness refusing to testify—prior testimony

The introduction of prior trial testimony from defendant's brother who refused to testify in the present trial did not violate the confrontation clauses of either the state or federal constitutions.

3. Appeal and Error— preservation of issues—plain error not alleged—no authority cited

An argument by a murder, robbery, and conspiracy defendant that the immunity offered to a State's witness was a bribe of a public official was not considered where defendant failed to preserve review of the issue through ordinary channels, waived plain error review by failing to allege plain error in his assignment of error, and cited no authority to support his contention in his brief.

4. Constitutional Law— self-incrimination—prior testimony voluntarily given

The trial court did not err in a prosecution for first-degree murder, armed robbery, and conspiracy to commit armed robbery by allowing the State to introduce testimony defendant had given during his brother's trial arising from the same events. During that testimony, defendant exercised his Fifth Amendment privilege and refused to answer many questions, but specifically stated under oath that his brother did not shoot or kill either of the victims. The privilege against self-incrimination furnishes no protection against the use of testimony which was voluntarily given.

5. Criminal Law— circumstantial evidence—sufficient

The trial court did not err by not allowing defendant's motion to dismiss charges of first-degree murder, armed robbery, and conspiracy to commit armed robbery. The contention that cir-

cumstantial evidence must exclude to a moral certainty every other reasonable hypothesis has been consistently rejected.

6. Search and Seizure— probable cause—evidence sufficient

The trial court did not err in a prosecution for first-degree murder, armed robbery, and conspiracy to commit armed robbery by denying defendant's motion to suppress items seized from his home. The affidavit provided to the magistrate issuing the warrant reveals that the affiant specifically listed details told him by an unnamed "concerned citizen" and employee of the company which was robbed; the details were specific; and these details were not public knowledge. The magistrate had a substantial basis for concluding that probable cause existed to issue the warrant.

Appeal by defendant from judgments entered 18 October 1996 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 13 September 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel P. O'Brien, for the State.

John T. Hall for defendant-appellant.

HUNTER, Judge.

Robert Anthony McNeill ("defendant") appeals the jury verdict convicting him of two counts of murder in the first degree, one count of robbery with a dangerous weapon, and one count of conspiracy to commit armed robbery. We find no error.

The pertinent facts reflected in the record are these: In May 1993, while defendant was working as a grocery manager for Food Lion grocers ("Food Lion"), he approached a co-worker, Craig Stover ("Stover") "about how easy it would be for them to rob the Tower Food Lion . . . ." In the process of devising a plan, defendant told Stover to get a gun. Defendant further suggested that in the course of the robbery they kill a particular manager that defendant disliked, but Stover did not want to kill anyone. On 16 May 1993, defendant and Stover decided to implement their plan. Just after the store closed to the public, while defendant and the store's assistant manager conducted the day's-end accounting, Stover arrived at a back door—which was to be left unlocked by defendant—dressed in disguise. Stover then put a gun to defendant's head, ordered defendant and the

other manager to the back of the store and locked them both in a tractor trailer that was pulled up to the loading dock. Stover then took defendant's keys and left the store with approximately $11,000.00, driving away in defendant's new truck. Although defendant spoke to the contrary, the record reflects that in the days and weeks following the robbery, defendant's behavior did not comport with that of someone who was terrified at having been robbed—in fact, defendant laughed and giggled about it. Furthermore, defendant was known to be spending large sums of money just after the robbery.

On 18 September 1993, defendant's brother, Elmer Ray McNeill ("Ray") went to South Carolina to pick up a friend ("Thornhill") whom he had asked to obtain a gun. Thornhill bought a Ruger Blackhawk .357 magnum from Zane Bryant ("Bryant") and gave it to Ray. On the night of 19 September 1993, Ray met with defendant and gave defendant the gun. Later that night, Food Lion at Six Forks was robbed and two managers were murdered, execution style. The store showed no sign of forced entry and there were no signs of a struggle with the victims. However both defendant's and Ray's fingerprints were found at the crime scene next to those of one of the victims. Additionally, bullet fragments recovered from the victims' bodies matched both the gun type and the ammunition loaded in the gun which Bryant sold to Thornhill for Ray. Furthermore, there were four small metal parts found at the crime scene next to the body of one of the victims. Those four parts were found to be the ejector rod, ejector housing, spring, and ejector rod screw from a Ruger Blackhawk revolver. At trial, Bryant testified that the gun he sold Thornhill had an "ejector screw [that] would never tighten up properly."

At Ray's trial, defendant testified that Ray was innocent and that he did not commit any of the crimes for which he was being tried. After defendant testified, Ray "voluntarily called himself to the witness stand to testify . . . and denied that he committed the crimes for which he was charged . . . ." However, at defendant's trial, when called to the stand, Ray refused to testify. The trial court therefore allowed the State to admit statements made by Ray, under oath at his own trial, into evidence at defendant's trial.

[1] In the record we see defendant preserved twenty-six assignments of error; however, he argues only seven. Thus we deem those not argued to be abandoned. N.C.R. App. P. 28(b)(5). Defendant first assigns error to the trial court's admitting Ray's prior testimony and

statements into evidence in violation of N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). Defendant argues that the statements were inadmissible because the trial court's findings of fact and conclusions of law were not supported by the evidence to show that there were "equivalent circumstantial guarantees of trustworthiness . . . ." N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (1999). We disagree.

We begin by agreeing with the State that although defendant argues there are "four different statement clusters that fall under this challenge," the record reveals that the trial court admitted only one of these "clusters" pursuant to this rule, specifically Ray's prior testimony. Therefore, we address only defendant's contention that Ray's prior trial testimony was statutorily inadmissible under hearsay exception Rule 804(b)(5).

Under North Carolina law, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (1999). Although hearsay is generally not admissible, there are any number of exceptions to the hearsay rule. *See* N.C. Gen. Stat. § 8C-1, Rule 802-804. Accordingly, one such exception is listed for when a declarant is unavailable, the pertinent sub-section allows a trial court to admit hearsay statements when a declarant "*[p]ersists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so . . . .*" N.C. Gen. Stat. § 8C-1, Rule 804(a)(2) (1999) (emphasis added).

In the case at bar, it is not disputed that Ray's prior testimony, offered in defendant's trial "to prove the truth of the matter asserted," is hearsay. N.C. Gen. Stat. § 8C-1, Rule 801(c). However, the record before this Court reflects that after Ray testified under oath at his own trial, he refused to testify at defendant's trial. Yet, defendant argues that the trial court's inquiry to determine Ray's unavailability was inadequate. Defendant further argues "[t]he trial court determined that the Fifth Amendment privilege invoked by . . . Ray was appropriate . . . ." However, we find the record to reflect the very opposite.

The record reveals the trial court found that, having testified at his own trial, Ray:

> 5. . . . *[K]nowingly waived any privilege against self-incrimination which may have existed* prior to the time of his

testimony. That privilege having been waived, either side may call him as a witness in [the present defendant's trial court] proceedings. *[Ray] has no right to refuse to testify or to refuse to answer questions under oath concerning these matters.*

. . .

7. The Court having so ruled that the privilege no longer exists, and the State having in fact called Ray McNeill as a witness, and *[Ray] having been ordered by the court to testify and having willfully refused to testify* and refused to take the oath and refused to answer any questions, the Court finds and concludes that such refusal was without any right in law and that *such willful refusal renders the witness Ray McNeill unavailable as a matter of fact and as a matter of law. . . .*

(Emphasis added.) Defendant offers no proof for his insistence that the trial court only found Ray unavailable due to his assertion of the privilege. Neither does defendant offer this Court any authority upon which we should overturn the trial court's ruling due to an abuse of discretion with regard to its finding that Ray was unavailable. Thus, we hold the record supports the trial court's findings of fact and conclusions of law that Ray was, in fact, unavailable as required under Rule 804(a)(2).

However, having held that Ray was unavailable to testify at defendant's trial, we must still consider other factors to determine if Ray's prior trial testimony offered by the State was properly allowed. N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) reads:

(b) *Hearsay exceptions.*—The following [offered testimony is] not excluded by the hearsay rule *if the declarant is unavailable as a witness:*

. . .

(5) *Other Exceptions.*—A statement not specifically covered by any of the foregoing exceptions but *having equivalent circumstantial guarantees of trustworthiness*, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the [State] can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admis-

> sion of the statement into evidence. However, a statement may not be admitted under this exception unless the [State] gives written notice stating [its] intention to offer the statement and the particulars of it . . . to the [defendant] sufficiently in advance of offering the statement to provide the [defendant] with a fair opportunity to prepare to meet the statement.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (emphasis added). (The State does not contend as to whether the offered testimony is specifically covered by another hearsay exception. Thus, that issue is not before us.)

In *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), our Supreme Court outlined six specific questions and their explanation pursuant to Rule 803(24) (now codified as Rule 804(b)(5)) which a trial court must answer in its determination of whether to admit hearsay testimony. They are:

> [1] Has proper notice been given?
>
> [Where the] testimony is sought to be admitted as substantive evidence under Rule 803(24), the proponent must first provide written notice to the adverse party . . . .
>
> . . .
>
> [2] Is the hearsay not specifically covered elsewhere?
>
> If the trial judge determines that the statement is covered by one of the other specific exceptions, that exception, not . . . [this one] governs . . . and the inquiry must end. . . .
>
> **[3] Is the statement trustworthy?**
>
> This threshold determination has been called "the most significant requirement" of admissibility under [this exception]. . . . Among the[] factors [to be considered] are (1) assurance of personal knowledge of the declarant of the underlying event . . . ; (2) the declarant's motivation to speak the truth or otherwise . . . ; (3) whether the declarant ever recanted the testimony . . . ; and (4) the practical availability of the declarant at trial for meaningful cross-examination. . . .
>
> None of these factors, alone or in combination, may conclusively establish or discount the statement's "circumstantial guarantees of trustworthiness." The trial judge should focus upon the

factors that bear on the declarant at the time of making the out-of-court statement and should keep in mind that the peculiar factual context within which the statement was made will determine its trustworthiness.

. . .

[4] Is the statement material?

[The statement must be] ". . . offered as evidence of a material fact." [N.C. Gen. Stat. § 8C-1, Rules 401 and 402.] . . .

[5] Is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts?

The requirement [of necessity] imposes the obligation of a dual inquiry: were the proponent's efforts to procure more probative evidence diligent, and is the statement more probative on the point than other evidence that the proponent could reasonably procure? . . .

. . .

[6] Will the interests of justice be best served by admission?

[As] set out in N.C.G.S. § 8C-1, Rule 102, [the general purpose of the Evidence Code is] . . . to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Id. at 92-96, 337 S.E.2d at 844-47 (emphasis added) (footnotes omitted). However, in his brief to this Court, defendant takes issue only with questions 3 through 6 (emphasized above), thus those are the only issues we will address.

The record reveals that the trial court, in determining whether Ray's proffered testimony possessed equivalent circumstantial guarantees of trustworthiness, found Ray:

> 9. . . . [H]as actual knowledge of the events about which he testified, and that this evidence is more probative than any other evidence which the State can produce through reasonable efforts. [Furthermore,] [t]he Court also finds and concludes that the general purposes of the Rules of Evidence and the interest of

justice [are] best . . . served by the admission of this testimony into evidence.

10. . . . [Ray's] testimony was given under oath in a court of law and subjected to direct and cross examination. The testimony is materially consistent with [his] prior statements . . . . This testimony of Ray is also consistent with [that] of [defendant] at Ray's trial. . . .

11. The Court finds . . . that these two men had a close relationship as brothers and that Ray would not likely have incriminated his brother in his testimony unless the testimony was, in fact, true. . . .

12. . . . [Defendant's] testimony at Ray's trial shows that he was specifically asked about his own conduct on the evening of the murders and . . . [defendant] refused to answer and gave as a basis for such refusal that the answer would tend to incriminate him. . . . [T]he Court specifically finds that this defendant asserted his Fifth Amendment privilege in Ray's trial in good faith and that the answers to the questions posed to the defendant at that time which he refused to answer would have tended to incriminate him. . . . [W]here one has voluntarily chosen to testify as a witness for a co-defendant and has used this Fifth Amendment claim in that co-defendant's trial as a "sword" for the co-defendant's defense, to create an impression in the minds of the co-defendant's jury that the co-defendant on trial is innocent and that the witness claiming the Fifth Amendment privilege is in fact the perpetrator, then the Court can consider the totality of this conduct as a circumstantial guarantee of trustworthiness of the testimony of the co-defendant on trial, which testimony the witness claiming the Fifth Amendment privilege has sought to support, re-enforce, and bolster.

It is undisputed by defendant that Ray purchased the gun at issue. The State presented evidence at trial that the only parties privy to the robbery and murders were the victims (both dead), defendant, and Ray—although their brother, Michael McNeill, testified of things each brother had told him, the stories conflicted. Therefore, we hold that the trial court's findings of fact and conclusions of law were supported by the evidence that Ray had personal knowledge of the underlying events, that his prior testimony was material and (in light of his refusal to testify at defendant's trial) more probative than any evidence the State could procure through reasonable efforts, and that

Ray's testimony possessed equivalent circumstantial guarantees of trustworthiness.

Further, the record reflects that Ray never deviated from claiming that he was innocent. From the time he was arrested and spoke to the police, to the time of his trial, Ray consistently stated he did not commit the robbery or murders. In fact, we agree with the trial court that defendant's voluntarily testifying at Ray's trial—during which defendant stated " 'Ray knows who beat him up and took the gun that night. He has sat there thirty months keeping his mouth shut for some reason; stupidity maybe, loyalty another[,]' "—"support[ed], reenforce[d], and bolster[ed]" Ray's testimony that he was innocent. We again hold that the evidence supports the trial court's conclusion that Ray was motivated to speak the truth and that he had never recanted his claim of innocence. Defendant's only showing that Ray may not have been telling the truth was based on the fact that Ray's testimony conflicted with that of their brother, Michael. We find defendant's argument one of credibility going against Michael's testimony, and not Ray's prior trial testimony which was "given under oath in a court of law and subjected to direct and cross examination." Thus, we find no error in the trial court's admitting Ray's prior trial testimony because it, in fact, served the interests of justice.

[2] Defendant's second assignment of error is that the trial court's allowance of Ray's prior trial testimony violated defendant's state and federal constitutional rights to confrontation and cross-examination. We find defendant's argument meritless.

In his brief to this Court, defendant admits:

> "The Confrontation Clauses in the Sixth Amendment to the United States Constitution and Article I Section 23 of the North Carolina Constitution prohibit the State from introducing hearsay evidence in a criminal trial *UNLESS* the State: (1) demonstrates the necessity for using such testimony, and (2) establishes 'the inherent trustworthiness of the original declaration.' "

(Emphasis added) (quoting *State v. Waddell*, 130 N.C. App. 488, 494, 504 S.E.2d 84, 88 (1998).) Having already addressed the trustworthiness of Ray's statement and the fact that the testimony was more probative than any other evidence which the State could produce through reasonable efforts, we hold that the trial court's admittance of the testimony did not violate the Confrontation Clauses of either our state or federal constitutions, and thus, did not violate any of

defendant's constitutional rights. *See State v. Jackson*, 348 N.C. 644, 503 S.E.2d 101 (1998).

[3] Defendant's third assignment of error is that the trial court committed plain error, in violation of defendant's constitutional rights, by allowing Craig Stover to testify while also granting him immunity. It is defendant's position that the immunity offered Mr. Stover was a bribe of a public official by the district attorney.

Defendant admits that he failed to preserve, through ordinary channels, the right to argue this issue. Nonetheless:

> In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(c)(4). However, even a plain error argument must be made an assignment of error in the record, which defendant also failed to do. "[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C.R. App. P. 10(a). Therefore, defendant has "also waived plain error review by failing to allege in his assignment of error that the trial court committed plain error." *State v. Flippen*, 349 N.C. 264, 274-75, 506 S.E.2d 702, 710 (1998). Furthermore, although defendant makes several arguments in his brief concerning this issue, he cites no authority to support the contention that admittance of testimony of a witness who is offered immunity violates a defendant's constitutional rights. Thus, we refuse to address defendant's argument. N.C.R. App. P. 28(b)(5).

[4] Defendant's fourth assignment of error is that the trial court erred by allowing the State to introduce his own testimony made during's Ray's trial. It is defendant's contention that by the trial court's admitting the prior testimony (during which defendant "exercise[d] his Fifth Amendment privilege and refused to answer many questions about his own activities on the date of these homocides . . . [but] specifically stated under oath . . . that Ray did not shoot or kill either of the victims in this case[,]") the State was allowed to unconstitutionally compel him to testify or to "call[] attention to [defendant's] failure to take the stand and testify at [his own] trial." We disagree.

Defendant is correct in that it has long been held by our Supreme Court that the privilege against self-incrimination is one against being compelled to testify. It furnishes no protection against the use of testimony which was voluntarily given. *State v. Farrell*, 223 N.C. 804, 807, 28 S.E.2d 560, 563 (1944) (citations omitted) ("[t]he constitutional inhibition against compulsory self-incrimination . . . is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial. Such statements, confessions, and testimony voluntarily given on a former trial are received against the accused as his admissions"). The record before us clearly reflects that the trial court found,

> [a]gainst the advice of his lawyers who were present and with whom he had consulted, and after being advised by the Court that he did not have to testify and that he could refuse to answer any question that would tend to incriminate him, [defendant] *freely and voluntarily chose to take the witness stand and testify on behalf of Ray.*

(Emphasis added.) At no time before, nor does defendant now object to the trial court's findings that he voluntarily testified at the trial of his brother, Ray. Case law is clear, that where a defendant fails to object to the trial court's findings, "the findings of fact are deemed to be supported by the evidence and are conclusive upon appeal." *State v. Davis*, 46 N.C. App. 778, 780, 266 S.E.2d 20, 22 (1980). Therefore, we hold that defendant's prior testimony from Ray's trial was freely and voluntarily given and defendant's Fifth Amendment privilege against self-incrimination does not apply to that "voluntarily given" testimony. Defendant's argument is overruled.

[5] Defendant's fifth assignment of error is that the trial court erred by not allowing his motion to dismiss for lack of evidence. Defendant's only support for his contention that the evidence was insufficient is that "[i]n the present case, only the improperly admitted hearsay statements of [] Ray [] provide any direct evidence that the defendant was present or otherwise participated in the crimes." We disagree.

We reject defendant's assertion that "circumstantial evidence must exclude to a moral certainty every other reasonable hypothesis[,]" and thus the evidence is insufficient to justify his conviction. *State v. Madden*, 212 N.C. 56, 58, 192 S.E. 859, 860 (1937). From as far back as 1956, our Supreme Court has consistently rejected that line

of reasoning, holding that even in cases where the evidence is completely circumstantial:

> "If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." [*State v. Simmons*, 240 N.C. 780, 785, 83 S.E.2d 904, 908 (1954) (quoting *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930).] . . . [Therefore,] there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. *To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. . . .*

State v. Stephens, 244 N.C. 380, 383-84, 93 S.E.2d 431, 433-34 (1956) (emphasis added).

A review of the record reveals much more evidence admitted at trial (including Michael's testimony and Stover's testimony) than that to which defendant takes issue. Since defendant does not argue that any element was missing from the State's *prima facie* case, and having already held that Ray's statements were trustworthy and properly admitted; we hold that, in the light most favorable to the State, there was substantial evidence (be it circumstantial or direct) of every element of the crimes charged and that defendant committed the crimes. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985). Thus we are unpersuaded by defendant's argument.

[6] Defendant next assigns error to the trial court's denial of his motion to suppress items seized from his home and truck. It seems defendant's substantive argument is that the applications for the search warrants of his vehicles and home failed to provide sufficient probable case for issuance of the warrants. Specifically, defendant argues that the affidavits were insufficient because "there [wa]s no information to indicate the reliability of the informant." Thus, the warrants were issued in violation of his constitutional right against unreasonable searches and seizures. We are unpersuaded.

Since the State did not introduce any evidence seized from any of defendant's vehicles, we need only address defendant's contention

with respect to items seized from his home, specifically the bag of washed clothes found wet in defendant's garage rafters.

In *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 257-58 (1984), our Supreme Court plainly adopted the totality of the circumstances test enunciated in *Illinois v. Gates*, for determining whether probable cause exists for the issuance of a search warrant. (*See Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548 (1983), overruling and abandoning the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723 (1964); and *Spinelli v. U.S.*, 393 U.S. 410, 21 L. Ed. 2d 637 (1969)).

> The question under the totality test is whether the issuing magistrate, given the totality of the circumstances as set forth in the affidavit before him, including the veracity and basis for knowledge of persons supplying hearsay information, had a substantial basis for concluding that probable cause existed. *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257-58.

Our review of the affidavit provided to the issuing magistrate reveals that the affiant, among other things, specifically listed for both robberies and the murders, details told him about the crimes by an unnamed "concerned citizen" and a Food Lion employee. The details listed were specific, "includ[ing] the number of people present during the robbery, the weapon used, where the alleged victims were left, where the get away vehicle was left and the items actually taken from the Food Lion Store." Furthermore, the affiant stated, "[t]hese details were not public knowledge and could only have been known by those persons actually involved or law enforcement officers." Thus, we hold that the magistrate had a substantial basis for concluding probable cause existed to issue the warrants.

Finally, defendant argues vaguely that the trial court committed prejudicial error against him by its entering judgments and by committing other errors throughout the trial. Because defendant's arguments have already been addressed in his other assignments of error, we need not address them here.

We find the trial court committed

No error.

Judges LEWIS and WALKER concur.

IN RE WILL OF SECHREST

[140 N.C. App. 464 (2000)]

IN THE MATTER OF THE PURPORTED LAST WILL AND TESTAMENT OF DORIS S. SECHREST, DECEASED

No. COA99-624

(Filed 7 November 2000)

1. Wills— caveat—undue influence—no fiduciary duty between testatrix and propounder

The trial court did not err in a will caveat proceeding by directing a verdict for propounders of the May 1994 will on the issue of the executor of the estate/propounder's undue influence on testatrix, because: (1) testatrix stated to her attorney the day after her husband's death that she wanted to exclude caveators from her will based on the fact that her husband already took care of caveators with a $200,000 educational trust, and the propounder had little contact with testatrix prior to her husband's death; (2) the propounder is not a beneficiary under the May 1994 will and stands to receive $300,000 less from the annuities than he would have under the prior 16 February 1994 bequest; (3) it is implausible that the propounder overcame testatrix's will and caused her to include a particular tax provision in the May 1994 will when her prior wills contain similar tax provisions; and (4) the propounder did not have a fiduciary relationship with testatrix so as to shift the burden on him to prove that any transaction enuring to his benefit was untainted by fraud when the health care power of attorney designating the propounder as testatrix's health care agent dealt exclusively with medical decisions, the general power of attorney was executed contemporaneously with the 16 February 1994 will devising one-half of testatrix's estate to the propounder, and the record does not contain any evidence as to when the propounder learned of his appointment as testatrix's attorney-in-fact.

2. Wills— caveat—testamentary capacity

The trial court did not err in a will caveat proceeding by directing a verdict for propounders of the May 1994 will on the issue of testatrix's testamentary capacity to make and execute a will, because: (1) the evidence reveals that testatrix knew the natural objects of her bounty when she explained to her attorney that she did not want to leave caveators anything based on the fact that her deceased husband already provided for them by setting up an educational trust; (2) even though caveators showed

evidence that testatrix was almost always drunk and that she once made mathematical errors in calculating an employee's paycheck, caveators did not put forth evidence that at or near the time testatrix executed the May 1994 will, she was mentally unequipped to do so; (3) testatrix's attorney testified that during the time between the death of testatrix's husband and the execution of her May 1994 will, there was no cause to believe that testatrix lacked the requisite capacity to execute a will; and (4) the trial court further observed that even a lunatic can make a valid will when the person is in a lucid moment.

3. Costs— attorney fees—will caveat—no abuse of discretion

The trial court did not abuse its discretion in a will caveat proceeding by awarding costs, including attorney fees, to propounders of a will under N.C.G.S. § 6-21.

Appeal by caveators from judgment and order entered 10 August 1998 by Judge H. W. Zimmerman, Jr. and from order entered 8 December 1998 by Judge Julius A. Rousseau, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 27 March 2000.

Adams Kleemeier Hagan Hannah & Fouts, PLLC, by Amiel J. Rossabi and Edward L. Bleynat, Jr., for caveators-appellants.

Womble Carlyle Sandridge & Rice, a Professional Limited Liability Company, by Tyrus V. Dahl, Jr. and Jack M. Strauch, for propounder-appellee G. Jack Mowery.

TIMMONS-GOODSON, Judge.

This appeal arises out of a will caveat proceeding challenging a writing dated 17 May 1994 purporting to be the "Last Will and Testament of Doris S. Sechrest" ("the May 1994 Will" or "the Will"). Caveators seek to set aside the Will on the grounds that it was the product of undue influence or, in the alternative, mental incapacity. The pertinent factual and procedural history is summarized as follows.

Doris Sechrest ("testatrix") died on 21 June 1994. On 29 June 1994, G. Jack Mowery ("Mowery" or "propounder") presented the May 1994 Will for probate to the Clerk of Superior Court, Guilford County. Under the Will, testatrix bequeathed her entire legacy in equal shares to Kevin A. Sechrest, her nephew by marriage, and to William R. Bane, III, Walter Stanley Bane, Frances Rebecca Bane, and

Faviona Bane ("the Banes"), her nearest blood relatives. Testatrix appointed Mowery to serve as the executor of the estate, and she directed that all taxes assessed on property passing under or outside of the Will be paid out of her legacy.

On 21 August 1996, Thomas D. Wilson, testatrix's grandnephew by marriage, filed a caveat to the May 1994 Will claiming that the instrument had been procured through Mowery's undue influence upon testatrix and that testatrix lacked the requisite mental capacity to make and execute a will. By consent order dated 22 May 1997, Thomas Wilson's siblings, Kirsten Wilson Jones, Heather E. Wilson, and Ashley Wilson united with Thomas as caveators to the May 1994 Will. Kevin Sechrest, although a beneficiary under the Will, also joined with caveators. The Banes aligned with Mowery as propounders of the disposition.

The matter came on for trial before Judge H. W. Zimmerman, Jr. at the 27 April 1998 Civil Session of Superior Court, Guilford County. Caveators presented their case, which tended to show that testatrix was the widow of Harold Sechrest ("Harold" or "Mr. Sechrest"), who died on 5 February 1994. The Sechrests had no children of their own, but they acted as surrogate parents to their niece and nephew, Kevin and Judi Sechrest, the children of Harold's brother. Judi's children—Thomas, Kirsten, Heather, and Ashley ("the Wilsons")—came to know the Sechrests as their "grandparents," and the Sechrests, in turn, treated the Wilsons like their "grandchildren." The Sechrests gave generously to the Wilsons and provided for their future by naming them as beneficiaries of a $200,000 educational trust. The Wilsons have already received distributions from the trust approximating $240,000. Roughly $77,000 currently remains in trust and will be paid out to the beneficiaries when the trust terminates.

Caveators' evidence further showed that Mowery had been an employee of Mr. Sechrest's business, High Point Face Veneer, for over thirty years. In addition to his administrative duties, Mowery acted as a personal assistant to Mr. Sechrest—picking up his cleaning, opening his mail, paying his bills, and balancing his checkbook. Mowery continued working for Mr. Sechrest in this capacity after the business was sold in 1986. Harold placed considerable trust in Mowery and, in 1992, directed his attorney, Hugh Bennett, who was also Mowery's attorney, to prepare health care powers of attorney for him and testatrix naming Mowery as their health care attorney-in-fact. Shortly thereafter, Harold was diagnosed with pancreatic cancer. He died on 5 February 1994.

On 10 February 1994, testatrix renounced her right to administer Harold's estate and nominated Mowery to serve as the executor of Harold's will. On that same day, testatrix met with Mr. Bennett and instructed him to draw up a durable power of attorney naming Mowery as her general attorney-in-fact. She also informed Bennett that she desired to change her will and directed him to draft an instrument bestowing one-half of her residuary estate on Mowery. She wanted to leave the other half to Kevin Sechrest and the Banes. Testatrix executed the durable power of attorney and the will on 16 February 1994. This will revoked a prior will, dated 12 August 1988 as amended by codicil dated 2 September 1992, devising testatrix's entire estate to the Wilsons, the Banes, and Kevin Sechrest. Mowery testified that when he learned of the disposition under the February Will, he advised testatrix to "take [him] out" of the will, or "[she would] never get [her] estate settled."

Thereafter, testatrix contacted Mowery's son-in-law, Ben Miller, a securities broker, and explained that she wanted to change the beneficiary of Harold's annuities, which were worth $1.4 million. On 14 March 1994, Miller brought the forms to testatrix, and she executed the change, thereby naming Mowery as the new beneficiary. Mowery notarized the forms. Testatrix then called Mr. Bennett and instructed him to remove Mowery as a beneficiary under her will. The new instrument, executed 16 May 1994, distributed the entire residuary estate in equal shares to Kevin Sechrest and the Banes. The Will named Mowery as the executor and provided that the residuary estate carry the tax burden for all properties passing under or outside of the devise.

Caveators' evidence further tended to show that after Harold's death, testatrix came to depend heavily on Mowery to handle her personal and legal affairs. Mowery brought testatrix breakfast every morning, and while they ate, they would sort through her mail. Additionally, Mowery paid bills for testatrix, handled her banking transactions, and ran a variety of personal errands for her, i.e., taking her to the beauty shop and the pharmacy. Mowery testified that he went to testatrix's home at least three times a day to make sure that she had eaten and "to see that everything was okay."

Caveators also presented evidence that testatrix had what they described as a "severe drinking problem" and that she was twice hospitalized for alcohol-related illnesses. According to her hospital records, testatrix "[drank] at least ½ pint of Vodka a day . . . with some brief periods of abstinence." The records further indicated that testa-

trix's alcoholism resulted in "an overall deteriorated level of functioning and some memory problems." Her psychiatric evaluation "showed mild alcohol related dementia," but found that it was "not overall debilitating."

At the close of caveators' evidence, the trial judge allowed propounders' motion for directed verdict on the issues of undue influence and testamentary capacity. Both parties moved to recover costs and attorneys' fees, and by order entered 10 August 1998, the trial court dismissed caveators' action and taxed costs, including attorneys' fees, to caveators. On 24 August 1998, caveators filed motions for a new trial and for relief from the judgment taxing costs against them. The trial court heard arguments on caveators' motions and entered an order denying the motions on 8 December 1998. Caveators filed notice of appeal.

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[1] Caveators argue first that the trial court erred in directing a verdict for propounders on the issue of undue influence. Caveators contend that they presented sufficient evidence to create a question for the jury as to whether Mowery unduly influenced testatrix to make the disposition reflected in the May 1994 Will. We must disagree.

A motion for directed verdict challenges whether the evidence is legally sufficient to present a question for the jury and to support a verdict in favor of the non-moving party. *In re Will of Buck*, 130 N.C. App. 408, 410, 503 S.E.2d 126, 129 (1998), *aff'd*, 350 N.C. 621, 516 S.E.2d 858 (1999). In ruling on a motion for directed verdict, the trial court has a duty to examine the evidence in the light most favorable to the non-movant. *Id.* Thus, the the non-movant is given the benefit of all helpful inferences reasonably drawn from the evidence, and all conflicts and contradictions in the evidence are decided in the non-movant's favor. *Id.* Evidence of the non-movant " 'which raises a mere possibility or conjecture cannot defeat a motion for directed verdict. . . . If, however, non-movant shows more than a scintilla of evidence, the court must deny the motion.' " *Ellis v. Vespoint*, 102 N.C. App. 739, 743-44, 403 S.E.2d 542, 545 (1991) (quoting *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 177 (1990) (citations omitted)).

In the context of a will caveat, "[u]ndue influence is more than mere persuasion, because a person may be influenced to do an act which is nevertheless his voluntary action." *Buck*, 130 N.C. App. at 413, 503 S.E.2d at 130. The influence necessary to nullify a testamen-

tary instrument is the " 'fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.' " *In re Will of Dunn*, 129 N.C. App. 321, 328, 500 S.E.2d 99, 103-04 (quoting *Griffin v. Baucom*, 74 N.C. App. 282, 286, 328 S.E.2d 38, 41, *disc. review denied*, 314 N.C. 115, 332 S.E.2d 481 (1985) (quotation omitted)), *disc. review denied and review dismissed*, 348 N.C. 693, 511 S.E.2d 645 (1998). Because direct evidence of undue influence is rarely available, our courts look to the "surrounding facts and circumstances, which standing alone would have little importance, but when taken together would permit the inference that, at the time the testat[rix] executed [her] last will and testament, [her] own wishes and free will had been overcome by another." *Buck*, 130 N.C. App. at 413, 503 S.E.2d at 130.

" 'There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence.' " *Dunn*, 129 N.C. App. at 328, 500 S.E.2d at 104 (quoting *Griffin*, 74 N.C. App. at 286, 328 S.E.2d at 41). Factors relevant to the issue of undue influence include:

> "1. Old age and physical and mental weakness.
>
> 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
>
> 3. That others have little or no opportunity to see [her].
>
> 4. That the will is different from and revokes a prior will.
>
> 5. That it is made in favor of one with whom there are no ties of blood.
>
> 6. That it disinherits the natural objects of [her] bounty.
>
> 7. That the beneficiary has procured its execution."

In re Andrews, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (quoting *In re Will of Mueller*, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915)).

Taken in the light most favorable to caveators, the evidence demonstrated (1) that testatrix was seventy years of age and suffered from mild alcohol-related dementia; (2) that Mowery visited testatrix's home three times daily to assist her with personal and financial matters; (3) that following Harold's death, members of the Wilson family had little opportunity to visit with testatrix; (4) that the May

1994 Will (and the February 1994 Will) revoked testatrix's earlier 12 August 1988 Will, as amended by codicil dated 2 September 1992, leaving each of the Wilsons a share of her estate; (5) that the May 1994 Will caused the taxes on the annuities to be paid out of the residuary estate, in favor of Mowery, who had no blood ties to testatrix; (6) that the May 1994 Will (and the February 1994 Will) disinherited the Wilsons, who testatrix regarded as her "grandchildren"; and (7) that in order to avoid an anticipated legal challenge, Mowery procured the execution of the May 1994 Will in lieu of the February 1994 Will devising one-half of testatrix's residuary estate to him. Although relevant to the issue of undue influence, these facts do not establish that the May 1994 Will was the product of anything other than testatrix's own wishes and free will.

The evidence, which caveators do not dispute, reveals that testatrix met with her attorney the day after Harold's funeral, on 10 February 1994, to discuss changing her will. It was then that testatrix expressed her intent to leave one-half of her estate to Mowery and to disinherit the Wilsons. According to Mr. Bennett, testatrix stated that she wanted to exclude the Wilsons, "because Harold took care of them" with the $200,000 educational trust. The evidence is further undisputed that prior to Harold's death, Mowery had little contact with testatrix and, thus, had virtually no opportunity to exert his will over hers.

Notably, Mowery is not a beneficiary under the May 1994 Will, and he stands to receive $300,000 less from the annuities than he would under the 16 February 1994 bequest. Nevertheless, caveators claim that as a result of the provision regarding payment of taxes, Mowery receives a substantial financial benefit under the May 1994 disposition. Thus, caveators essentially argue that Mowery fraudulently procured the following language:

> Payment of Taxes. All transfer, estate, inheritance, succession, supplemental estate, generation-skipping and other death taxes, together with any interest or penalty thereon (but excluding and [sic] tax imposed as a result of Section 2032A of the Internal Revenue Code or corresponding provision of state law), which shall become payable by reason of my death, whether in respect of property owned my [sic] me and passing under this Will, in respect of any property included in my estate under the provisions of Sections 2041 and 2042 of the Internal Revenue Code of 1986, or in respect of any other property included in my

> gross estate for the purposes of determining such taxes, shall be paid out of my residuary estate.

However, the record discloses that testatrix's prior wills—the 12 August 1988 Will, as amended by codicil dated 2 Februrary 1992, and the 16 February 1994 Will—contain similar provisions. In fact, a like provision appears in Harold's will as well. Therefore, the notion that Mowery overcame the will of testatrix and caused her to include the tax provision in the May 1994 Will for his benefit is implausible.

Moreover, we are not persuaded by caveators' assertion that an issue of fact existed as to whether Mowery stood in a fiduciary relationship with testatrix so as to shift the burden on him to prove that any transaction enuring to his benefit was untainted by fraud.

As our Supreme Court observed in *McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943),

> The law is well settled that in certain known and definite "fiduciary relations, if there be dealing between the parties, on the complaint of the party in the power of the other, the relation of itself and without other evidence, raises a presumption of fraud, as a matter of law, which annuls the act unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted."

Id. at 181, 25 S.E.2d at 616 (quoting *Lee v. Pearce*, 68 N.C. 76 (1873)). One such fiduciary relationship is that of a " 'principal and agent, where the agent has entire management so as to be, in effect, as much the guardian of his principal as the regularly appointed guardian of an infant.' " *Cross v. Beckwith*, 16 N.C. App. 361, 363, 192 S.E.2d 64, 66 (1972) (quoting *McNeill*, 223 N.C. at 181, 25 S.E.2d at 617). Therefore,

> " '[w]hen one is the general agent of another, who relies upon him as a friend and adviser, and has entire management of his affairs, a presumption of fraud, as a matter of law, arises from a transaction between them wherein the agent is benefited, and the burden of proof is upon the agent to show by the greater weight of the evidence, when the transaction is disputed, that it was open, fair and honest.' "

Id. at 363-64, 192 S.E.2d at 66 (quoting *McNeill*, 223 N.C. at 181, 25 S.E.2d at 617) (quotation omitted)).

The evidence shows that on 2 September 1992, testatrix executed a power of attorney designating Mowery as her health care agent and

giving him "full power and authority to make health care decisions on [her] behalf." Caveators contend that this instrument created a fiduciary relationship between the parties, which placed the burden on Mowery to prove that the tax benefit resulting under the 1994 Will was fair, reasonable and just. However, an agent is a fiduciary only pertaining to matters within the scope of his agency. *Hutchins v. Dowell*, 138 N.C. App. 673, 531 S.E.2d 900 (2000). Because the health care power of attorney dealt exclusively with medical decisions, it did not create a fiduciary relationship between Mowery and testatrix concerning her May 1994 Will.

However, after Harold's death, testatrix executed a general power of attorney granting Mowery "full power and authority to do and to perform all and every act or thing whatsoever requisite or necessary to be done for [testatrix's] upkeep, care and maintenance and for the management of any property owned by [testatrix], as fully to all intents and purposes as [she] might or could do if personally present." The record shows that the general power of attorney was executed contemporaneously with the 16 February 1994 Will devising one-half of testatrix's estate to Mowery. The record does not, however, contain any evidence as to when Mowery learned of his appointment as testatrix's general attorney-in-fact, nor does it provide any evidence that he was acting as such when she executed the February 1994 Will or the May 1994 Will. Therefore, the court was correct in failing to submit to the jury the issue of whether a fiduciary relationship existed between Mowery and testatrix by way of the durable power of attorney. *See In re Estate of Ferguson*, 135 N.C. App. 102, 105, 518 S.E.2d 796, 798 (1999) (court properly declined to submit issue of whether power of attorney created fiduciary relationship where no evidence in record "that Propounder served as Testator's attorney-in-fact at the time Testator executed her will"); *In re Will of Atkinson*, 225 N.C. 526, 35 S.E.2d 638 (1945) (court's instruction that fiduciary relationship created between testator and attorney-in-fact erroneous where power of attorney did not exist at time will was executed). Absent evidence of a fiduciary relationship, it is not presumed that Mowery exerted his will over that of testatrix, and, thus, the burden did not fall on him to prove that the May 1994 Will was fair. Accordingly, we hold that the trial court properly directed a verdict for propounders on the issue of undue influence.

[2] Caveators next argue that they presented sufficient evidence to create an issue of fact concerning testatrix's mental incapacity to make and execute a will. Again, we disagree.

An individual possesses testamentary capacity—the capacity to make a will—if the following is true:

> [She] (1) comprehends the natural objects of [her] bounty, (2) understands the kind, nature and extent of [her] property, (3) knows the manner in which [she] desires [her] act to take effect, and (4) realizes the effect [her] act will have upon [her] estate.

In re Will of Jarvis, 334 N.C. 140, 145, 430 S.E.2d 922, 925 (1993). In our jurisprudence, a presumption exists that every individual has the requisite capacity to make a will, and those challenging the will bear the burden of proving, by the greater weight of the evidence, that such capacity was wanting. *Buck*, 130 N.C. App. at 412-13, 503 S.E.2d at 130. To prove lack of testamentary capacity, the caveators must "present specific evidence relating to testat[rix's] understanding of [her] property, to whom [she] wished to give it, and the effect of [her] act in making a will at the time the will was made." *Id.* at 413, 503 S.E.2d at 130.

Caveators contend that the evidence, considered in the light most favorable to them, defeats the presumption of testamentary capacity. They argue that the evidence suggests that testatrix did not know the natural objects of her bounty because she did not include the Wilsons in the May 1994 Will. Assuming that the Wilsons are natural objects of testatrix's bounty, the evidence indicates that she not only acknowledged them as such, she explained to Mr. Bennett that she did not want to leave them anything, because Harold had already provided for them in setting up their educational trust.

As further evidence that testatrix lacked testamentary capacity, caveators show "that [testatrix] was almost always drunk" and that she once made mathematical errors in calculating an employee's pay. This evidence notwithstanding, caveators have put forth no evidence that at or near the time testatrix executed the May 1994 Will, she was mentally unequipped to do so. To the contrary, Mr. Bennett testified that during the time between Harold's death and the execution of the May 1994 Will, he had no cause to believe that testatrix lacked the requisite capacity to execute a will. Furthermore, as the trial court observed, "a lunatic, an absolute lunatic, can make a valid will when he's in a lucid moment." *See In re Will of Maynard*, 64 N.C. App. 211, 227, 307 S.E.2d 416, 428 (1983) (recognizing that "the insane person during a lucid interval can make a valid will.") Thus, we conclude that a directed verdict in favor of propounders on the issue of testamentary capacity was proper.

[3] As a final matter, caveators challenge the order awarding costs, including attorneys' fees, to propounders. The relevant provision, section 6-21 of the North Carolina General Statutes, states the following:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . . .
>
> (2) Caveats to wills . . . ; provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit.
>
> . . . .
>
> The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow . . . .

N.C. Gen. Stat. § 6-21 (1999). Whether to allow costs and attorneys' fees under this section is a matter within the trial court's discretion. *In re Ridge*, 302 N.C. 375, 275 S.E.2d 424 (1981). Caveators have failed to show that the court abused its discretion; therefore, we uphold the award of costs, including attorneys' fees, to propounders.

In summary, we affirm the order of the trial court directing a verdict in favor of propounders on the issues of undue influence and testamentary capacity. We likewise affirm the order taxing costs, including attorneys' fees, against caveators.

Affirmed.

Chief Judge EAGLES and Judge HUNTER concur.

TONY LEE CURTIS, PETITIONER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT

No. COA99-1221

(Filed 7 November 2000)

1. Administrative Law— standard of review—whole record test

The standard of review applied by the Court of Appeals to a State Personnel Commission decision was the whole record test where, despite the allegation of certain errors of law, the crux of the petition focused on whether the SPC's final decision was supported by substantial evidence.

2. Public Officers and Employees— state employee—demotion and transfer—not politically motivated—causal connection—speculation

The trial court did not err by determining that a DMV employee's transfer and demotion were not politically motivated where the employee had reluctantly accepted a prior transfer from Asheville to Wilmington, which he did not preserve for review, immediately began trying to return to Asheville, and eventually succeeded, although with a demotion. Petitioner satisfied the first two elements of making a prima facie case in that his was not a policymaking position and he was sympathetic to the Republican Party although registered a Democrat (political affiliation need not be strictly defined along party lines), but did not show a causal connection between his political affiliation in that his testimony to that affect was only speculative.

3. Public Officers and Employees— state employee—demotion and transfer—just cause

DMV did not act without just cause in demoting and transferring an employee to Asheville where the employee had previously worked in Asheville, specifically asked for a transfer back to Asheville and was willing, however begrudgingly, to accept a demotion if that was required.

4. Public Officers and Employees— state position—refusal to hire—not political

The State Personnel Commission and the trial court correctly concluded that DMV's refusal to hire petitioner for certain positions in Asheville was not the result of political discrimination

where petitioner made a prima facie case in that the position was non-policymaking, petitioner is a Republican party sympathizer, and petitioner demonstrated a causal connection in that the people hired were related to or knew high officials in the Democratic Party, but DMV articulated a non-discriminatory reason for refusing to hire petitioner in that he had ineffective supervisory skills.

5. Public Officers and Employees— state employee—transfer—salary reduction—breach of alleged agreement

The contention of a petitioner who was transferred by DMV with a salary reduction that the reduction violated an agreement he had with DMV was not addressed in an appeal from a contested case hearing before the Office of Administrative Hearings and the State Personnel Commission. Breaches of alleged agreements between the State and an employee are not among the statutorily listed exclusive grounds for contested case hearings; furthermore, the administrative law judge did not conclude that any such agreement ever existed.

6. Public Officers and Employees— state employee—promotion and demotion within one year—salary level

The salary of a DMV employee should have been adjusted to its former level where he was promoted from Captain to Inspector and then demoted to Sergeant within the same year in conjunction with a move from Asheville to Wilmington and back to Asheville. According to the plain language of the State Personnel Commission Rule applicable at that time, petitioner's post-demotion salary must return to the original salary and it is irrelevant that his final position as Sergeant was at a lower level than the beginning position as Captain. The rule applies anytime an employee is promoted and then demoted to any lower class within the same year.

Judge HUNTER concurring in the result.

Appeal by petitioner from order entered 8 July 1999 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 28 August 2000.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed, Jr. and Jennifer W. Moore, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Gwendolyn W. Burrell, for respondent-appellee.

LEWIS, Judge.

Petitioner Tony Lee Curtis is employed by the Enforcement Section of the North Carolina Division of Motor Vehicles ("DMV"). Although he is a registered Democrat, he has several ties to the Republican Party. In 1992, during the administration of Republican Governor James G. Martin, petitioner was promoted to Captain at the Asheville Weigh Station. After the present Governor, Democrat James B. Hunt, Jr., took office in 1993, the DMV, in a letter dated 20 May 1993, informed petitioner he was being transferred to the Wilmington Weigh Station to serve as Inspector. An internal reorganization of the Enforcement Section was cited as the reason for this transfer. The Inspector position to which petitioner was being transferred actually was a promotion from his previous position as Captain. Nonetheless, petitioner did not want to move to Wilmington, as his wife had recently been diagnosed with cancer and would receive better health insurance benefits with her employer in Asheville. However, petitioner never filed a formal grievance contesting this transfer. Instead, he begrudgingly reported to Wilmington as directed. Petitioner immediately began efforts to be reassigned back to Asheville. He eventually filed a request with the DMV for a hardship transfer, in which he stated, "If taking a demotion to Sergeant will enable me to return to Asheville I have no complaints what so ever."

Meanwhile, four Inspector positions with the Asheville Weigh Station opened up in 1993: two in May (before petitioner's transfer), one in July, and one in August. Petitioner never applied for the two May openings, but he did apply for the July and August openings. However, the DMV did not award petitioner either of the Inspector positions, noting that his hardship transfer petition had stated a willingness to accept the position of Sergeant instead.

The DMV eventually granted petitioner his request to be transferred back to Asheville, effective 1 September 1993. During discussions regarding his requested transfer, petitioner claims he was told that, should he be demoted to Sergeant, his pay would only decrease a few dollars a month. No specific figures were discussed. Upon his transfer, however, his annual pay decreased $3175, or some $265 per month.

Petitioner thereafter filed a petition for a contested case hearing with the Office of Administrative Hearings ("OAH"), alleging that his transfer and demotion to Asheville were done without just cause, in violation of N.C. Gen. Stat. § 126-35, and were politically-motivated,

in violation of N.C. Gen. Stat. § 126-34.1. The Administrative Law Judge ("ALJ") dismissed petitioner's claims, concluding that the DMV's actions could not have been done without just cause, nor were they politically-motivated, because petitioner specifically asked for the transfer and demotion in the first place. After the State Personnel Commission ("SPC") and the Superior Court both affirmed the ALJ, this Court reversed. In an unpublished opinion, we concluded that even voluntary requests for transfers or demotions can serve as the basis for unjust cause and political discrimination claims. We also held that petitioner had adequately raised the issue of political discrimination in the context of the DMV's refusal to hire petitioner for the Inspector positions in Asheville that opened up.

On remand, the SPC reviewed the administrative record and concluded petitioner's demotion and transfer to Asheville were neither politically-motivated nor done without just cause. Furthermore, the SPC concluded the DMV's refusal to hire petitioner for one of the Inspector positions in Asheville was not politically-motivated. Finally, the SPC concluded that the $265 per month pay cut resulting from his demotion violated no agreement between him and the DMV, but fell within the salary range set forth by the applicable rules for DMV employees. Upon judicial review in Superior Court, the trial judge adopted the findings and conclusions of the SPC and then affirmed its order in every respect. Petitioner appealed to this Court.

[1] At the outset, we must determine our standard of review. That standard of review will depend upon the nature of the error alleged in the petition for judicial review. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62, 468 S.E.2d 557, 559, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996). If errors of law are alleged, our review is de novo. *Id.* If the alleged error is that the final agency decision is not supported by the evidence, we employ the "whole record" test. *Id.* Here, although the petition for judicial review alleges certain errors of law, the crux of the petition focuses on whether the SPC's final decision was supported by substantial evidence. Accordingly, the appropriate standard of review is the "whole record" test. That test requires us to examine the administrative record and determine whether it contains substantial evidence to support the agency's decision. *Id.* at 62, 468 S.E.2d at 560. With this standard in mind, we now proceed to the merits of petitioner's claims.

[2] We begin by discussing petitioner's demotion and transfer to Asheville. Significantly, we are not presented with the issue of peti-

tioner's original transfer to Wilmington. Despite petitioner's repeated attempts before the ALJ and this Court to make that an issue, he never filed a grievance contesting that transfer. Accordingly, the ALJ correctly dismissed that issue as not properly before him. Petitioner did not appeal that dismissal or otherwise act to preserve the issue for our review. We therefore only focus on petitioner's transfer from Wilmington back to Asheville. In this regard, we will analyze his political discrimination and unjust cause claims separately.

Our statutes expressly prohibit the demoting of State employees based upon their political affiliation. N.C. Gen. Stat. § 126-34.1(a)(2)(b) (1999). However, our courts have not heretofore outlined the elements of such a claim. As in the context of other discrimination claims, we look to federal decisions for guidance. *Dept. of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). In our federal courts, a prima facie case of political discrimination requires showing (1) the employee works for a public agency in a non-policymaking position (i.e., a position that does not require a particular political affiliation), (2) the employee had an affiliation with a certain political party, and (3) the employee's political affiliation was the cause behind, or motivating factor for, the demotion or other adverse employment action. *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995) (per curiam). If the employee makes out a prima facie case, the burden then shifts to the employer to articulate a non-discriminatory reason for the adverse action. *Graning v. Sherburne County*, 172 F.3d 611, 615 (8th Cir. 1999). The employer's burden is simply one of production and nothing more. *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83. If the employer satisfies this requirement, the burden then shifts back to the employee to prove that the reason given was in fact just a pretext. *Graning*, 172 F.3d at 615. In other words, the ultimate burden of persuasion rests with the employee. *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83.

We conclude petitioner has satisfied the first two elements of his prima facie case. The position of Inspector is not a policymaking position for which a particular political affiliation may be required. Furthermore, petitioner has demonstrated that, although a registered Democrat, he is in fact more sympathetic to the Republican Party. In this respect, we disagree with the DMV's contention that petitioner could not be politically discriminated against because he and the administration in power were registered members of the same party. For purposes of political discrimination claims, an employee's political affiliation need not be strictly defined along party lines; intra-

party discrimination may also form the basis for a complaint. *Robertson*, 62 F.3d at 600. This is so because "[t]he danger that employees will abandon the expression or exercise of their political beliefs to appease their supervisors is not diminished because a supervisor supports a different identifiable faction within a party as compared to a different party altogether." *Id.*

However, we conclude petitioner has not satisfied the third element of his prima facie case. There is not substantial evidence in the record before us to support a causal connection between his political affiliation and his demotion and transfer back to Asheville. At the hearing before the ALJ, petitioner admitted the demotion and transfer was not the product of any disciplinary actions but was the result of the letters he wrote requesting a transfer. He even admitted he was willing to quit his job in Wilmington altogether in order to return to Asheville. Although his transfer request may not have been truly voluntary, instead being compelled by his wife's circumstances, the *only* testimony suggesting any sort of political discrimination is petitioner's testimony to the following effect:

> Q: Why then did you write that letter [requesting a transfer], marked as Exhibit 25?
>
> A: After seeing the positions being filled up here [in Asheville] with people I knew that played politics, I knew I wouldn't be able to get back as an inspector. So that was my alternative, to come back as a sergeant.

(1 Tr. at 30). This testimony amounts to nothing more than speculation. Absent more specific evidence, we cannot say petitioner met his burden of showing a causal connection. We therefore uphold the trial court's determination that petitioner's demotion and transfer to Asheville was not politically-motivated.

[3] We next determine whether his demotion and transfer were done without just cause, in violation of N.C. Gen. Stat. § 126-35. We reject this claim as well. Petitioner had specifically asked for a transfer back to Asheville and was willing, however begrudgingly, to accept a demotion if that was required. The DMV thus gave petitioner exactly what he sought—a position in Asheville. By accommodating his request, the DMV did not act without just cause.

[4] Having rejected petitioner's claims based upon his demotion and transfer to Asheville, we now consider whether the DMV's refusal to hire petitioner for one of the Inspector positions in Asheville was the

product of political discrimination. Although four such positions in Asheville became available, only the July 1993 and August 1993 positions are ones for which petitioner applied. Accordingly, we limit our review to a consideration of those two.

We conclude petitioner has made out a prima facie case of political discrimination as to both the July and August openings. Our previous analysis as to the first two elements is equally applicable here: "Inspector" is a non-policymaking position, and petitioner is a Republican Party sympathizer. Furthermore, petitioner has demonstrated a causal connection between his political affiliation and the DMV's refusal to hire him. In particular, petitioner testified that Joe Whitt, the person to whom the July position was eventually offered, is the brother of a precinct chairman of the Democratic Party in Buncombe County. As for the August position, petitioner testified that Joe Austin, the one eventually hired, "knows a lot of people," including several high-ranking officials in the Democratic Party. (1 Tr. at 39). This testimony was sufficient to fulfill the causal connection requirement.

Once petitioner satisfied the three elements of his prima facie case, it was then incumbent upon the DMV to articulate some non-discriminatory reason for refusing to hire petitioner. *Graning*, 172 F.3d at 615. The DMV did so. Arnold Craig, former district supervisor in Asheville, testified that petitioner "was weak as a supervisor" and could not manage the weigh station. (1 Tr. at 176). Specifically, according to Mr. Craig, petitioner "was having difficulty in supervising the men out there. The men weren't responsive." (1 Tr. at 176). Ineffective supervisory skills was a legitimate non-discriminatory reason to satisfy the DMV's burden. The burden then shifted back to petitioner to prove the DMV's alleged reason was in fact pretextual. In addressing this alleged reason,

> [t]he trier of fact is not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for discrimination.
>
> . . . "While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason must be reasonably articulated and nondiscriminatory, but does not have to be a reason that the judge or jurors would act upon or approve."

Gibson, 308 N.C. at 140, 301 S.E.2d at 84 (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979)). Here, the SPC ultimately concluded petitioner failed to prove that the DMV's reason was pretextual. Upon our review of the entire record, we hold there was substantial evidence to support this conclusion. Petitioner was repeatedly asked for specific facts to back up his allegations of political discrimination. His only response was, "I guess the biggest fact is me being around for twenty-three years, and me knowing how things work out with politics, the rumor mill, that sort of thing." (1 Tr. at 57). This scant evidence based more on innuendo and conjecture than on actual facts is insufficient to overturn the SPC's and the trial court's conclusions.

[5] Finally, we turn to petitioner's decrease in pay as a result of his demotion and transfer to Asheville. He first contends his $265 per month salary reduction violated an agreement he had with the DMV that his pay would only decrease a few dollars a month. We need not address this specific contention as it is not properly before us. This is an appeal from a contested case hearing before the OAH and the SPC. N.C. Gen. Stat. § 126-34.1 lists the exclusive grounds for contested case hearings, including harassment, dismissals, demotions, reductions in force, suspensions, retaliatory actions, and certain other unlawful State employment practices. Breaches of alleged agreements between the State and the employee (even if regarding pay) are not among those grounds specifically listed. Accordingly, neither the OAH, the SPC, the Superior Court, nor this Court has subject matter jurisdiction to consider this argument. Furthermore, the ALJ—upon whose findings everything else is based—nowhere even concluded that any such "agreement" ever existed.

[6] In the alternative, petitioner claims his resultant pay cut was not within the salary range prescribed by the SPC's own rules regarding pay. Prior to his transfer to Wilmington, petitioner's salary was $34,768. Following this transfer, at which time he was also promoted to Inspector, he earned $35,463 per year. And following his demotion and return to Asheville, his salary dropped to $32,288. Petitioner claims the applicable rules required that, upon his return to Asheville, his pay should have only been reduced to $34,768, the amount he was earning before his initial transfer. We agree.

In 1993, the applicable SPC rules stated:

> When an employee is promoted and subsequently demoted or reassigned, or is reallocated upward and subsequently reallo-

cated downward, demoted or reassigned to any lower class within one year, the following shall apply:

(1) the salary shall revert to the salary being paid before the promotion or reallocation, plus any increases that would have been given had the promotion not occurred.

N.C. Admin. Code tit. 25, r. 1D.04046(a) (Aug. 1991). Here, petitioner was promoted from Captain to Inspector and then demoted from Inspector to Sergeant all within the same year. According to the plain language of the rule, petitioner's post-demotion salary therefore must return to the same as that which he was earning prior to his original promotion—$34,768. The fact that his post-promotion position of Sergeant was at a lower level than his pre-promotion position of Captain is irrelevant under the applicable rule; the rule applies anytime an employee, within the same year, is promoted and then demoted "to *any* lower class." Although Rule 1D.0406 has subsequently been amended such that the same salary requirement applies only if the pre-promotion position and post-demotion position are "in the same grade level," this amendment did not take effect until 1995, after the relevant time period here. Thus, petitioner's salary must be adjusted upward by the SPC pursuant to its own rules.

Affirmed in part, reversed and remanded in part.

Judge WALKER concurs.

Judge HUNTER concurs in the result.

Judge HUNTER concurring in the result.

I concur in the result of the majority opinion but write separately to articulate my disagreement with part of the majority's reasoning. I agree with the majority that petitioner has not satisfied the third element of the *prima facie* case for his claim that he was demoted and transferred from Wilmington to Asheville due to his political affiliation. The third element required for making a *prima facie* case of political discrimination is a showing of a causal relationship between the petitioner's political affiliation and the adverse employment action. *Robertson v. Fiore*, 62 F.3d 596 (3rd Cir. 1995). The majority found that this element was not satisfied since petitioner had written letters to DMV requesting that he be demoted and transferred to

Asheville. Thus, the only evidence admitted suggesting political discrimination was mere speculation.

I respectfully disagree with the majority's conclusion that petitioner satisfied the elements required for making a *prima facie* case with respect to DMV's refusal to hire petitioner for the Asheville inspector positions that became available in July and August of 1993. In my opinion, the third element for establishing a *prima facie* case of political discrimination, the causal connection requirement, was not met and the evidence presented by petitioner on this claim, as the evidence presented for the demotion and transfer claim, was mere speculation. The majority finds that the causal connection requirement was met because of petitioner's unsubstantiated testimony that Joe Whitt, the person to whom the July inspector position was offered, is the brother of a precinct chairman of the Democratic Party in Buncombe County. Joe Austin, the person eventually hired for the August inspector position, "knows a lot of people," including several high-ranking officials in the Democratic Party. This testimony was nothing more than mere speculation. In my opinion, the petitioner did not satisfy the causal connection existing between his political affiliation and DMV's refusal to hire him. Under the majority's holding, an employee working for a public agency in a non-policymaking position, who has an affiliation with a certain political party, need only speculate as to the causal connection between the political affiliation and the adverse employment action in order to make out a *prima facie* case for political discrimination. I would hold that this is insufficient to satisfy the causal connection requirement of a political discrimination claim.

STATE OF NORTH CAROLINA v. KERRY DAVID BRIGGS

No. COA99-1163

(Filed 7 November 2000)

1. Search and Seizure— lawfully detained vehicle—driver ordered to exit—no unreasonable search and seizure

A defendant's Fourth Amendment rights against unreasonable searches and seizures were not violated when an officer required him to exit his lawfully detained vehicle at a driver's license checkpoint in a high crime area because this procedure

reduces the likelihood of assault on the officer and is not a serious intrusion upon the sanctity of the person.

2. Search and Seizure— protective search—pat down for weapons—defendant outside his automobile

An officer had reasonable suspicion to initiate a weapons pat down search of defendant at a driver's license checkpoint in a high crime area after the officer ordered defendant to exit his vehicle, because: (1) although a routine traffic stop does not justify a protective search for weapons in every instance, once defendant is outside the automobile, an officer is permitted to conduct a limited pat down search for weapons if he has a reasonable suspicion based on articulable facts under the circumstances that defendant may be armed and dangerous; and (2) the totality of circumstances was sufficient to justify a pat down search of defendant's person when defendant was stopped in a high crime area, the hour was late, the officer was aware that defendant had been charged and convicted on more than one occasion for sale and delivery of cocaine and was then on probation for his most recent conviction, and the officer was aware that drug dealers frequently carry weapons.

3. Search and Seizure— pat down search—plain feel doctrine—cigar holder—totality of circumstances—incriminating nature of object

An officer's seizure of a cigar holder from defendant's pocket while conducting a pat down search for weapons at a driver's license checkpoint in a high crime area after the officer ordered defendant to exit his vehicle was justified by probable cause under the plain feel doctrine based on the totality of circumstances, because: (1) the hour was late and defendant was stopped in a high crime area; (2) the officer had previously arrested defendant for possession of controlled substances and knew defendant was on probation for such an arrest at the time of the stop; (3) the officer smelled burned cigar in defendant's vehicle and on defendant, and was aware that burning cigars were commonly used to mask the smell of illegal substances; (4) defendant had previously stated he did not smoke cigars; (5) defendant's eyes were red and glassy, and his behavior suggested possible usage of a controlled substance; and (6) the officer's experience made him aware that cigar holders were commonly used to store controlled substances.

4. Arrest— probable cause—fruits of pat down search

Although defendant contends an officer did not have authority to arrest him at a driver's license checkpoint stopping all vehicles in a high crime area, the fruits of the valid pat down search conducted on defendant reveal that the officer had probable cause to arrest defendant.

Appeal by defendant from order entered 29 March 1999 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 13 September 2000.

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

Knox & Jones, by Michael G. Knox, for the defendant-appellant.

LEWIS, Judge.

Shortly after midnight on 25 February 1998, Officers Carlton and Stikeleather of the Concord Police Department were conducting a driver's license check by stopping all vehicles in a "high crime area" in Concord, North Carolina. (Tr. at 6.) Officer Carlton initially stopped defendant at the license check and requested him to produce his license and vehicle registration. As Officer Carlton was returning defendant's license to him, Officer Stikeleather approached the vehicle and recognized defendant as someone he previously arrested for possession with intent to sell and sale and delivery of cocaine. Officer Stikeleather knew defendant to be on probation at that time, and was aware that defendant had been previously convicted for possessing and selling controlled substances on more than one occasion. Although defendant denied that he had been drinking or taking drugs, Officer Stikeleather noted defendant was chewing gum "real hard" and his eyes were glassy and blood-shot. (Tr. at 7.) Further, Officer Stikeleather smelled the odor of burned cigar tobacco inside the vehicle coming from defendant's person. When the officer asked about the smell, defendant stated he did not smoke cigars, but a female who was in the vehicle earlier was smoking a cigar. The officer knew from his experience that drug users often smoked cigars to mask the smell of illegal drugs.

Officer Stikeleather requested to search defendant's vehicle, but defendant declined. The officer then required defendant to exit the vehicle and conducted a pat down search for weapons. Officer Stikeleather testified that while conducting this pat down search, "I

felt a hard, cylindrical shape in [defendant's] pocket and it felt like a cigar holder; and I'm familiar with these because folks carry these frequently to keep their controlled substances in. It's like a little plastic test tube with a little cap on it; and there's really nothing else that's shaped exactly like that." (Tr. at 8.) The officer asked defendant what the object was, and defendant stated, "A cigar holder." (Tr. at 8.) The officer said, "I thought you didn't smoke cigars," but defendant did not respond. (Tr. at 8.) At that point, he removed the cigar holder from defendant's pocket and when he shook it, the cigar holder "rattled like it had a number of small hard objects in it." (Tr. at 9.) The officer opened the cigar holder, found ten rocks of crack cocaine inside and placed the defendant under arrest.

A true bill of indictment returned 16 March 1998 charged defendant with possession of cocaine with intent to sell and deliver and resisting, delaying and obstructing an officer. Another true bill of indictment returned 27 April 1998 charged defendant as an habitual felon. On 5 August 1998 defendant made a motion to suppress the evidence of the container of crack cocaine. On 26 March 1999 the trial court denied the motion to suppress. Defendant entered a guilty plea to possession of cocaine pursuant to N.C. Gen. Stat. § 90-95(a) and to being an habitual felon pursuant to N.C. Gen. Stat. § 14-7.1. Pursuant to the plea agreement, the charge of resisting, delaying and obstructing an officer was dismissed. Defendant was sentenced to imprisonment for a minimum of 80 months to a maximum of 105 months. Defendant appeals from the court's order denying his motion to suppress.

Defendant does not challenge the constitutionality of the stop as a basis to support his motion to suppress. Nonetheless, an investigative stop and detention leading to a pat down search must be based on an officer's reasonable suspicion of criminal activity. *State v. Sanders*, 112 N.C. App. 477, 481, 435 S.E.2d 842, 845 (1993). 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. *Delaware v. Prouse*, 440 U.S. 648, 663, 59 L. Ed. 2d 660, 673-74 (1979); *Sanders*, 112 N.C. App. at 480, 435 S.E.2d at 844.

[1] Defendant first contends his Fourth Amendment rights were violated when the officer required him to exit his vehicle. The State, however, maintains the officer was justified in removing defendant from his vehicle under this Court's decision in *State v. McGirt*, 122

N.C. App. 237, 468 S.E.2d 833 (1996), *aff'd per curiam*, 345 N.C. 624, 481 S.E.2d 288, *cert. denied*, 522 U.S. 869, 139 L. Ed. 2d 121 (1997). We agree. In *McGirt* we held the Fourth Amendment's proscription of unreasonable searches is not violated when an officer requires the driver of a lawfully detained vehicle to exit the vehicle. *Id.* at 239, 468 S.E.2d at 835. This procedure reduces the likelihood of assault on the officer and "is not a 'serious intrusion upon the sanctity of the person.' " *Id.* (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109-11, 54 L. Ed. 2d 331, 336-37 (1977)).

[2] Defendant next argues the officer did not have a reasonable suspicion to initiate a weapons pat down search as allowed under *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). Although a routine traffic stop does not justify a protective search for weapons in every instance, once the defendant is outside the automobile, an officer is permitted to conduct a limited pat down search for weapons if he has a reasonable suspicion based on articulable facts under the circumstances that defendant may be armed and dangerous. *State v. Adkerson*, 90 N.C. App. 333, 338, 368 S.E.2d 434, 437 (1988). In further explanation of this standard, this Court has stated:

> "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him."

Sanders, 112 N.C. App. at 481, 435 S.E.2d at 845 (quoting *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982)).

Here, defendant was stopped in a "high crime" area (Tr. at 6), the hour was late, and the officer was aware that defendant had been charged and convicted on more than one occasion for sale and delivery of cocaine, and was then on probation for his most recent conviction. From his experience, the officer was aware that drug dealers frequently carry weapons. The totality of these circumstances was sufficient to justify a pat down search of defendant's person. *See also State v. Butler*, 331 N.C. 227, 233-34, 415 S.E.2d 719, 722 (1992) (upholding protective search of defendant where defendant was stopped in a high crime area, on a specific corner known for drug activity, and defendant immediately walked away from officer after

making eye contact); *McGirt*, 122 N.C. App. at 240, 468 S.E.2d at 835 (upholding protective search of defendant where officer knew defendant was a convicted felon who was under investigation for cocaine trafficking and it was the officer's experience that cocaine dealers normally carry weapons, even absent any obvious signs of carrying a weapon).

[3] We turn now to the most difficult consideration, which is whether the officer's seizure of the cigar holder was justified under the plain feel doctrine announced in *Minnesota v. Dickerson*, 508 U.S. 366, 124 L. Ed. 2d 334 (1993). In *Dickerson*, the Supreme Court recognized a plain feel exception to the warrant requirement of the Fourth Amendment. *Id.* at 375, 124 L. Ed. 2d at 345. The Court reasoned that if "a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity *immediately apparent*, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." *Id.* at 375-76, 124 L. Ed. 2d at 346 (emphasis added). The Court concluded that the search in *Dickerson* exceeded the scope of *Terry* because the incriminating character of the object felt was not *immediately apparent* to the officer. *Id.* at 379, 124 L. Ed. 2d at 348. The Court emphasized that "the officer determined that the lump was contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'—a pocket which the officer already knew contained no weapon." *Id.* at 378, 124 L. Ed. 2d at 347 (quoting *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992)). After feeling the lump in Dickerson's pocket, the officer reached into it and pulled out a bag of cocaine. The Court found the officer's manipulation of the object in *Dickerson* unlawful, stating the police officer "overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*. *Id.* (quoting *Terry*, 392 U.S. at 26, 20 L. Ed. 2d at 908). Thus, if after feeling the object, the officer lacks probable cause to believe that the object is contraband without conducting some further search, the "immediately apparent" requirement has not been met and the plain feel doctrine cannot justify the seizure of that object. *Id.* at 375, 124 L. Ed. 2d at 345.

There is a split of authority among the courts that have reviewed the plain feel doctrine where contraband is found on the person of the defendant in a container whose shape itself does not reveal its identity as contraband. Courts upholding such seizures generally

look to factors other than an officer's bare tactile perception to determine whether the incriminating nature of the object was "immediately apparent," and thus, the officer had probable cause to seize it. *See, e.g., State v. Stevens*, 672 So. 2d 986, 987 (La. App. 1996) (seizure of matchbox upheld—officer knew, from common sense and experience, that certain areas are known for drug activity and drug sellers often place crack cocaine in matchboxes); *People v. Champion*, 549 N.W.2d 849, 858-59 (Mich. 1996), *cert. denied*, 519 U.S. 1081, 136 L. Ed. 2d 685 (1997) (seizure of pill bottle upheld under plain feel doctrine—officer with 20 years' experience in narcotics work searched defendant known to him; defendant was stopped in high-crime area; and officer discovered pill bottle in defendant's groin area); *State v. Rushing*, 935 S.W.2d 30 (Mo. 1996), *cert. denied*, 520 U.S. 1220, 137 L. Ed. 2d 837 (1997) (seizure of cylindrical medicine bottle from defendant's pocket upheld under plain feel doctrine—suspicious transaction had been observed, neighborhood had reputation as drug-trafficking area, and officer had knowledge about, and experience with, commonly used drug containers).

Several other courts, on the other hand, have determined that containers themselves cannot be "immediately apparent" as contraband, and thus, no probable cause exists to seize them. *See, e.g., United States v. Gibson*, 19 F.3d 1449 (D.C. Cir. 1994) (despite suspicious circumstances, seizure of "flat hard object" containing cocaine held improper—officer related nothing from his experience to correlate objects of this sort with criminal activity); *United States v. Mitchell*, 832 F. Supp. 1073 (N.D. Miss. 1993) (seizure of six small plastic bags of crack cocaine contained in a white athletic sock in a brown paper sack in the pocket of defendant's leather jacket unlawful—an "immediately apparent" determination of contraband made as a result of a single pass of the officer's hand over defendant's leather jacket not possible despite suspicious circumstances and that both officers were seasoned veterans in narcotics); *Warren v. State*, No. 1980792, 2000 WL 1273939, at *7 (Ala. Crim. App. Sept. 8, 2000) (seizure of a Tic Tac box from defendant's front pants pocket held improper despite tip from informant that defendant and a group of men were buying and selling drugs); *State v. Parker*, 622 So. 2d 791 (La. App.) (seizure of matchbox from defendant's pocket containing drugs unlawful since identity of contraband was not readily identifiable, despite high crime area, informant tip of drug activity in the location of defendant and fidgety defendant), *cert. denied*, 627 So. 2d 660 (La. 1993); *Campbell v. State*, 864 S.W.2d 223 (Tex. Crim. App.

1993) (seizure of film canister containing crack cocaine from defendant's front pocket unlawful, despite "impaired" defendant).

This Court has applied the plain feel doctrine to an officer's seizure of an object in this context on several occasions. However, these cases do not indicate that our courts have adopted any set rule for applying the plain feel doctrine in the situation where contraband is found in a container whose shape itself does not reveal its identity as contraband. *But cf. State v. Wilson*, 112 N.C. App. 777, 437 S.E.2d 387 (1993) (seizure of lumps in package in breast pocket upheld because the nature of the contraband was apparent from the officer's tactile perception). Incidentally, our authority does not fall neatly on any one side of the split of authority previously discussed.

First, in *State v. Beveridge*, 112 N.C. App. 688, 436 S.E.2d 912 (1993), *aff'd per curiam*, 336 N.C. 601, 444 S.E.2d 223 (1994), a panel of this Court invalidated an officer's seizure of a cylindrical shaped plastic baggie from defendant's pocket under *Dickerson*. At the time of the seizure, it was after midnight, the officer was aware that previous arrests had been made for controlled substances violations in the area and the defendant appeared to be under the influence of controlled substances. *Id.* at 689, 691, 436 S.E.2d at 912-13. While conducting a pat down of defendant, the officer felt a cylindrical bulge in defendant's pocket which, based on the officer's experience and training and the circumstances, he believed to contain controlled substances. *Id.* at 690, 436 S.E.2d at 913. The officer asked the defendant what was in his pocket. *Id.* Defendant started laughing and responded "money," reached into his pocket and pulled out some money, but appeared to conceal something else in his hand. *Id.* The officer asked defendant what was in his hand. *Id.* Defendant opened his hand and the officer observed a plastic baggie containing a white powdery substance later determined to be cocaine. *Id.* The officer seized the baggie. *Id.*

The *Beveridge* Court determined the officer did not have probable cause to seize the object, stating:

> [The officer's] testimony indicates that he did not know that the bag contained contraband until he asked the defendant to turn out his pockets and show him the contents in his hands. He knew only that there was a cylindrical bulge in the pocket of the defendant's jeans, and that the bulge felt like a plastic baggie. . . . While the pat-down revealed that the defendant had a plastic baggie in his pocket, the officer's testimony at *voir dire* indicated

> that it was not *immediately apparent* to him that the baggie held contraband. Without some other exigency to justify the continued warrantless search of the defendant, he was no longer authorized under *Terry* and its progeny to invade the defendant's privacy.

Id. at 696, 436 S.E.2d at 916. Thus, in invalidating the search under the plain view doctrine, it appears the Court in *Beveridge* did not consider the several suspicious factors surrounding the officer's seizure of the baggie. Rather, the Court effectively held that the container itself (i.e., the cylindrical bulge which felt like a plastic baggie) was not "immediately apparent" as contraband pursuant to the officer's tactile perception of the object. *Id.*

Subsequently in *In re Whitley*, 122 N.C. App. 290, 468 S.E.2d 610, *disc. review denied*, 344 N.C. 437, 476 S.E.2d 132 (1996), this Court upheld an officer's seizure of a plastic bag of cocaine from respondent's person. While conducting a lawful pat down of respondent's lower body on the outside of his pants, an item which was concealed inside respondent's pants fell into the officer's hand. *Id.* at 291, 468 S.E.2d at 611. When the officer felt the item fall, he reached into the leg of respondent's pants and seized it, discovering a plastic bag with a white powdery substance. *Id.*

In *Whitley*, there was no evidence as to the officer's tactile perception of the object when it fell into his hand. Thus, the Court did not even consider whether the baggie itself was "immediately apparent" as contraband pursuant to the officer's tactile perception, as did the Court in *Beveridge*. Instead, the *Whitley* Court upheld the search based on the officer's personal experience as a law enforcement officer, concluding that this experience provided the officer probable cause to believe the object was some type of illegal substance. *Id.* at 293, 468 S.E.2d at 612. Absent any additional evidence indicating the officer impermissibly manipulated the object, the *Whitley* Court upheld the seizure.

This Court again addressed the issue in *State v. Benjamin*, 124 N.C. App. 734, 478 S.E.2d 651 (1996). While conducting a lawful *Terry* search, the officer in *Benjamin* felt two hard, plastic containers in defendant's pocket. *Id.* at 736, 478 S.E.2d at 652. The officer asked defendant, "What is that?" Defendant responded that it was "crack." *Id.* As a result, the officer seized the containers. *Id.* The Court upheld the officer's seizure of the vials of crack cocaine. *Id.* at 741, 478 S.E.2d at 655.

The validity of the seizure in *Benjamin*, however, hinged on the fact that the defendant stated to the officer that the containers contained crack before the officer seized them. *Id.* Although the Court mentioned other related factors in its application of the plain feel doctrine, such as the officer's experience, narcotics training and the size, shape and mass of the object, it was the defendant's *statement* which supplied the probable cause to seize the objects. *Id.* Significantly, the *Benjamin* Court noted, "Had [the officer] seized the items after defendant had made no response to the officer's question, or defendant had answered that the object contained something other than contraband, our analysis would necessarily be far different." *Id.* Whether the Court would have accorded weight to the attendant circumstances related to the officers' experience is not made clear. Accordingly, we find the analysis in *Benjamin* inapposite here.

After considering the various cases addressing this issue, we conclude that the better-reasoned view is to consider the totality of the circumstances in determining whether the incriminating nature of the object was immediately apparent and thus, probable cause existed to seize it. We acknowledge the baseline principle that legality of the seizure in this case ultimately hinges on whether Officer Stikeleather had probable cause to believe the cigar holder contained contraband before he seized it. When the *facts and circumstances within the officer's knowledge* are sufficient to warrant a person of reasonable caution in the belief that the item may be contraband, probable cause exists. *Texas v. Brown*, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 514 (1983). It is well settled that the *probable* cause determination does not require hard and fast certainty by an officer, but involves more of a common-sense determination. *Id.* Here, that involves considering the evidence as understood by those versed in the field of law enforcement under the circumstances then existing.

Accordingly, we consider the numerous facts and circumstances surrounding the officer's seizure of the cigar holder in determining whether seizure of the cigar holder was lawful. Here, the hour was late and defendant was stopped in a "high crime" area. (Tr. at 6.) The officer had previously arrested the defendant for possession of controlled substances and knew defendant was on probation for such an arrest at the time of the stop. The officer smelled burned cigar in defendant's vehicle and on defendant, and was aware that burning cigars were commonly used to mask the smell of illegal substances. Defendant had previously stated he did not smoke cigars. His eyes

were red and glassy, and his behavior suggested possible usage of a controlled substance. Furthermore, the officer's experience made him aware that cigar holders were commonly used to store controlled substances. Considering these facts and circumstances, Officer Stikeleather had sufficient information to warrant a person of reasonable caution in the belief that the item he detected contained contraband. Absent any evidence indicating impermissible manipulation of the object by the officer, we conclude seizure of the cigar holder in this case was lawful.

[4] In his last assignment of error, defendant contends the officer did not have authority to make an arrest. Since we have concluded all other aspects of the stop, search and resulting seizure were valid, we also conclude that, based on the fruits of the valid pat down search, the officers had probable cause to arrest the defendant.

Our analysis makes it unnecessary to address defendant's remaining argument. The trial court properly denied defendant's motion to suppress.

Affirmed.

Judges WALKER and HUNTER concur.

VIRGEL PETTY AND WIFE, MARTHA P. PETTY, PLAINTIFFS v. J.D. OWEN D/B/A OWEN CONSTRUCTION CO., DEFENDANT

No. COA99-1139

(Filed 7 November 2000)

1. Construction Claims— residential construction contract—modular home—no general contractor license—bond requirements met

A defendant who met the $5,000 surety bond requirements under N.C.G.S. § 143-139.1 was not required to be a licensed general contractor under N.C.G.S. § 87-1 in order to enter into a residential construction contract with plaintiffs for the erection of a modular home, because: (1) N.C.G.S. § 87-1 and N.C.G.S. § 143-139.1 read together evidence an intent to exempt a general contractor who erects modular buildings from having a license if

the surety requirement is met; (2) the title of N.C.G.S. § 143-139.1 evidences a legislative intent to exempt general contractors from the licensing requirement so long as they meet the surety bond requirement; (3) the North Carolina Department of Insurance, charged with general supervision over the administration and enforcement of the building code, has determined that general contractors who erect modular buildings are exempt from the licensing requirement if they meet the bond requirements; (4) the legislature did not intend that everyone who engages in the erection of modular homes be licensed as a general contractor and be required to meet the bonding requirement of N.C.G.S. § 143-139.1; and (5) the two cases cited by plaintiffs in an attempt to make the contract unenforceable are inapplicable since the contractor in those cases constructed a conventional residence and not a modular home.

2. Construction Claims— modular surety bonds—exemption from obtaining general contractor's license—additional activities within scope of bond

Although plaintiffs rely on the Department of Insurance's 10 March 1998 memorandum on modular surety bonds to contend that defendant should not be exempt from the licensing requirement under N.C.G.S. § 87-1 regarding the erection of modular homes since he exceeded the $30,000 limit on additional construction activities, the additional activities including constructing a basement, attaching a garage, installing hardwood flooring, a HVAC system, and a septic tank all fall within the erection and installation of the modular home under N.C.G.S. § 143-139.1 and are thus within the scope of the surety bond posted with the county.

3. Contracts— construction of modular home—additional options—lien waiver in exchange for second note—consideration

The trial court properly granted summary judgment in favor of defendant on his claim on a second promissory note where plaintiffs contracted with defendant to construct a modular home, plaintiffs executed a second note for additional options they wanted to add that exceeded the original contract price, defendant executed a lien waiver in order to enable plaintiffs to obtain financing from their lender, and plaintiffs thereafter failed to make payments due on the note, because: (1) the agreement was supported by adequate consideration based on the fact that

plaintiffs received the lien waiver in exchange for the note, and it was irrelevant which documents were signed first; and (2) the execution of the second note and a deed of trust by plaintiffs in exchange for defendant's lien waiver was outside the scope of the existing residential construction contract and thus constituted a new agreement between the parties.

Appeal by plaintiffs from judgment entered 27 April 1999 by Judge Judson D. DeRamus and filed 29 April 1999 in Guilford County Superior Court. Heard in the Court of Appeals 16 August 2000.

Richard I. Shope for plaintiffs-appellants.

Robinson & Lawing, L.L.P., by Robert J. Lawing and H. Brent Helms, for defendant-appellee.

WALKER, Judge.

Plaintiffs entered into a residential construction contract (contract) with defendant on 11 February 1997, whereby defendant agreed to furnish labor and materials to erect a modular dwelling manufactured by Nationwide Homes, Incorporated (Nationwide), a licensed North Carolina general contractor. At the time, defendant was not a licensed general contractor in North Carolina. Under the original contract, plaintiffs were to pay defendant $183,642.00 less a down payment of $1,500. This amount included the base price of the home as well as numerous options. On 15 May 1997, plaintiffs executed a note and deed of trust in favor of defendant to cover the contract price. The note was to be paid in full by 15 July 1997, when plaintiffs were to obtain permanent financing at the completion of construction of their modular home. The contract price was later increased to $199,022.00 to allow for additional options in the home's construction. Because defendant was not a licensed general contractor, he posted a modular building set-up contractor license bond with Guilford County Planning and Development Department (County) on 3 April 1997.

Plaintiffs' home arrived from Nationwide in fully constructed sections, complete with all of the options they had selected, including the garage. For this reason, defendant's work was limited to pouring the home's foundation, assembling the sections, and overseeing the installation of the heating, air conditioning, plumbing and electrical work by sub-contractors. Defendant completed this work, and on 9 July 1997, the County issued a certificate of occupancy certifying

that the erection and construction fully complied with the North Carolina Building Code (Code) and other applicable ordinances.

As the time for closing on the loan approached, plaintiffs informed defendant that they were unable to obtain permanent financing for the entire amount owed under the contract, leaving a balance of $33,185.67 still owed to defendant. It was agreed by the parties that plaintiffs would execute a second note and deed of trust in favor of defendant for $33,185.67 and defendant would in turn execute a lien waiver.

Plaintiffs failed to make the payment due under the second note and deed of trust on 31 August 1997. After defendant filed a claim of lien and demanded payment, plaintiffs filed this action on 19 October 1998 seeking to have declared void the two notes and deeds of trust and defendant's claim of lien.

On 11 January 1999, defendant filed an answer and counterclaimed for $33,187.00 plus interest and attorney fees. Plaintiffs and defendant then filed motions for summary judgment, and on 27 April 1999, the trial court granted plaintiffs' motion for summary judgment as to their claim on the first note and deed of trust and denied plaintiffs' motion for summary judgment as to the second note and deed of trust and claim of lien. Defendant's motion for summary judgment was allowed as to the second note and deed of trust and claim of lien. Judgment was entered in defendant's favor in the amount of $44,489.26, which included interest and attorney fees.

On appeal, plaintiffs contend the trial court erred by denying their motion for summary judgment and in granting defendant's motion for summary judgment as to the second note and deed of trust and claim of lien. In support of their contention, plaintiffs argue they presented evidence that the residential construction contract was not enforceable because: (1) defendant was not a licensed general contractor as required by law; and (2) defendant signed a lien waiver after plaintiffs signed the second note and deed of trust, thereby relinquishing his right to collect under these instruments.

At the outset, we note that summary judgment is appropriate 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); *See also Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 337

S.E.2d 644 (1985), *disc. review allowed*, 315 N.C. 589, 341 S.E.2d 28 (1986).

[1] We first address whether defendant was required to be a licensed general contractor in order to enter into a residential construction contract calling for the erection of a modular home.

> It is well settled in North Carolina that a general contractor within the meaning of G.S. 87-1 who has no license may not recover for the owner's breach of the contract, or for the value of the work and services furnished or materials supplied under the contract on the theory of unjust enrichment.

Harrell v. Clarke, 72 N.C. App. 516, 517, 325 S.E.2d 33, 34 (1985), *citing Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968). However, defendant contends that because he complied with the requirement of posting a surety bond with the County, the contract is enforceable. Defendant further asserts that the legislature carved out an exception to the general contractor license requirement of N.C. Gen. Stat. § 87-1 when it adopted the following statutory language in N.C. Gen. Stat. § 143-139.1:

> The Building Code Council may also adopt rules to insure that any person that is not licensed, in accordance with G.S. 87-1, and that undertakes to erect a North Carolina labeled manufactured modular building, meets the manufacturer's installation instructions and applicable provisions of the State Building Code. Any such person, before securing a permit to erect a modular building, shall provide the code enforcement official proof that he has in force for each modular building to be erected a $5,000 surety bond insuring compliance with the regulations of the State Building Code governing installation of modular buildings.

N.C. Gen. Stat. §§ 87.1, 143-139.1 (1999); Act of July 15, 1989, Ch. 653, 1989 N.C. Sess. Laws 1810 (providing that persons who erect manufactured modular structures either have a valid contractor's license or comply with the rules of the Building Code Council).

Plaintiffs contend that while the plain language of this provision requires contractors to post a $5,000 surety bond, it does not provide an exception to the license requirement for general contractors who erect modular homes. Plaintiffs further argue that a literal interpretation of this statute merely grants the Building Code Council (Council) the authority to adopt rules for the purpose of insuring compliance with manufacturer's instructions and the Code.

Since our analysis invokes interpretation of two separate statutes, we are compelled to discern the legislative intent. *In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1978). An intent analysis is also warranted by the fact that N.C. Gen. Stat. § 143-139.1 and § 87-1 are *in pari materia* since they relate to the same subject and have a common purpose. *Taylor v. City of Lenoir*, 129 N.C. App. 174, 497 S.E.2d 715 (1998). "Such statutes should be reconciled with each other when possible, and any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent." *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 202, 214 S.E.2d 98, 104 (1975) (*citations omitted).*

Our Supreme Court has held that "[t]he will of the legislature 'must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.' " *State v. Oliver*, 343 N.C. 202, 212, 470 S.E.2d 16, 22 (1996), *citing Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967). Moreover, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Mazda Motors v. Southwestern Motors*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (citations omitted). "The courts will control the language to give effect to the legislative intent." *Variety Theatres v. Cleveland* County, 15 N.C. App. 512, 514, 190 S.E.2d 227, 228, *affirmed*, 282 N.C. 272, 192 S.E.2d 290 (1972), and *appeal dismissed*, 411 U.S. 911 (1973), *quoting Ikerd v. R. R.*, 209 N.C. 270, 183 S.E.2d 402 (1936).

In this regard, we note that at the time N.C. Gen. Stat. § 143-139.1 was amended, portions of § 87-1 were also amended under the same legislation. N.C. Gen. Stat. §§ 87-1, 143-139.1. N.C. Gen. Stat. § 87-1 was rewritten to include within its definition of a general contractor "any person, firm or corporation that is not licensed as a general contractor . . . [who] undertakes to erect a North Carolina labeled manufactured modular building meeting the North Carolina State Building Code," or one who undertakes construction costing $45,000 or more. N.C. Gen. Stat. § 87-1; Ch. 653, 1989 N.C. Sess. Laws at 1811. On the other hand, N.C. Gen. Stat. § 143-139.1 provides that an unlicensed general contractor may erect a modular building upon posting the required surety bond. N.C. Gen. Stat. §§ 87-1, 143-139.1; Ch. 653, 1989 N.C. Sess. Laws at 1810-1812. It is thus clear that these two statutes, when read together, evidence an intent to exempt a general contrac-

tor who erects modular buildings from having a license if the surety bond requirement is met.

In addition, "[w]hen the meaning of a statute is in doubt, reference may be made to the title and context of an act to determine the legislative purpose." *Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 782 (1981) (citations omitted). "However, the title does not control the text when it is clear." *Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E.2d 898 (1956). This is because "[t]he title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law, and if it passes into law the title thereof is consequently a legislative declaration of the tenor and object of the Act . . . . Consequently, when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered." *Sykes v. Clayton, Comr. of Revenue*, 274 N.C. 398, 406, 163 S.E.2d 775, 781 (1968).

The title of the subject amendment to N.C. Gen. Stat. § 143-139.1 reads: "AN ACT TO PROVIDE THAT PERSONS WHO ERECT MANUFACTURED MODULAR STRUCTURES EITHER HAVE A VALID CONTRACTORS' LICENSE OR COMPLY WITH RULES OF THE BUILDING CODE COUNCIL." Ch. 653, 1989 N.C. Sess. Laws at 1810-1811. Thus, the title also evidences a legislative intent to exempt general contractors from the licensing requirement so long as they meet the surety bond requirement.

Moreover, "[a]n administrative interpretation of a statute, acquiesced in over a long period of time, is properly considered in the construction of the statute by the courts." *Duggins v. Board of Examiners*, 25 N.C. App. 131, 137, 212 S.E.2d 657, 662, *cert. allowed*, 287 N.C. 258, 214 S.E.2d 430 (1975), and *affirmed*, 294 N.C. 120, 240 S.E.2d 406 (1978). "But an administrative interpretation can never be considered when in direct conflict with the intent and purpose of the act, or when in conflict with the interpretation of the courts." *Duke Power Co. v. Clayton, Comr. of Revenue*, 274 N.C. 505, 164 S.E.2d 289 (1968).

The North Carolina Department of Insurance (Department of Insurance) is charged with general supervision over the administration and enforcement of the Code. The Department of Insurance has determined, as evidenced in memorandums dated 16 March 1990 and 10 March 1998, that general contractors who erect modular buildings are exempt from the licensing requirement if they meet the bond

requirements. This interpretation by the Department of Insurance is also in accord with the Code, which now provides:

> In accordance with General Statutes G.S. 87-1 and G.S. 143-139.1 any person, firm or corporation that undertakes to erect a modular building must have either a valid North Carolina General Contractors License or provide a $5,000 surety bond for each modular building to be erected.

VIII N.C. State Bldg. Code § 206.4 (1994). Under the authority granted by the legislature, the Council adopted the Code for the purpose of ensuring safe buildings by regulating their construction. N.C. Gen. Stat. § 143-138 (1999); *In re Appeal of Medical Center*, 91 N.C. App. 107, 370 S.E.2d 597 (1988); *State v. Walker*, 265 N.C. 482, 144 S.E.2d 419 (1965).

Furthermore, we are convinced the legislature did not intend that everyone who engages in the erection of modular homes be licensed as a general contractor and be required to meet the bonding requirement of N.C. Gen. Stat. § 143-139.1.

Plaintiffs further contend that under the rule of *Brady v. Fulghum*, 309 N.C. 580, 308 S.E.2d 327 (1983), *superseded on other grounds as stated in Hall v. Simmons*, 329 N.C. 779, 407 S.E.2d 816 (1991), and *Harrell*, 72 N.C. App. 516, 325 S.E.2d 33, the contract between the parties is unenforceable. However, our review of these cases reveals that they are not applicable to the issue in this case. In *Brady*, our Supreme Court held that "[g]enerally, contracts entered into by unlicensed construction contractors, in violation of a statute passed for the protection of the public, are unenforceable by the contractor." *Brady*, 309 N.C. at 583, 308 S.E.2d at 330 (citation omitted). However, the present case is distinguishable because the contractor constructed a conventional residence and not a modular home. *Harrell* is likewise distinguishable for the same reason. *Harrell*, 72 N.C. App. 516, 326 S.E.2d 33.

In sum, based on our interpretations of N.C. Gen. Stat. §§ 87-1 and 143-139.1, the public will be protected since modular buildings must be constructed according to the Code. For the reasons set forth above, we hold that a person or entity who undertakes to erect a modular home need not be licensed if he meets the surety bond requirements.

[2] Plaintiffs also argue that if N.C. Gen. Stat. § 143-139.1 is found by this Court to be an exception to the licensing requirement regarding

the erection of modular homes, it does not apply in the instant case. In so doing, plaintiffs rely on the following statements made by the Department of Insurance while addressing modular surety bonds in a memorandum dated 10 March 1998:

> N.C.G.S. § 143-139.1 only applies to the set-up and installation of the modular unit itself. The only permissible building activity, other than the construction of the foundation for the modular unit, is the setting and field connections of the labeled manufactured modular unit. N.C.G.S. § 143-139.1 does not apply to additional activities . . . . If the cost of these additional construction activities meets or exceeds the thirty thousand dollar ($30,000) limit established by N.C.G.S. § 87-1, then a general contractor's license will be required. In any case, these activities are not included in the scope of the modular surety bond.

Plaintiffs therefore contend that defendant exceeded this $30,000 limit because of the additional activities such as constructing a basement, attaching a garage, installing hardwood flooring, a HVAC system, and a septic system. While the record indicates that plaintiffs' modular home arrived from Nationwide in fully constructed sections and complete with all of the options that plaintiffs had ordered, the record is unclear as to the extent of defendant's activities in these areas. However, even assuming the above activities were the defendant's responsibility, we conclude that these activities fall within the erection and installation of the modular home and are thus within the scope of the surety bond posted with the County.

[3] We last address whether summary judgment was proper as to the lien waiver. As defendant points out, this issue is similar to that in *Construction Co. v. Coan*, 30 N.C. App. 731, 228 S.E.2d 497, *disc. review denied*, 291 N.C. 323, 230 S.E.2d 676 (1976) where defendants contracted with plaintiff to construct a motel. When the completion date approached, the extras that defendants wanted exceeded the original contract price. *Id.* at 732, 228 S.E.2d 498. The parties agreed upon a final amount for which defendants executed two notes. *Id.* In return and as part of the agreement, plaintiff executed a lien waiver "acknowledging payment in full and waiving any lien rights in the project[,]" in order to enable defendants to obtain financing from their lender. *Id.* After defendants failed to make payments due on the notes, plaintiff filed suit and moved for summary judgment which was granted. *Id.* This Court upheld the trial court's entry of summary judgment because the evidence was "clearly sufficient to show an

accord and satisfaction." *Id.* at 738, 228 S.E.2d 502. This Court held that the trial court correctly found that the agreement was supported by adequate consideration because "defendants received the [lien waiver] in return for the notes. By that instrument, plaintiff admitted being fully paid on the underlying obligation and also waived its rights to file and perfect mechanic's and materialmen's liens . . . . That the lien waiver constituted value to the defendants is evidenced by their admission of using [it] to obtain permanent financing." *Id.* at 739-40, 228 S.E.2d 502-03.

Plaintiffs attempt to distinguish the case at hand from *Coan* on the basis that the second note and deed of trust in this case were signed before the lien waiver and therefore were not signed in consideration of it. *Id.* However, in both cases, the parties reached an agreement whereby one party would execute a note and deed of trust, and in return, the other party would execute a lien waiver. *Id.* It is irrelevant which documents were signed first.

Plaintiffs further assert that *Coan* has no bearing on this case because the lack of a disputed amount makes accord and satisfaction inapplicable. However, this Court in *Coan* also affirmed the trial court's finding that "[t]he making and delivery of the two notes which are the subject matter of this action by defendants was outside the scope of the contract between plaintiff and defendants for the construction of the [motel], since such contract did not provide for or require the defendants to make and deliver such notes." *Id.* at 734, 228 S.E.2d 499. We agree that accord and satisfaction is not applicable because there is no dispute as to the amount plaintiffs owed to defendant. However, as in *Coan*, the execution of the second note and deed of trust by the plaintiffs in exchange for defendant's lien waiver was outside the scope of the existing residential construction contract and thus constituted a new agreement between the parties. *Id.*

For the foregoing reasons, we conclude that summary judgment was properly granted on behalf of defendant and properly denied on plaintiffs' claims.

Affirmed.

Judges LEWIS and HUNTER concur.

WILLIAM E. JACKSON, PLAINTIFF v. GEORGE F. MARSHALL, FREDERICK INVESTMENT CORPORATION, KH INVESTMENT LIMITED PARTNERSHIP, AND GLENMOOR LIMITED PARTNERSHIP, DEFENDANTS

No. COA99-1156

(Filed 7 November 2000)

1. **Partnerships— breach of fiduciary duty—derivative claim belonging to partnership**

The trial court did not err by concluding that plaintiff limited partner had no standing to bring an individual non-derivative action against the general partner of a limited partnership for an alleged breach of fiduciary duty for mismanagement arising out of the general partner's decisions regarding a loan transaction resulting in a reduced value of the limited partnership shares, because: (1) a limited partner may only sue directly in two instances where he alleges a separate and distinct peculiar and personal injury to himself not suffered by the other shareholders, or the injuries arise out of a special duty running from the alleged wrongdoer to the limited partner; (2) all limited partners are similarly affected in this case by the repayment of the loan and by the general partner's business decision to keep the property unencumbered; and (3) plaintiff has not alleged that he has an individual cause of action as a result of a special duty owed to him, and the duty of a general partner to the limited partners in a limited partnership is a duty to discharge responsibilities according to the business judgment rule.

2. **Unfair Trade Practices— partnership—alleged egregious breach of fiduciary duty—no duty owed to limited partner**

Plaintiff limited partner's claim for unfair and deceptive trade practices arising out of defendants' alleged egregious breach of fiduciary duty cannot be sustained because defendants have not breached any duty owed to plaintiff.

3. **Partnerships— breach of fiduciary duty—no damages—limited partner had no standing to sue**

The trial court's conclusion that plaintiff limited partner is not entitled to damages is affirmed because plaintiff had no standing to sue the general partner of a limited partnership individually for an alleged breach of fiduciary duty.

4. Partnerships— rescission—failure to join necessary party—restitution precluded by parties' change in position

The trial court did not err by dismissing plaintiff limited partner's claim for rescission of the partnerships based on plaintiff's failure to join the other limited partner who was a necessary party, because: (1) restitution is precluded since the parties changed their position in reliance on these partnerships; and (2) the alleged dismissal of the claim need not be addressed since the trial court received evidence on the issue and determined on the merits that rescission was inappropriate.

Judge HORTON concurring in the result.

Appeal by plaintiff from judgment entered 29 December 1998 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 21 August 2000.

Nigle B. Barrow, Jr. and Alice E. Mazarick, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Wade M. Smith, Randall M. Roden and Daniel W. Clark, for defendant-appellees.

EAGLES, Chief Judge.

Plaintiff William E. Jackson (hereinafter "plaintiff") appeals from judgment entered after a bench trial, concluding that defendants had not breached any duties owed to the plaintiff.

The trial court's findings of fact tend to show the following. Plaintiff and defendant Marshall entered into several limited partnerships. Plaintiff sought defendant Marshall's investment in a limited partnership venture to acquire and re-develop the Kiddshill Plaza Shopping Center (hereinafter "KHP"). In order to obtain Marshall's investment, plaintiff offered to structure Marshall's investment so that before any partnership earnings would be distributed, Marshall's investment would be repaid with a 15% return per year (hereinafter "15% priority return"). This arrangement for repayment of defendant Marshall's investment was used in the Kiddshill Investment Limited Partnership (hereinafter "KHI") agreement as well as the KHP agreement. The agreements provided that the remaining profits would be divided 60% to defendant Marshall, 40% to plaintiff, after the payment of the 15% priority return.

The trial court found as a fact that neither plaintiff nor defendant Marshall were pleased with the format of KHP's partnership agreement. When forming KHI, defendant Marshall and plaintiff engaged a law firm, with which plaintiff had an ongoing relationship, to prepare the partnership agreement. Neither party reviewed the agreement until a few hours before they were to sign it, although both parties signed the agreement that day. Plaintiff testified that prior to signing the agreement, he read and understood the agreement. Plaintiff also testified he noticed the four month buy-sell provision in the agreement. KHI's general partner is Frederick Investment Corporation (hereinafter "FIC") whose sole shareholder and president is defendant Marshall. KHI's limited partners are defendant Marshall, plaintiff, and John Englert—who is not a party to this litigation. After KHI was formed, plaintiff acted in conformity with the agreement, sought to benefit from the agreement's buy-sell provision, and in March of 1995, executed an amendment to the agreement, thereby ratifying the terms of the KHI agreement. *Housing Inc. v. Weaver*, 37 N.C. App. 284, 300, 246 S.E.2d 219, 228 (1978).

The third partnership in dispute here is the Glenmoor Limited Partnership (hereinafter "Glenmoor"). Glenmoor's managing partner is FIC, and its limited partner is KHI. At the same time the parties signed the KHI partnership agreement and purchased property for KHI, plaintiff suggested that the parties purchase the Glenmoor property. After the Glenmoor partnership was formed, plaintiff assigned his contract rights in the Glenmoor property to KHI, the limited partner. In order to finance the purchase of the Glenmoor property, Glenmoor borrowed from General Credit Limited Partnership, a partnership whose general partner is FIC and its limited partner is defendant Marshall. The trial court made the following findings of fact with regard to this loan.

> 38. In addition, Jackson was informed of the terms of the proposed General Credit loan in advance and was offered the opportunity to arrange more advantageous financing. Jackson objected to the loan origination fee and it was reduced from ten percent to the two percent figure Jackson agreed was reasonable. Jackson's other objection was to the length of the term of the loan, but the loan was paid off without difficulty well in advance of the maturity date and there was no actual or potential harm to the partnership from the term of the loan. The loan was essential to enable Glenmoor to purchase the property. Under the circumstances, the loan did not constitute a breach of fiduciary duty and

Jackson is not entitled to any relief as a result of the loan or its terms.

Supplemental 53. Jackson also objected to a loan made by General Credit to Glenmoor to facilitate the purchase of the Glenmoor property. At the time that the decision to make the loan was made, Glenmoor was three weeks from the closing date and needed to borrow more than $2 million. The only asset Glenmoor had to offer as security for the loan was undeveloped land. Marshall "considered the purchase of that property within a short period of time to be a risky purchase." John Englert testified that "it is very difficult, literally impossible to finance vacant land. Institutions rarely ever do it." Joseph Kalkhurst, in response to a question about whether a commercial lender would have made the loan on the Glenmoor property stated, "Not on that property, standing on its own." Marshall similarly testified that "it would have been impossible to obtain a non-recourse loan from any source on raw land." Mr. Kalkhurst also remarked during his testimony that "banks certainly were not interested in lending money on raw land at the time." Richard Barta testified that when commercial lending is not available, the reasonable terms from a private lender are "whatever the private lending market will bear, and, you know, that's situational." When Marshall as an officer of the General Partner, made the decision to obtain a loan from General Credit, he "made that disclosure to the limited partners prominently identifying that the General Credit—that General Credit transaction was not an arms length transaction."

For the Glenmoor property to be profitable, the property needed to be rezoned and leased. This effort required extensive participation by defendant Marshall, Englert and plaintiff. The General Credit loan was satisfied on 18 April 1996 by the capital contributions of Englert, FIC and defendant Marshall. Currently the Glenmoor property is without encumbrances and is earning $400,000 a year in rental income.

The trial court ruled that the plaintiff was not entitled to recission of the partnerships and as a limited partner, was not entitled to participate in the management and control of the partnerships. Further, the trial court ruled that the complaint raised no claim of duress, that the defendants had not engaged in any unfair and deceptive trade practices and that all of plaintiff's alleged breach of fiduciary duty claims should have been brought as a derivative action. Plaintiff appeals.

I. Derivative Claims

[1] We first consider whether the trial court properly concluded as a matter of law that the General Partner's fiduciary duty is owed to the partnership and that any claims for breach of fiduciary duty are derivative, belonging to the partnership. Our Supreme Court in *Energy Investors Fund, L.P. v. Metric Constructors Inc.*, 351 N.C. 331, 525 S.E.2d 441 (2000), applied established principles of corporate law to limited partnerships. *Id.* The court in *Energy* found:

> Thus, limited partners are somewhat analogous to shareholders . . . . Information rights and fiduciary duties owed to limited partners are similar to those owed to shareholders. Limited partners, like shareholders, may bring derivative suits on behalf of the business entity against errant management. Limited partner interests are generally treated like corporate shares in the securities laws.

Id. at 334-35, 525 S.E.2d at 443 (quoting III Alan R. Bromberg & Larry E. Libstein, *Bromberg and Libstein on Partnership* § 11.01(c) (Supp. 1999-2)); *see also, Moore v. Simon Enters.*, 919 F.Supp. 1007, 1012 (N.D. Tex. 1995). In North Carolina, it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders. *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 344, 67 S.E.2d 350, 353 (1951). Our Supreme Court has also held that the status of limited partners in a partnership is the same as the status that exists between corporate shareholders and the corporation. *Energy*, 351 N.C. at 335, 525 S.E.2d at 445. In *Litman v. Prudential-Bache Properties, Inc.*, 611 A.2d 12 (Del. Ch. 1992), the Chancery Court of Delaware faced the exact question that is before us today. *Id.* at 13. The limited partners sued the general partners for mismanagement resulting in a reduced value of their limited partnership shares. The Chancery Court dismissed the direct action because the limited partners' claim was derivative. The Chancery Court held that a limited partner may only sue directly in two situations: (1) where a plaintiff alleges a "separate and distinct" "peculiar and personal" injury to himself not suffered by the other shareholders, or (2) the injuries arise out of a special duty running from the alleged wrongdoer to the plaintiff, e.g., a right to vote. *Litman*, 611 A.2d at 15; *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 488 S.E.2d 215 (1997). Unless plaintiff, as a limited partner, alleged facts sufficient to fit into one of these two exceptions, his claims are derivative and he has no standing to bring this action as an individual, non-derivative claim.

A. "Separate and Distinct" Exception.

In *Energy*, the Supreme Court held that "[a]n injury is peculiar or personal to the shareholder if 'a legal basis exists to support plaintiffs' allegations of an individual loss, separate and distinct from any damage suffered by the corporation.' " *Energy*, 351 N.C. at 335, 525 S.E.2d at 444; *Litman*, 611 A.2d at 16. Here, the purported injury of which plaintiff complains also affects John Englert and any other future limited partners. Plaintiff asserts that the loan from General Credit to Glenmoor at an interest rate of 15% with an origination fee of 2% affects plaintiff adversely. However, the question is not whether the plaintiff is in a less favorable position than the general partner, but whether the plaintiff is in a less favorable position when compared to all other limited partners. *Energy*, 351 N.C. at 336, 525 S.E.2d at 444; *Litman*, 611 A.2d at 16. All limited partners, including John Englert, are similarly affected by the re-payment of this loan at 15%. All limited partners are similarly affected by the general partner's business decision to keep the property unencumbered; e.g., not to refinance, even at a lower rate. Thus, any complaint about this loan transaction is properly actionable only in a derivative action.

B. "Special Duty" Exception.

Our Supreme Court has also affirmed the grant of a Rule 12(b)(6) motion in favor of defendants on claims plaintiffs made as individual shareholders under the "special duty" exception to the general rule. *Energy*, 351 N.C. at 337, 525 S.E.2d at 445; *see Litman*, 611 A.2d at 16. "This court has previously held that the existence of a special duty could be established by facts showing that defendants owed a duty to plaintiff that was personal to plaintiffs as shareholders . . . ." *Energy*, 351 N.C. at 336, 525 S.E.2d at 445. The *Litman* plaintiffs failed to allege sufficient facts from which the fact finder could conclude that defendants owed to plaintiff-shareholders a duty that was personal and distinct from the duty defendants owed the corporation. *Litman*, 611 A.2d at 16. All of plaintiff's allegations indicated that any duty defendants owed to plaintiff was purely derivative of defendants' duty to properly manage the corporation. *Energy*, 331 N.C. at 335, 525 S.E.2d at 444; s*ee Litman*, 611 A.2d at 16.

Here, plaintiff has not alleged that he has an individual cause of action as a result of a "special duty" owed to him. *Id.* We hold that the duties owed by a director of a corporation to the corporation's shareholders are likewise similar to the duties a general partner of a limited liability partnership owes to its limited partners, since a limited

partner in a limited partnership "is analogous to a shareholder." The Business Corporations Act requires that a director discharge his duties "(1) [i]n good faith; (2) [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) [i]n a manner he reasonably believes to be in the best interests of the corporation." N.C. Gen. Stat. § 55-8-30(a) (1990) (amended 1993). *State v. ILA Corp.*, 132 N.C. App. 587, 601-02, 513 S.E.2d 812, 821 (1999). N.C. Gen. Stat. § 55-8-30(d) states that "a director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section." N.C. Gen. Stat. § 55-8-30(d) (1990) (amended 1993); *ILA Corp.*, 132 N.C. App. at 601, 513 S.E.2d at 821. The General Assembly in its official comment to this section of the General Statutes stated that certain phrases in the statute embody "the long traditions of the common law." *Id.* Accordingly this act has been interpreted as codifying the common law theory of the business judgment rule. *Id.* We hold that in a limited partnership the duty of the general partner to the limited partners is a duty to discharge his responsibilities according to the business judgment rule. This is the duty defendants Marshall and FIC owe here to the partnerships and their limited partners.

The trial court in finding of fact number 33, found that the general partner did not act in any way that harmed the interest of the partnerships. Plaintiff's allegations of "shortcomings" of the general partner were broadside, conclusory and "non-specific" in nature. The trial court found these allegations all related to actions and matters within the business judgment and scope of the authority of the general partner. *ILA Corp.*, 132 N.C. App. at 601, 513 S.E.2d at 821. The trial court found as a fact that the few claims which may have alleged a breach of fiduciary obligation were not supported by plaintiff's own testimony. The trial court found as a fact that:

> 30. The serious claims of fraud, attempts by Marshall to squeeze Jackson out, obtain partnership assets for himself or otherwise wrongfully deprive Jackson of his interest in the partnerships are not supported by any credible evidence. Even Jackson's own testimony does not support such claims, although he frequently used harsh terms to describe his belief as to the purpose of the conduct of Marshall and the General Partner. The actions themselves, viewed in the context of all the evidence, do not support Jackson's extreme conclusions.

(Emphasis added.)

We hold that plaintiff failed to allege an injury that is "separate and distinct" to him, or that arose from a breach of a "special duty" owed to plaintiff by defendants. On this record, we hold that plaintiff, as a limited partner, had no standing to bring an individual, non-derivative action against the general partner of the limited partnership.

II. Miscellaneous

[2],[3],[4] Since we hold that the plaintiff has not alleged an individual, non-derivative cause of action, and that all of his claims were brought individually, we find it unnecessary to address the remaining issues at length. We note that plaintiff-appellant did not assign error to any of the trial court's findings of fact. The basis of plaintiff's claim for unfair and deceptive trade practices was the alleged egregious nature of the defendants' alleged breaches of fiduciary duty. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999). Since defendants have not breached any duty owed to the plaintiff, a claim for unfair and deceptive trade practices in this case cannot be sustained. The plaintiff objected to the trial court's conclusion that plaintiff failed to prove he was entitled to damages. Because we hold plaintiff had no standing to sue individually, we affirm the trial judge's conclusion as to damages. Plaintiff also assigned error to the trial court's dismissal of plaintiff's claim for recission because plaintiff failed to join a necessary party, John Englert. The trial court found in finding of fact number 11 that the parties changed their position in reliance on these partnerships and as a result of this change of position, restitution is precluded. Since the trial court received evidence on the issue of recission and determined on the merits that recission was inappropriate, we need not address the alleged dismissal of the claim.

For the reasons stated, the judgment of the trial court is

Affirmed.

Judge MARTIN concurs.

Judge HORTON concurs in the result with separate opinion.

Judge HORTON concurring in the result.

While I do not join in that portion of the majority opinion holding that "plaintiff, as a limited partner, had no standing to bring an individual, non-derivative action against the general partner of the limited partnership," I concur in the result reached by the majority.

This case is not before us on a motion to dismiss plaintiff's claims pursuant to Rule 12(b)(6) for failure to state a claim, but is an appeal from a lengthy bench trial in which numerous exhibits were entered. Although the able trial court states in its judgment that the plaintiff's claims based on breach of fiduciary duty should have been brought as derivative actions, the trial court heard voluminous testimony and found as a fact that plaintiff's "serious claims of fraud, attempts by Marshall to squeeze Jackson out, obtain partnership assets for himself or otherwise wrongfully deprive Jackson of his interest in the partnerships are not supported by any credible evidence," including plaintiff's own testimony. Thus, it appears that the trial court permitted plaintiff to offer evidence on his direct, non-derivative claims based on alleged breaches of fiduciary duty, but found after weighing all the evidence that plaintiff had not offered any believable evidence which supported his claims.

On this record, I do not believe we need to reach the issue of plaintiff's right to maintain his action for breach of fiduciary duty as a direct, non-derivative action, nor do we need to discuss the sufficiency of the allegations of plaintiff's complaint. I concur in the result reached by the majority as to plaintiff's claims based on an alleged breach of fiduciary duty by defendants, and concur fully as to plaintiff's other claims for relief.

STATE OF NORTH CAROLINA v. MARAITHEON E. PINCHBACK

No. COA99-1160

(Filed 7 November 2000)

1. Identification of Defendant— armed robbery—finding of fact—insufficient opportunity to view perpetrator

The trial court's finding of fact in a robbery with a firearm case that the victim had an ample and sufficient opportunity to view the passenger of another vehicle who took the victim's wallet in an ABC parking lot at gunpoint is not supported by competent evidence even though the trial court based its finding on evidence that the street lights were on, the victim was in the passenger's presence for approximately 30 minutes, and the passenger did not wear any masks or other concealing clothing, because: (1) the only evidence regarding the victim's ability to

view the passenger is the victim's testimony that the passenger was in sight for approximately five minutes and the victim was unable to view the passenger during this time because it was dark; and (2) the victim also testified the passenger forced him to lie face down on the ground and the victim never made eye-to-eye contact with him.

2. Identification of Defendant— armed robbery—finding of fact—victim's degree of attention to perpetrator

The trial court's finding of fact in a robbery with a firearm case that the victim's degree of attention to the identity of the passenger of another vehicle who took the victim's wallet in an ABC parking lot at gunpoint was strong and focused is not supported by competent evidence, because: (1) the victim's description of the commission of the crime was that he was able to focus on the appearance of the driver and not the passenger; and (2) the victim testified that the passenger forced him to lay face down on the ground and that the victim never made eye-to-eye contact with the passenger.

3. Identification of Defendant— armed robbery—finding of fact—reliability of victim's description to police

The trial court's finding of fact in a robbery with a firearm case that the victim's description given to the police was reliable is not supported by competent evidence because although defendant does fit the victim's description of a black male with short hair who was wearing black clothing, the substantial discrepancy in the victim's description of the passenger's height and weight render the victim's identification unreliable.

4. Identification of Defendant— armed robbery—finding of fact—victim's level of certainty of identification

The trial court's finding of fact in a robbery with a firearm case that the victim stated at the time of the identification that he could not make a positive identification of the passenger to show the victim's level of certainty at the time of the identification is supported by the victim's testimony and is therefore binding.

5. Identification of Defendant— armed robbery—finding of fact—time between commission of crime and identification

The trial court's finding of fact in a robbery with a firearm case that the identification took place within one hour to show the time that elapsed between the commission of the crime and

the identification is supported by the officer's testimony and is therefore binding.

6. Identification of Defendant— pretrial—suggestive nature—substantial likelihood of misidentification—error not harmless beyond a reasonable doubt

The trial court erred in a robbery with a firearm case by denying defendant's motion to suppress the victim's pretrial identification, because: (1) there is a substantial likelihood that the victim misidentified defendant when weighing the suggestiveness of the identification procedure against the facts that the victim's description of the height and weight of the passenger of another vehicle who took the victim's wallet in an ABC parking lot at gunpoint differed significantly from defendant's actual height and weight; and (2) the State failed to meet its burden under N.C.G.S. § 15A-1443(b) to demonstrate this error was harmless beyond a reasonable doubt.

Appeal by defendant from judgment dated 25 February 1999 by Judge A. Leon Stanback, Jr. in Caswell County Superior Court. Heard in the Court of Appeals 12 September 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Bruce S. Ambrose, for the State.

Theresa K. Pressley, for defendant-appellant.

GREENE, Judge.

Maraitheon E. Pinchback (Defendant) appeals a judgment dated 25 February 1999, finding him guilty of robbery with a firearm.

The evidence shows that on 9 May 1998, Christopher Penn (Penn) was sitting in his vehicle by himself at an ABC store in Yanceyville, North Carolina. Penn was waiting in the parking lot for his sister and sister-in-law to return from their dates, and he was supposed to meet them in the parking lot at approximately 11:00 p.m. While Penn was sitting in his vehicle, a red Toyota Tercel pulled into the parking lot. Someone in the Tercel then blew the vehicle's horn, and Penn stepped out of his vehicle and approached the driver's side door of the Tercel. Two men were seated in the front seats of the Tercel. The man seated in the driver's side of the Tercel asked Penn whether he knew "a guy by the name of Tim." Penn responded, " 'No, I don't.' " The driver of the vehicle then stated, " 'Well, he sells gats.' " Penn responded, " 'No,

I don't. I don't even know him.' " Penn "almost started back to [his] vehicle" when the passenger of the Tercel exited the Tercel and walked toward Penn. The passenger had a gun in his hand, and he told Penn to give him his wallet and all of his money. After the passenger took Penn's wallet, the passenger walked over to Penn's vehicle and looked in the dashboard, seat, and floorboard. The passenger then told Penn to "l[ie] down on the ground face down" and, while Penn was still on the ground, the passenger returned to the Tercel and the robbers drove away in the Tercel.

Approximately ten minutes after the robbery, Penn's sister arrived at the ABC store and Penn told her that he had been robbed. Penn's sister called the Yanceyville Police Department from her cellular telephone to report the robbery. Approximately five minutes later, Steve Perkins (Perkins), a sergeant with the Yanceyville Police Department, arrived at the ABC parking lot. Penn told Perkins he had been robbed by "two black males . . . riding in a red Toyota Tercel." Penn stated that "both [robbers] had on black clothing and [had] real short almost bald hairstyle[s]." Perkins notified other police officers over the radio to "lookout" for two black males driving a "small four-door red vehicle."

Approximately thirty minutes later, Perkins received notification that a police officer in Danville, Virginia, had stopped a vehicle that fit the description given by Penn. The vehicle was stopped at a Kentucky Fried Chicken (KFC) in Danville, which is an approximately twenty-five minute drive from the ABC store. After receiving this notification, Perkins drove Penn to Danville in his patrol vehicle to identify the robbers. Perkins testified that when he and Penn arrived at the KFC, the two suspects were standing in the KFC parking lot. Perkins told Penn to remain in the patrol vehicle and to observe the two suspects, who were standing next to a red Tercel. The Tercel was parked approximately twenty to twenty-five feet from the patrol vehicle and was surrounded by several law enforcement vehicles. Perkins left the patrol vehicle to speak to a Danville police officer. Perkins testified that when he returned to the patrol vehicle Penn told him "he was quite certain that that was the two that just robbed him at the ABC [s]tore." Penn, however, testified that he told Perkins, " 'I can give a proper identification on the driver but not the passenger.' " Penn did not give a positive identification of Defendant as the passenger at trial.

Defendant made a motion at trial to suppress Perkin's testimony that Penn identified Defendant at the KFC as the passenger in the

robbery. The trial court held a *voir dire* on this motion during which Penn testified regarding his identification of Defendant at the KFC. Penn testified that when Perkins arrived at the ABC store, Penn told Perkins: " 'I can't make a positive identification of the passenger but I can give . . . a positive identification of the driver.' " Penn also told Perkins that the passenger was wearing black clothing and had short hair or was bald. Penn stated the passenger was in his view for approximately five minutes while looking in Penn's car; however, it was dark in the ABC parking lot. Upon their arrival at the KFC, Penn told Perkins that the two men standing next to the Tercel were the men who had robbed him. Penn then told Perkins that he could identify the driver; however, he could not identify the passenger because he "never made eye-to-eye contact with him." Penn testified Defendant, a black male, did have similar hair and complexion to the passenger and also was wearing a black shirt; nevertheless, he was unable to make a positive identification of Defendant as the passenger. Penn testified that at the time of the robbery, he described the passenger as approximately 5 feet, nine inches tall, weighing approximately 160 pounds, and having a "medium" build.

Perkins testified during *voir dire* that the ABC parking lot was "pretty well lit up" at the time of the robbery. He also testified that when he arrived at the KFC with Penn within one hour of the robbery, Penn told him that he was " 'positive' " Defendant was one of the men who had robbed him. Information contained in notes Perkins made subsequent to Defendant's arrest, however, indicate Defendant was 6 feet, 1 inch tall and at the time of his arrest he weighed 230 pounds. Perkins would have characterized Defendant at the time of his arrest as having a "heavy" or "muscular" build.

Subsequent to the *voir dire* hearing, the trial court made the following findings of fact:

> The Court finds that . . . the lighting conditions at the crime scene near the ABC Store in Yanceyville when this robbery happened in the nighttime, that the street lights were on. That . . . Penn[] was in the presence of the two robbers for approximately 30 minutes. That he testified he was able to look in the face of the driver of the robber's vehicle. That he was closer—he was very close at that time to the driver. That the passenger in the automobile was the person with the firearm that got out of the car but he could not make a positive identification of that passenger with the gun other than to say that he was a black male, had a black T-shirt on and close-cut hair. He was approximately a height of

approximately 5/9 and weight was approximately 165 or so. That the degree of the attention of the victim was great. That the perpetrator's [sic] of the robbery did not wear any masks or other concealing clothing.

That after the robbery [Penn] was taken to Danville within one hour. At that time he was shown the two subjects who had been stopped in the red Toyota Tercel automobile that he identified as being the car being operated by the robbers. At that time he saw the two individuals and made an identification. . . .

. . . .

The Court also finds that the pretrial identification procedure involving a show-up did not violate any of . . . [D]efendant's rights to due process of law, and was reliable and was not the product of a substantial likelihood of any misidentification, given the totality of the circumstances surrounding the robbery and the identification of the perpetrators, the witness's opportunity to view the accused and observe the physical characteristics of the accused and the automobile was ample and sufficient to gain a reliable impression at the time of the crime. That the witness's degree of attention was strong and focused. That his description given to the police was reliable.

The trial court then made the following conclusion of law: "[T]he show-up at the [KFC] premises in Danville, Virginia was suggestive but it was not so unnecessarily or impermissibly suggestive as to render any identification inadmissible." Accordingly, the trial court denied Defendant's motion to suppress Penn's pretrial identification.

The issues are whether: (I) the trial court's findings of fact regarding Defendant's motion to suppress Penn's pretrial identification of Defendant are supported by competent evidence;[1] and (II) the trial court's findings of fact which are supported by competent evidence support its conclusion of law that Penn's identification of

1. Although there is a dispute in the evidence regarding whether Penn actually made a pretrial identification of Defendant, the trial court found as fact that Penn "made an identification" at the KFC. Because this finding is supported by Perkins' testimony that Penn identified Defendant at the KFC, we are bound by this finding of fact. *See State v. Freemen*, 313 N.C. 539, 544, 330 S.E.2d 465, 470 (1985) (trial court's findings of fact are binding on appeal when supported by competent evidence).

Defendant "was not so unnecessarily or impermissibly suggestive as to render [the] identification inadmissible."[2]

"Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). Therefore, even when the procedures used at a pretrial identification are suggestive, the pretrial identification is nevertheless admissible unless under the totality of the circumstances "there is a substantial likelihood of irreparable misidentification." *State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987). In determining whether this substantial likelihood exists, the trial court must consider the following factors:

1) The opportunity of the witness to view the criminal at the time of the crime;

2) the witness'[s] degree of attention;

3) the accuracy of the witness'[s] prior description;

4) the level of certainty demonstrated at the confrontation; and

5) the time between the crime and the confrontation.

Id. at 99-100, 357 S.E.2d at 633-34. A trial court's findings of fact regarding these factors are binding on appeal when supported by competent evidence. *Freeman*, 313 N.C. at 544, 330 S.E.2d at 470.

I

[1] In this case, the trial court made findings regarding each of the factors set forth in *Pigott*.[3] First, the trial court found that Penn's "opportunity to view the [passenger] and observe the physical char-

2. Defendant argues in his brief to this Court that his motion to suppress should have been granted because "Defendant did not voluntarily go with police to a show-up . . . [and] [t]here is no mention anywhere that Defendant was advised of his right to counsel." Defendant, however, did not raise this issue during the trial court's hearing on Defendant's motion to suppress, and the trial court did not rule on this issue in its order denying Defendant's motion to suppress. Accordingly, this issue is not properly before this Court. *See* N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make.").

3. The trial court concluded and the State concedes in its brief to this Court that the pretrial identification procedure was "suggestive." We, therefore, do not address this issue.

acteristics of the [passenger] . . . was ample and sufficient to gain a reliable impression at the time of the crime." The trial court based this finding on evidence "that the street lights were on," Penn was in the passenger's presence "for approximately 30 minutes," and the passenger "did not wear any masks or other concealing clothing." This evidence, however, does not support a finding that Penn had an opportunity to actually *view* the passenger at the time of the crime. Rather, the only evidence regarding Penn's ability to view the passenger is Penn's testimony that the passenger was in his sight for approximately five minutes, and he was unable to view the passenger during this time because it was dark. Penn also testified the passenger forced him to lie face down on the ground, and Penn "never made eye-to-eye contact with him." The trial court's finding of fact that Penn had an "ample and sufficient" opportunity to view the passenger is, therefore, not supported by competent evidence.

[2] Second, the trial court found as fact that "the witness's degree of attention [to the identity of the passenger] was strong and focused." The State argues in its brief to this Court that this finding is "supported by . . . Penn's description of the crime and of his behavior." Penn's description of the commission of the crime, however, was that he was able to focus on the appearance of the driver and not the passenger, the passenger forced Penn to lie face down on the ground, and Penn "never made eye-to-eye contact with [the passenger]." The trial court's finding of fact that "the witness's degree of attention [to the identity of the passenger] was strong and focused" is, therefore, not supported by competent evidence.

[3] Third, the trial court found that Penn's "description given to the police was reliable." The evidence shows Penn described the passenger to Perkins as 5 feet, 9 inches tall and weighing approximately 160 pounds. Perkins testified, however, that the notes he made subsequent to Defendant's arrest indicate Defendant was 6 feet, 1 inch tall and at the time of the arrest weighed 230 pounds. Although Defendant does fit Penn's description of a black male with short hair who was wearing black clothing, the substantial discrepancy in Penn's description of the passenger's height and weight render Penn's identification unreliable. *See State v. Richardson*, 328 N.C. 505, 512, 402 S.E.2d 401, 405 (1991) (identification "reliable" when witness's description accurately described defendant's clothing, bag, and approximate height and weight). The trial court's finding of fact that Penn's "description given to the police was reliable" is, therefore, not supported by competent evidence.

[4] Fourth, the trial court found Penn stated at the time of the identification that "he could not make a positive identification of th[e] passenger." This finding of fact regarding Penn's "level of certainty" at the time of the identification is supported by Penn's testimony that he was not able to make a positive identification of the passenger. This finding of fact, therefore, is binding on this Court. *See Freeman*, 313 N.C. at 544, 330 S.E.2d at 470.

[5] Finally, the trial court found the identification took place "within one hour." This finding regarding the time that elapsed between the commission of the crime and the identification is supported by Perkin's testimony that the identification took place within an hour of the crime. This finding is, therefore, binding on this Court. *See id.*

II

[6] When applying the factors from *Pigott* to determine whether there is a "substantial likelihood of irreparable misidentification," the factors must be weighed against "the corrupting effect of the suggestive procedure itself." *Pigott*, 320 N.C. at 100, 357 S.E.2d at 634.

In this case, the trial court's only findings of fact supported by competent evidence are that Penn "could not make a positive identification of th[e] passenger" and the identification took place "within one hour" of the robbery. Further, the evidence, which was not controverted, shows Penn did not have an opportunity to view the passenger at the time of the robbery, Penn's degree of attention to the identity of the passenger was minimal because Penn was unable to view the passenger, and Penn's description of the passenger was not reliable. Although Penn was able to identify the passenger as a black male with short hair who was wearing black clothing, Penn's description of the passenger's height and weight differed significantly from Defendant's actual height and weight. Weighing these factors against the suggestiveness of the identification procedure, "there is a substantial likelihood" that Penn misidentified Defendant. The trial court's denial of Defendant's motion to suppress Penn's pretrial identification, therefore, was error. Further, as the admission of Penn's pretrial identification at trial violated his right to due process under the Constitution of the United States, *see Neil v. Biggers*, 409 U.S. 188, 198, 34 L. Ed. 2d 401, 410-11 (1972) (likelihood of misidentification violates defendant's right to due process), the burden is upon the State to demonstrate this error was harmless beyond a reasonable

doubt, N.C.G.S. § 15A-1443(b) (1999). The State has not met this burden.[4] Accordingly, Defendant is entitled to a new trial.

Because the issues raised by Defendant's additional assignments of error are unlikely to recur at a new trial, we do not address them.

Reversed.

Judges EDMUNDS and SMITH concur.

SECURITY CREDIT LEASING, INC., A FLORIDA CORPORATION, PLAINTIFF v. D.J.'S OF SALISBURY, INC., A NORTH CAROLINA CORPORATION, D/B/A D.J.'S RESTAURANT, AND LOUIE MOUROUZIDIZ, DEFENDANTS

No. COA99-1150

(Filed 7 November 2000)

Judgments— foreign—enforcement—30-day waiting period

The trial court did not abuse its discretion by finding that defendants' motion for relief and notice of defenses was timely filed where defendants and plaintiff entered into a lease for security equipment at defendants' restaurant; defendants rejected the equipment as unsatisfactory; plaintiff brought an action in Florida under a forum selection clause in the lease; plaintiff obtained a default judgment on 11 August 1997; plaintiff filed its petition to enforce a foreign judgment in North Carolina on 17 February 1998; defendants filed a motion for relief and notice of defenses on 7 May 1998, alleging that Florida did not have personal jurisdiction when it entered the judgment; and the court denied plaintiff's motion to enforce the Florida judgment. Although plaintiff argued that N.C.G.S. § 1C-1704(b) gives a defendant debtor a maximum of 30 days in which to seek relief from a foreign judgment, the thirty-day limitation is a waiting period, a restriction on plaintiff-creditor rather than defendant-debtors.

Appeal by plaintiff from an order entered 9 June 1999, *nunc pro tunc* 29 March 1999, by Judge Michael E. Beale in Rowan County District Court. Heard in the Court of Appeals 16 August 2000.

4. The State does not argue in its brief to this Court that any error in allowing into evidence Penn's pretrial identification of Defendant is harmless beyond a reasonable doubt.

Adams Kleemeier Hagan Hannah & Fouts, by David A. Senter and Brooks F. Bossong, for plaintiff-appellant.

Woodson, Sayers, Lawther, Short, Parrott & Hudson, LLP, by Sean C. Walker, for defendant-appellees.

HUNTER, Judge.

Security Credit Leasing, Inc. ("plaintiff") appeals the trial court's order denying its Petition and Motion to Enforce Foreign Judgment against defendant-appellees D.J.'s of Salisbury, Inc., and Louie Mourouzidiz (collectively "defendants").

The following facts are undisputed. Plaintiff is a Florida corporation in the business of leasing security equipment. Defendant Mourouzidiz, a resident of North Carolina, is president of D.J.'s of Salisbury, Inc., a North Carolina corporation doing business as a restaurant in Salisbury, North Carolina. On 12 June 1996, Mourouzidiz was approached while at D.J.'s by an agent of the plaintiff who proposed leasing video surveillance equipment to the restaurant. (Plaintiff's agent was headquartered in Greensboro, North Carolina.) Defendants and plaintiff entered into a lease agreement for security equipment, which agreement included a forum-selection clause giving the State of Florida jurisdiction over any controversy arising out of the lease agreement.

When plaintiff had the surveillance equipment delivered to defendants, defendants rejected the equipment as unsatisfactory, notifying plaintiff of the same. On 25 November 1996, plaintiff sued defendants in Hillsborough County, Florida for breach of contract. Although defendants were served by first class mail, defendants did not answer the Florida complaint, and on 11 August 1997, plaintiff obtained a default judgment against defendants in the Florida court. On 17 February 1998, plaintiff filed its Petition to Enforce Foreign Judgment in Rowan County, North Carolina. Defendants were properly served and in response, filed a Motion for Relief and Notice of Defenses on 7 May 1998, alleging that the State of Florida did not have personal jurisdiction over defendants at the time it rendered its judgment against them, thus the court's judgment was void. In its order denying plaintiff's motion to enforce the foreign judgment, the trial court found:

1. . . . Plaintiff filed and Defendants were served with the complaint and summons in the underlying matter by personal

service in Rowan County, North Carolina. Defendants did not answer the complaint of the plaintiff in the state of Florida and Plaintiff obtained a default and default judgment . . . .

. . .

6. On March 22, 1999 . . . [t]his Court allowed Defendant's motion to dismiss and denied the oral motion of Plaintiff to strike Defendant's motion for relief and notice of defenses for failure to file within 30 days of service of Plaintiff's Petition to Enforce Foreign Judgment.

7. [However,] [d]uring the same term of Superior Court, the undersigned Judge presiding reconvened the parties on March 29, 1999 and entered a revised ruling pursuant to Rule 59 of the Rules of Civil Procedure, in which the Court determined that the motion to dismiss by the Defendant was waived by failure to plead in a timely manner and reinstated the Plaintiff's Petition and Motion to Enforce Foreign Judgment. Further, the Court ruled that the Defendants['] Motion for Relief and Notice of Defenses was timely and properly before the Court. The Court ordered the parties to present evidence on the merits of their respective motions at that time.

. . .

9. The court finds that the Defendants . . . entered into a lease agreement with the Plaintiff . . . . Plaintiff was represented in this negotiation by an agent operating out of Greensboro, North Carolina.

. . .

11. That the Defendant Mourouzidis [sic] is a native of Greece and immigrated to the United States at age 14. The Defendant speaks English as a second language and speaks with a markedly heavy accent, which is difficult to understand.

12. . . . The Defendants own only one restaurant [located in Salisbury] and live in Salisbury, North Carolina.

13. That the Defendants have no connection to the State of Florida and have not availed themselves of the protections of Florida's laws.

14. That the lease signed by Defendants on June 12, 1996 was proffered by the Plaintiff and was pre-printed by or for Plaintiff with terms on both the front and reverse sides.

15. That the specific clause consenting to jurisdiction in Florida is contained on the reverse side of the lease in smaller typeface than used on the front side, at the very bottom of the page as the last clause. The clause is written in technical legal terminology. The second page of the lease is not signed or initialed by the Defendants.

16. That the provisions relating to jurisdiction in Florida in the lease were not highlighted or explained to the Defendants by the Plaintiff or its agents. Plaintiff did not submit any evidence that the Defendants were aware of this provision or of its significance.

17. That the consent to jurisdiction clause included in the Plaintiff's lease contract executed by the Defendants was the product of unequal bargaining power and that enforcement of that clause would be unfair and unreasonable as to both Defendants.

18. That based on the foregoing findings, the Court finds an ultimate fact that the matter before the Court was not fully and fairly litigated in the State of Florida in regards to personal jurisdiction.

Therefore, the trial court concluded:

2. That the notice filed by the Plaintiff with its original Petition was insufficient as to both Defendants; however, this defect was waived by the failure of the Defendants to properly raise the issue in their pleadings.

3. That the Motion for Relief and Notice of Defenses filed by the Defendants was timely and not barred by any statute.

. . .

5. That there was not a full, fair, and final litigation on the matters pertaining to jurisdiction in this cause in the State of Florida.

6. That the clause in the lease between the parties ostensibly consenting the Defendants to jurisdiction in Florida courts is unenforceable because it is unfair, unreasonable, and was procured as a result of unequal bargaining power favoring the Plaintiff and therefore the judgement in the State of Florida entered in this cause against the Defendants in the State of

> Florida is not entitled to Full Faith and Credit as a judgement in this State pursuant to NCGS § 1C-1701 et seq.

In the record, plaintiff preserved four assignments of error all of which rely on the notion that defendants' Motion for Relief and Notice of Defenses was time-barred pursuant to N.C. Gen. Stat. § 1C-1701 *et seq.* (the Uniform Enforcement of Foreign Judgments Act, hereinafter, "the Act"). Consequently, defendants preserved two cross-assignments of error. Due to our disposition of the case, we need only address whether, in fact, the Act—specifically § 1C-1704—serves as a statute of limitation for defendants to file their Motion for Relief and Notice of Defenses. Because we do not find the statute to be one of limitation for a defendant-debtor, we affirm the trial court's ruling.

In its brief to this Court, plaintiff argues that the trial court erred in its interpretation of N.C. Gen. Stat. § 1C-1704(b) because the statute plainly gives a defendant-debtor a maximum of thirty (30) days in which to seek relief from a foreign judgment. Furthermore, plaintiff contends that where, as here, defendant-debtor does not respond in the thirty (30) day time period, defendant-debtor is time-barred from later doing so. Although we find this an interesting argument, we are unpersuaded.

We recognize the statutes under the Act must be read *in para materia* in order to ascertain the regulations and allowances provided under the Act. Plaintiff's interpretation aside, in actuality N.C. Gen. Stat. § 1C-1703(b) (1999) states that:

> (b) Upon the filing of the foreign judgment and the affidavit, the foreign judgment shall be docketed and indexed in the same manner as a judgment of this State; however, ***no execution shall issue*** *upon the foreign judgment nor shall any other proceeding be taken for its enforcement until the expiration of 30 days* from the date upon which notice of filing is served in accordance with G.S. 1C-1704.

Id. (emphasis added). Thus, we conclude that the thirty day limitation period is not one barring a defendant-debtor's response but instead the limitation period is specifically set to bar a plaintiff-creditor from obtaining a foreign judgment against one of our state's citizens and then immediately (within thirty days) being able to enforce it without that defendant-debtor being afforded the notice required by due process. Furthermore, in keeping with our interpretation of

N.C. Gen. Stat. § 1C-1703's thirty day limitation period, we note our statutes clearly go on to set out what a plaintiff-creditor must do in order to proceed with enforcing its obtained judgment:

> (a) Promptly upon the filing of a foreign judgment and affidavit, the judgment creditor shall serve the notice of filing . . . on the judgment debtor . . . .
>
> (b) ***The notice shall set forth*** the name and address of the judgment creditor, of his attorney if any, and of the clerk's office in which the foreign judgment is filed in this State, and shall state *that the judgment attached thereto has been filed in that office,* ***that the judgment debtor has 30 days from the date of receipt of the notice to seek relief from the enforcement of the judgment, and that if the judgment is not satisfied and no such relief is sought within that 30 days, the judgment will be enforced*** in this State in the same manner as any judgment of this State.

N.C. Gen. Stat. § 1C-1704(a), (b) (1999) (emphasis added). Thus again, we are convinced that the Act's thirty day limitation at issue is a "waiting period"—a restriction on when plaintiff-creditors may act and not on when defendant-debtors may not.

Nevertheless, to bolster its argument to this Court, plaintiff cites *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 429 S.E.2d 435 (1993), in which this Court stated,

> If the judgment debtor takes no action within thirty days of receipt of the notice to delay enforcement of the judgment, "the judgment *will* be enforced in this State in the same manner as any judgment of this State." N.C.G.S. § 1C-1704(b). To delay enforcement of the judgment, the judgment debtor may "file a motion of relief from, or notice of defense to," the judgment on grounds as permitted in the Act. N.C.G.S. § 1C-1705(a).

Id. at 300, 429 S.E.2d at 437 (emphasis added). However, we do not agree that *Lust* stands for the premise asserted by plaintiff.

In *Lust*, there was no issue as to whether defendant-debtor was time-barred from filing a motion for relief because the record clearly reflected that defendants filed their response on the thirtieth day. There is, therefore, nothing in the facts of *Lust* to assist plaintiff in persuading this Court that it should hold the present defendants time-barred from filing their notice of defenses. Instead, we find the pas-

sage from which plaintiff quotes dispositive in that, although the court stated that "the judgment [would] be enforced" where the debtor took no action within the thirty day notice period, the court continued by further stating that in order for defendant-debtor to "delay enforcement" he may file a motion for relief from or notice of defense to the enforcement. Again, we find no issue of time limitation raised by the court as to *when* defendant-debtor had to file his motion or notice; we only find that after thirty days passed—without defendant-debtor filing a written response, plaintiff-creditor could then move for enforcement. *Id.* at 300, 429 S.E.2d at 437. Therefore, we hold that as long as defendant-debtor acts *before* enforcement, defendant-debtor could properly delay enforcement by filing his motion for relief and/or notice of defenses. *Id.*

Furthermore, we are reminded that our courts "are constrained by the full faith and credit clause to treat foreign judgments the same as domestic judgments. *Boyles v. Boyles*, 59 N.C. App. 389, 297 S.E.2d 405 (1982), *aff'd*, 308 N.C. 488, 302 S.E.2d 790 (1983). They do not receive *extra* deference." *White v. Graham*, 72 N.C. App. 436, 441, 325 S.E.2d 497, 501 (1985) (emphasis in original). Accordingly, if defendant-debtors of default judgments rendered here in North Carolina are not bound by a thirty-day statute of limitations, then defendant-debtors of foreign default judgments cannot be held to a higher standard. *Id.*

Under the North Carolina statute governing domestic default judgments, N.C. Gen. Stat. § 1A-1, Rule 55, the only time limitation given is the same thirty day "waiting period" (as with foreign judgments), required of a plaintiff-creditor **IF**:

> **The [plaintiff's] motion *specifically provides*** *that the court will decide the motion for judgment by default without a hearing if the party against whom judgment is sought [defendant-debtor]* fails to serve a written response, stating the grounds for opposing the motion, within 30 days of service of the motion . . . .

N.C. Gen. Stat. § 1A-1, Rule 55(b)(2)(b)(1) (1999) (emphasis added). However, we note that the statute provides—not an "automatic enforcement" of a plaintiff's default judgment, but instead requires a plaintiff-creditor to "motion [the court] for judgment by default" once the thirty days have passed following notice. *Id.* This concept is directly in line with our interpretation of N.C. Gen. Stat. § 1C-1704(b)'s requirement that once the thirty day "waiting

period" ends, a plaintiff-creditor must act by motioning the court for enforcement of its foreign judgment *before* the defendant-debtor responds.

We further note, however, that even where a plaintiff includes the required specificity within its motion, a trial court may still set aside an entry of default or a default judgment for good cause. N.C. Gen. Stat. § 1A-1, Rule 55(2)(b). "A motion to set aside an entry of default pursuant to [this Rule] for 'good cause' shown falls within the sound discretion of the trial court, whose decision will not be disturbed on appeal 'absent a showing of abuse of that discretion.' " *Automotive Equipment Distributors, Inc. v. Petroleum Equipment & Service, Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896 (1987) (quoting *Lumber Co. v. Grizzard*, 51 N.C. App. 561, 563, 277 S.E.2d 95, 96 (1981)). "The law generally disfavors default and 'any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits.' " *Id.* (quoting *Peebles v. Moore*, 48 N.C. App. 497, 504-05, 269 S.E.2d 694, 698 (1980), *modified and aff'd*, 302 N.C. 351, 275 S.E.2d 833 (1981)).

In the case at bar, there is no dispute that defendants filed their Motion for Relief and Notice of Defenses almost thirty days after expiration of the thirty day time period but before plaintiff moved for immediate enforcement of its default judgment against defendants. And although plaintiff had the right and the opportunity to file a motion for immediate enforcement *BEFORE* defendants responded, plaintiff failed to do so. Additionally, nowhere in the record or in plaintiff's brief to this Court does plaintiff argue that it was prejudiced by defendants' delay. Thus, in "treat[ing] [plaintiff's] foreign judgment[] the same as [any] domestic judgment[,]" *Boyles v. Boyles*, 59 N.C. App. 389, 391, 297 S.E.2d 405, 406, we hold that the trial court did not abuse its discretion in finding that "the Defendants Motion for Relief and Notice of Defenses was timely and properly before the Court."

After thorough review, we conclude the record supports the trial court's findings and its findings support its conclusions of law. " 'Where trial is by judge and not by jury, the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.' " *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612-13 (1993) (quoting *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991), *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993)). Finally, we note that our

Supreme Court has held that forum selection clauses are valid and enforceable *except* when compelling reasons dictate otherwise. *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 146, 423 S.E.2d 780, 784 (1992). Here, the trial court's findings support those compelling reasons. *Id.* One remedy may be to ensure that the forum selection clause is prominently displayed in the document executed by the parties. Another remedy may be for the parties to initial the forum selection clause. Nevertheless, having found no abuse of discretion in the case at bar, the trial court's order is

Affirmed.

Judges LEWIS and WALKER concur.

DUDLEY L. SIMMS, III, JOHN L. SIMMS, DLS FAMILY INVESTMENT PARTNERSHIP, AND JLS FAMILY INVESTMENT PARTNERSHIP, PLAINTIFFS v. PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA AND LARRY G. FRAZIER, DEFENDANTS

No. COA99-1130

(Filed 7 November 2000)

Fraud— negligent misrepresentation—failure to state a claim

The trial court did not err by granting a Rule 12(b)(6) dismissal for defendants in an action for negligent misrepresentation arising from plaintiffs becoming creditors of a company emerging from bankruptcy by purchasing the claims of third party creditors and receiving stock in the new company. Plaintiffs do not allege that defendants had a duty of care to them to be certain the information they were giving plaintiffs was complete or accurate and plaintiffs should have been put on notice by the language used that whether the revitalized entity would be profitable remained a risk. Although plaintiffs alleged that the information was supplied in the course of defendant Frazier's business, profession, or employment, plaintiffs allege nothing that would bring a reasonable mind to believe that Frazier or the company he then worked for was in the business of giving financial advice and did not allege that Frazier had or gained a pecuniary interest from plaintiffs' investments. Finally, plaintiffs did not allege that defendant Prudential provided them any information or owed them any duty; and it is not possible to hold

Prudential liable under respondeat superior for Frazier's actions since plaintiff failed to state a claim as to Frazier.

Appeal by plaintiffs from orders entered 16 June 1999 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 16 August 2000.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, for plaintiff-appellants.

Smith Helms Mulliss & Moore, L.L.P., by Benjamin F. Davis, Jr. and Shannon R. Joseph; Weil, Gotshal & Manges, LLP, by Greg A. Danilow, for defendant-appellee Prudential Insurance Company of America.

F. Kevin Mauney for defendant-appellee Larry G. Frazier.

HUNTER, Judge.

Plaintiff-appellants Dudley L. Simms, III, John L. Simms, DLS Family Investment Partnership, and JLS Family Investment Partnership (collectively "plaintiffs") appeal the trial court's orders of 16 June 1999, allowing defendants' Prudential Life Insurance Company of America and Larry G. Frazier (collectively "defendants") motion to dismiss, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). We agree that plaintiffs have failed to state a claim upon which relief may be granted and, therefore, affirm the trial court's rulings.

The factual basis out of which this appeal arises began in April 1993 when Piece Goods Shop Company, L.P. ("Piece Goods"), of which Prudential was the principal creditor, filed for bankruptcy. More than two years later on 16 October 1995, Piece Goods was reorganized and renamed Silas Creek Retail Company, Inc. ("Silas Creek"). However in August 1995, before reorganization was completed, defendant Frazier (who at the time was president and chief operating officer of Piece Goods) informed Dudley Simms that "the equity value of the entity emerging from bankruptcy reorganization would be in excess of $31 million dollars, and that it would be in a debt free position except for a $9 million dollar line of credit and current trade debts." Dudley Simms conveyed this information to John Simms, DLS and JLS and, on 2 October 1995 (before reorganization was completed), plaintiffs "chose to become creditors [of Piece Goods], by purchasing claims from one or more [of Piece Goods'] general unsecured creditors . . . ." This first purchase of claims, made

by Dudley Simms and DLS, was for an investment of $1,650,000.00, which was later exchanged for 138,637 shares of stock in Silas Creek. (The debt reorganization plan allowed for "the issuance to General Unsecured Creditors [by the soon-to-be reorganized company] of one (1) share of New Common Stock for each $100.00 of each such Creditor's Allowed Claim.") However, we note that there is no allegation by plaintiffs—nor is there any evidence of record—that (at the time defendants conveyed and plaintiffs acted upon the information) defendants received any consideration or pecuniary gain from plaintiffs' (Dudley Simms and DLS) purchasing the claims of third-party unsecured creditors during the bankruptcy proceedings. On 20 November 1995 (after reorganization was completed), John Simms and JLS invested $567,321.33 in exchange for 47,277 shares of stock in Silas Creek. Again we note that there is no allegation by plaintiffs—or evidence of record—that defendants received any direct consideration or pecuniary gain from this investment by plaintiffs (John Simms and JLS) in the newly reorganized company.

On 15 March 1996, Silas Creek acquired Northwest Fabrics and Craft stores at a cost of $35 million, by incurring the cost as debt to its principal lender. Then in August 1996, it was found that Silas Creek had an inventory shortage in excess of $8 million. Between the acquisition of Northwest Fabrics and the inventory loss, "irreparable harm [was caused] to Silas Creek . . . from which th[e] entity was unable to recover. . . . [Thus,] [p]laintiffs lost the entirety of their investments in Silas Creek . . . ."

On 29 July 1998, plaintiffs filed their complaint against defendants alleging: (1) that Frazier was at all times acting as an agent and servant of Prudential; (2) that Frazier negligently misrepresented the financial status of Piece Goods by failing to advise Dudley Simms that (a) "the entity emerging from bankruptcy was actively considering the acquisition of . . . Northwest Fabrics[,]" and (b) "the equity value [of the emerging company] was overstated by the amount of at least $8 million representing an actual shortage of physical inventory not reflected on the financial records"; (3) that Prudential, which "owned in excess of 60% of [Silas Creek,]" made Frazier president and chief operating officer of Silas Creek, and therefore Frazier was acting on behalf of Prudential by gaining plaintiffs as investors; (4) that defendants failed to exercise reasonable care in obtaining and communicating the information to plaintiffs; (5) that defendants intended that plaintiffs rely on the information given them by Frazier; and (6) that plaintiffs did reasonably and justifiably rely on the information sup-

plied by Frazier, to their severe detriment. In response, defendants filed a motion with the court to dismiss with prejudice pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, which motion the court allowed.

Plaintiffs bring forth two assignments of error which we combine, the issue being whether the trial court committed reversible error by granting defendants' 12(b)(6) motions. We hold that it did not.

> A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). This Court has summarized the trial court's duty in ruling upon such a motion as follows:
>
> *"In order to withstand [a 12(b)(6) motion], the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim.* The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. In general, 'a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' "

Werner v. Alexander, 130 N.C. App. 435, 437-38, 502 S.E.2d 897, 899-900 (1998) (emphasis added and emphasis in original) (quoting *Harris v. NCNB*, 85 N.C. App. at 670-71, 355 S.E.2d at 840 (citations omitted)). Thus, in the case at bar, where plaintiffs' claim is one of negligent misrepresentation, plaintiffs' complaint must have addressed each of the necessary elements of that claim.

> It has long been held in North Carolina that
>
> > The tort of negligent misrepresentation occurs when [(1)] a party justifiably relies [(2)] to his detriment [(3)] on information prepared without reasonable care [(4)] by one who owed the relying party a duty of care.

Raritan River Steel Co. v. Cherry, Bekaert & Holland, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988), *reversed on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991). Therefore, to withstand defendants'

motion to dismiss, plaintiffs at bar must be able to show that they *justifiably* relied—to their detriment—on the information provided them by defendants and that defendants owed plaintiffs a duty of care to be certain that the information provided was complete and accurate.

In their complaint, plaintiffs allege "Frazier made plaintiffs aware that Piece Goods . . . *could* emerge from bankruptcy reorganization as a new revitalized entity and that investment in the equity of the new revitalized entity *should be* extremely valuable and profitable." (Emphasis added.) Our courts have said that "[w]here 'the purchaser has full opportunity to make pertinent inquiries but fails to do so through no artifice or inducement of the seller, an action in [negligent misrepresentation] will not lie.' " *C.F.R. Foods, Inc. v. Randolph Development Co.*, 107 N.C. App. 584, 589, 421 S.E.2d 386, 389 (1992) (quoting *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E.2d 565, 568, *review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983)). The record is clear and plaintiffs freely admit that although Frazier conveyed the information to Dudley Simms in August 1995, plaintiffs did not make their first investment until October 1995 and their second investment until late November 1995. Yet plaintiffs offer no evidence, and there is none in the record, to show that they did not have "full opportunity to make pertinent inquiries" as to the factual accuracy of Frazier's statements to them upon which they claim to have based their decision to invest. *Id.* We note that by the plain language admittedly used by Frazier, plaintiffs should have been put on notice that the fact of whether the revitalized entity would be profitable remained a risk. The fact that plaintiffs took the risk by acting on this "hot tip" and it did not turn out to be profitable is unfortunate; however, we recognize it is often the result of a high risk investment.

Nevertheless, plaintiffs proceed to state specific things told to them and also withheld from them by Frazier, things which plaintiffs allege were misrepresentations of the true state of Piece Goods and its successor, Silas Creek. Plaintiffs further allege that it is upon these statements by Frazier (or the lack thereof) that they justifiably relied to their detriment. (It is undisputed that plaintiffs suffered injury—by way of their losing almost $2 million invested in Piece Goods and Silas Creek. However, Prudential also lost its investment when Silas Creek went bankrupt.) Yet, the record reflects that *at no time and in no way do plaintiffs allege that defendants had a duty of care to them, a duty which required that they be certain the information*

they were giving plaintiffs was complete or accurate. Without an allegation that defendants owed plaintiffs a duty of care regarding the information given, plaintiffs' claim must necessarily fail. *Id.* See also *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337-38, 525 S.E.2d 441, 445 (2000); *Holshouser v. Shaner Hotel Grp. Props. One*, 134 N.C. App. 391, 394, 518 S.E.2d 17, 21 (1999), *aff'd* 351 N.C. 330, 524 S.E.2d 568 (2000); and, *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 488, 516 S.E.2d 176, 179 (1999).

Plaintiffs' complaint alleged that:

> Defendants supplied the . . . information to plaintiffs in the course of defendants' business, in transactions in which both plaintiffs and defendants had financial interest.
>
> Defendants intended that plaintiffs rely on the information supplied by them for guidance in particular financial transactions, that is, the acquisition of stock in the entity emerging from bankruptcy.

Plaintiffs contend they have met their burden of showing a duty of care. We disagree. It is true that our Supreme Court has defined a breach of the duty owed in negligent misrepresentation as:

> ". . . One who, *in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest,* supplies false information for the guidance of others in their business transactions, [and thus] is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP, 350 N.C. 214, 218, 513 S.E.2d 320, 323-24 (1999) (emphasis added) (quoting Restatement (Second) of Torts § 552 (1977)). However, aside from plaintiffs' allegation that Frazier supplied the information in the course of his business, profession or employment, plaintiffs allege nothing that would bring a reasonable mind to believe that either he or Piece Goods (the company for which he worked at the time the information was given) was in the business of giving financial advice. Furthermore, the record reflects that *at no time and in no way do plaintiffs allege that Frazier had a pecuniary interest or obtained any pecuniary gain from plaintiffs' investments or transactions.*

Thus, again, plaintiffs have failed to meet their burden of showing a duty of care owed them by Frazier, and their claim against him for negligent misrepresentation must necessarily fail. *Id.* We then hold that the trial court's grant of Frazier's 12(b)(6) motion was proper.

We further note that plaintiffs' complaint, on its face, has no allegation that Prudential provided them any information at all. Neither do plaintiffs allege Prudential owed them a duty of care. In fact, the only link plaintiffs make between Prudential and the misrepresentation is that "[a]t all material times defendant Larry G. Frazier acted as an agent and servant of defendant Prudential . . . and his conduct which is the subject of this action was within the course and scope of this agency and employment." Therefore, because plaintiffs attempt to reach Prudential through an employer/employee or principal/agent relationship with Frazier under a theory of *respondeat superior*, plaintiffs' claim against Prudential must also necessarily fail. *Long v. Giles*, 123 N.C. App. 150, 152, 472 S.E.2d 374, 375 (1996). Our courts have long held that:

> A finding of liability against defendant . . . employer, is only possible if [the employee] is found liable, and the injuries arose out of and in the course of his [or her] employment [with defendant employer]. In other words, defendant [employer's] liability is derivative of [its employee's] liability, and the primary claim against the [employee] must first be determined before any claim against [defendant employer] is possible. . . .
>
> If plaintiffs do not recover against [the employee], they cannot seek to recover against defendant [employer] under a *respondeat superior* theory . . . .

Id. See also *McLain v. Taco Bell Corp*, 137 N.C. App. 179, 191, 527 S.E.2d 712, 720-21 (2000); *Wrenn v. Maria Parham Hosp., Inc.*, 135 N.C. App. 672, 679, 522 S.E.2d 789, 793 (1999); and, *Watson v. Dixon*, 132 N.C. App. 329, 332, 511 S.E.2d 37, 39 (1999), *aff'd* 352 N.C. 343, 532 S.E.2d 175 (2000).

Since we have already held that plaintiffs have failed to state a claim for which relief may be granted as to Frazier, it is not possible then that we could hold otherwise as to plaintiffs' claim that Prudential, as Frazier's employer or principal, is liable under a theory of *respondeat superior*. *Id.* Thus, we hold that the trial court's grant of Prudential's motion to dismiss was also proper.

Affirmed.

Judges LEWIS and WALKER concur.

JACKIE E. LEWIS, PLAINTIFF v. DR. JANAKI RAM SETTY, DEFENDANT

No. COA99-1215

(Filed 7 November 2000)

Costs— expert fees and exhibits—voluntary dismissal

The trial court did not abuse its discretion by awarding costs against plaintiff for expert witness fees and trial exhibits. N.C.G.S. § 7A-305 enumerates certain items that are allowable as costs in a civil action and allows recovery of witness fees; moreover, assuming that the statute does not embody these fees, the court reviewed the itemized invoices and exercised its discretion under N.C.G.S. § 6-20 in finding their rates and times to be reasonable and necessary. Although trial exhibit costs are not enumerated in N.C.G.S. § 7A-305, the trial court rightly exercised its discretion and allowed the costs for trial exhibits pursuant to N.C.G.S. § 6-20 because defendant did not receive plaintiff's notice of voluntary dismissal until just prior to trial and preparation for trial would necessarily include having exhibits prepared and ready.

Appeal by plaintiff from an order entered 25 June 1999 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 23 August 2000.

Lennard D. Tucker for plaintiff-appellant.

Wilson & Iseman, L.L.P., by Elizabeth Horton and Kevin B. Cartledge, for defendant-appellee.

HUNTER, Judge.

Jackie E. Lewis ("plaintiff") appeals from an order taxing costs against him in the amount of $7,176.80. Plaintiff assigns as error the trial court's granting of Dr. Janaki Ram Setty's ("defendant's") motion to tax costs with regards to expert witness fees and trial exhibit preparation fees. Plaintiff claims that these costs allowed by the trial

court (1) were not enumerated in N.C. Gen. Stat. § 7A-305(d), and (2) were not reasonable and necessary. We disagree, and therefore affirm the trial court.

Plaintiff, a quadriplegic, filed this action on 18 June 1997, alleging that defendant negligently broke his hip while transferring him from an EKG examination table to his wheelchair. Defendant filed a motion to dismiss on 3 July 1997. Forsyth County Superior Court Judge W. Osmond Smith, III, granted defendant's motion by order filed on 7 August 1997, finding plaintiff's failure to obtain a Rule 9(j) certification (that the medical care had been reviewed by a person reasonably expected to qualify as an expert witness) fatal. Plaintiff appealed. On appeal, this Court reversed the trial court and held that plaintiff's complaint alleged ordinary negligence, not medical malpractice, and thus did not require a Rule 9(j) certification. *See Lewis v. Setty*, 130 N.C. App. 606, 503 S.E.2d 673 (1998). The case was then remanded to the trial court for further proceedings.

On remand, the case was set peremptorily as the first case for trial for the week beginning Monday, 10 May 1999. On Friday, 7 May 1999, plaintiff filed and served via regular United States mail a notice of voluntary dismissal without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a). The notice was not received by defendant until the morning of 10 May 1999, just prior to commencement of the trial. On 24 May 1999, defendant filed a motion to tax costs to plaintiff in the amount of $9,423.60 pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure. The motion was heard by the Honorable W. Douglas Albright during the 21 June 1999 session of Forsyth County Superior Court. Judge Albright granted defendant's motion but reduced the amount requested, taxing plaintiff costs in the amount of $7,176.80. Judge Albright granted the motion to tax costs with regard to (1) costs of the prior appeal, (2) deposition fees for three depositions, (3) expert witness fees, and (4) costs of trial exhibits. However, Judge Albright denied the motion to tax costs with regard to (1) mediation fees, (2) an extra copy of a deposition transcript, and (3) fees charged by two of defendant's expert witnesses for appointments canceled in anticipation of their trial testimony. Plaintiff appeals from this order and challenges the trial court's awarding of the expert witness fees and costs of trial exhibits.

Plaintiff's two assignments of error are best combined into one for this appeal. Plaintiff assigns error to the trial court's granting of defendant's motion to tax costs against him, claiming that the costs

of the expert witness fees and trial exhibits were not enumerated in N.C. Gen. Stat. § 7A-305(d) and were not reasonable and necessary. We disagree.

"In North Carolina costs are taxed on the basis of statutory authority." *Estate of Smith v. Underwood*, 127 N.C. App. 1, 12, 487 S.E.2d 807, 815, *review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997). Here, plaintiff voluntarily dismissed his claim without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a), which governs voluntary dismissals by plaintiffs. Costs are discussed under subsection (d) of Rule 41, whereby it states "[a] plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis." The purpose of this rule " 'aside from securing the payment of costs, is to prevent vexatious suits made possible by the ease with which a plaintiff may dismiss [his case].' " *Alsup v. Pitman*, 98 N.C. App. 389, 390, 390 S.E.2d 750, 751 (1990) (quoting 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* § 41.16 (2d ed. 1995)).

Costs which are to be taxed under Rule 41(d) include those costs enumerated in N.C. Gen. Stat. § 7A-305(d). *Sealey v. Grine*, 115 N.C. App. 343, 347, 444 S.E.2d 632, 635 (1994). N.C. Gen. Stat. § 7A-305(d) enumerates certain items that are allowable as costs in a civil action. Section 305(d) does not, however, preclude liability for other costs as provided by law. N.C. Gen. Stat. § 7A-305(e).

"In addition, costs which are not allowed as a matter of course under G.S. § 6-18 or § 6-19 . . . may be allowed in the discretion of the court under G.S. § 6-20 . . . ." *Estate of Smith*, 127 N.C. App. 1, 12, 487 S.E.2d 807, 815. Thus, costs which are to be taxed under Rule 41(d) may also include those costs allowable under N.C. Gen. Stat. § 6-20. *See Alsup*, 98 N.C. App. 389, 390, 390 S.E.2d 750, 751. "N.C. Gen. Stat. § 6-20 provides that in those civil actions not enumerated in § 6-18, 'costs may be allowed or not, *in the discretion of the court*, unless otherwise provided by law.' " *Id.* (emphasis in original) (quoting N.C. Gen. Stat. § 6-20). The negligence action voluntarily dismissed by plaintiff *sub judice* is not one of the actions enumerated in §§ 6-18 or 6-19, thus it falls within the scope of N.C. Gen. Stat. § 6-20.

The trial court's discretion to tax costs pursuant to N.C. Gen. Stat. § 6-20 is not reviewable on appeal absent an abuse of discretion. *Estate of Smith*, 127 N.C. App. 1, 12, 487 S.E.2d 807, 815; *Minton v. Lowe's Food Stores*, 121 N.C. App. 675, 680, 468 S.E.2d 513, 516, *review denied*, 344 N.C. 438, 476 S.E.2d 119 (1996). "While case law

has found that deposition costs are allowable under section 6-20, it has in no way precluded the trial court from taxing other costs that may be 'reasonable and necessary.' " *Minton*, 121 N.C. App. 675, 680, 468 S.E.2d 513, 516 (emphasis in original).

Plaintiff claims that the following costs were improperly taxed against him: $600.00 for review of medical records by Tri-Co Ortho & Sports Med P.A., $1,600.00 for records reviewed by Club Haven Family Practice, P.A., and $1,000.00 for review of records by Lexington Orthopedic Clinic. We disagree with plaintiff's assertion that these costs were improperly taxed. Each of the above costs relates to defendant's expert witnesses. N.C. Gen. Stat. § 7A-305(d)(1) allows for the recovery of "[w]itness fees, as provided by law." Assuming arguendo, that the statute does not embody the witness fees at issue here, the trial court still reviewed the itemized invoices from each of defendant's three expert witnesses and exercised its discretion under N.C. Gen. Stat. § 6-20 finding their rates and time expended to be reasonable and necessary. In the past, this Court has upheld awards of costs of expert witnesses for time spent outside of trial. *Campbell v. Pitt County Memorial Hosp.*, 84 N.C. App. 314, 328, 352 S.E.2d 902, 910, *aff'd*, 321 N.C. 260, 362 S.E.2d 273 (1987), *overruled on other grounds, Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85, *rehearing denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). We have also previously held that a trial court did not exceed its discretionary authority in assessing expert witness fees for the testimony of three physicians, even though they all were used to prove identical facts in issue. *Brown v. Flowe*, 128 N.C. App. 668, 496 S.E.2d 830, *rev'd on other grounds*, 349 N.C. 520, 507 S.E.2d 894 (1998). Therefore, the trial court here did not abuse its discretion in taxing the expert witness fees to plaintiff pursuant to N.C. Gen. Stat. § 6-20.

Plaintiff also claims that $2,796.70 for trial exhibit preparation by Art for Medicine was improperly taxed. Plaintiff rightly argues that trial exhibit costs are not enumerated in N.C. Gen. Stat. § 7A-305(d), however plaintiff wrongfully assumes that the trial court does not have the discretion under N.C. Gen. Stat. § 6-20 to award those costs where it finds them to be reasonable and necessary. It is true that in *Sealey v. Grine*, this Court stated that the costs to be taxed under Rule 41(d) "means the costs recoverable in civil actions as delineated in N.C. Gen. Stat. § 7A-305(d) (1989)." *Sealey v. Grine*, 115 N.C. App. 343, 347, 444 S.E.2d 632, 635. We did not, however, have to analyze *Sealey* under § 6-20 as that plaintiff "did not assign error to the trial court's finding of fact that 'the costs enumerated and set forth . . . are

reasonable and necessary' . . . ." *Id.* In *Sealey*, plaintiff's failure to assign error to the trial court's finding the costs to be necessary and reasonable, obviated our need to analyze the trial court's rationale under N.C. Gen. Stat. § 6-20. Based on the plaintiff's argument, this Court was left to "only determine whether the costs awarded in [the] case [were] either 'deposition expenses' or specifically authorized by statute." *Id.* While we did hold that costs include deposition costs, we also modified the amount of costs taxed against plaintiff, striking certain expenses for copies of x-ray films and records. *Id.* at 348, 444 S.E.2d at 635. Our decision was based on the fact that these expenses did not relate to the depositions and were not enumerated in N.C. Gen. Stat. § 7A-305(d). *Id.*

Finally, the plaintiffs in *Estate of Smith v. Underwood*, a professional negligence and breach of fiduciary duty case, assigned error to the partial denial of their motion for costs. 127 N.C. App. 1, 12, 487 S.E.2d 807, 814. Upon plaintiff's petition for costs, including expert witness fees, discovery, subpoena charges, transcript costs, postage charges, and costs of reproducing documents for use as trial exhibits for a total of $36,176.78, the trial court awarded costs in the amount of $14,234.38. *Id.* Plaintiffs contended that the trial court abused its discretion in not allowing the full amount of their costs. *Id.* We held, "[s]ince the enumerated costs sought by plaintiffs are not expressly provided for by law, it was within the discretion of the trial court whether to award them." *Id.* at 13, 487 S.E.2d at 815. We found no abuse of discretion. *Id.*

As evoked *supra*, an order taxing costs as reasonable and necessary pursuant to N.C. Gen. Stat. § 6-20 is reviewable only for abuse of discretion. *See Estate of Smith*, 127 N.C. App. 1, 12, 487 S.E.2d 807, 815; *see also Minton*, 121 N.C. App. 675, 680, 468 S.E.2d 513, 516. At bar, the trial court found the costs of the trial exhibits to be reasonable and necessary. The trial court took into account factors such as: this case being set for trial on Monday, 10 May 1999; plaintiff filing his notice of voluntary dismissal without prejudice on Friday, 7 May 1999, only 3 days prior to trial; plaintiffs serving the notice via regular United States mail; and defendant not receiving the notice until just prior to trial on 10 May 1999, leaving defendant no choice but to be prepared for trial. Under these circumstances, preparation for trial would necessarily include having the trial exhibits prepared and ready. Therefore, the trial court rightly exercised its discretion and allowed the costs for the trial exhibits finding them reasonable and necessary pursuant to N.C. Gen. Stat. § 6-20.

Thus we hold the trial court did not abuse its discretion in awarding costs against plaintiff for expert witness fees and trial exhibits pursuant to N.C. Gen. Stat. § 6-20. We therefore affirm the ruling of the trial court.

Affirmed.

Judges LEWIS and WALKER concur.

INTERIOR DISTRIBUTORS, INC., PLAINTIFF v. JAMES J. AUTRY D/B/A AUTRY CONSTRUCTION AND ALSO D/B/A AUTRY DRYWALL & CONSTRUCTION; MARIE AUTRY; SIGMA CONSTRUCTION COMPANY, INC.; AND THE AMERICAN INSURANCE COMPANY, AS SURETY, DEFENDANTS

SPECIALTIES, INC., PLAINTIFF v. JAMES J. AUTRY D/B/A AUTRY DRYWALL & CONSTRUCTION; SIGMA CONSTRUCTION COMPANY, INC.; AND THE AMERICAN INSURANCE COMPANY, AS SURETY, DEFENDANTS

BET PLANT SERVICES INC., D/B/A BPS EQUIPMENT RENTAL & SALES, PLAINTIFF v. JAMES J. AUTRY, D/B/A AUTRY DRYWALL & CONSTRUCTION AND ALSO D/B/A AUTRY CONSTRUCTION, INC; SIGMA CONSTRUCTION COMPANY, INC.; DAVID A. MARTIN, COUNTY OF CUMBERLAND, NORTH CAROLINA; AND THE AMERICAN INSURANCE COMPANY, AS SURETY, DEFENDANTS

COLONIAL MATERIALS OF FAYETTEVILLE, INC., PLAINTIFF v. JAMES J. AUTRY D/B/A AUTRY DRYWALL & CONSTRUCTION, INC; SIGMA CONSTRUCTION COMPANY, INC.; AND THE AMERICAN INSURANCE COMPANY, AS SURETY, DEFENDANTS

No. COA99-1175

(Filed 7 November 2000)

Appeal and Error— appealability—orders allowing plaintiffs to proceed in their actions—interlocutory orders—no substantial right

Defendants' appeal from the orders allowing plaintiffs to proceed in their actions against defendants Sigma, American, and Martin to recover payment for materials and rental equipment supplied for the Cumberland County Coliseum project, after the bankruptcy court terminated the automatic stay entered when defendant Autry went into Chapter 11 bankruptcy, is dismissed as interlocutory because: (1) the orders do not dispose of any issue in any case; and (2) the avoidance of a rehearing or trial is not a substantial right entitling a party to an immediate appeal.

Appeal by defendants Sigma Construction Company, Inc., The American Insurance Company, and David A. Martin from orders entered 6 May 1999 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 9 October 2000.

Vann & Sheridan, LLP, by Paul A. Sheridan and Nan E. Hannah, for plaintiff-appellees.

Safran Law Offices, by Perry R. Safran, for defendant-appellants Sigma Construction Company, Inc., The American Insurance Company, and David A. Martin.

SMITH, Judge.

Defendant Sigma Construction Company, Inc. (Sigma) entered into a contract with the State of North Carolina through its political subdivision Cumberland County for construction of the Cumberland County Coliseum (the project). In December 1995, Sigma, as general contractor, entered into a Payment Bond Agreement with defendant The American Insurance Company (American) for $12,349,010.00. *See* N.C. Gen. Stat. § 44A-27 (1995). The Bond Agreement listed Sigma as the Principal and Cumberland County as the Owner.

On or about 22 February 1996, Sigma entered into a subcontract agreement with defendant James J. Autry (Autry) d/b/a Autry Drywall & Construction Company, whereby Autry would provide labor and materials for drywall work on the project. Between August 1996 and May 1997, Autry entered into contracts with plaintiffs Interior Distributors, Inc. (Interior Distributors); Specialties, Inc. (Specialties); BET Plant Services Inc., d/b/a BPS Equipment Rental & Sales (BET); and Colonial Materials of Fayetteville, Inc. (Colonial) to supply materials and rental equipment for the project. Autry's contract with Sigma was terminated. Autry failed to fully pay plaintiffs, and in September and October 1997, each of the plaintiffs filed complaints against Autry, Sigma, and American. BET also joined as a defendant David Martin as guarantor for Sigma. On 1 December 1997, defendants Sigma and American answered, made motions to dismiss, and raised affirmative defenses against Interior Distributors and Specialties and asserted cross-claims against Autry. On 8 December 1997, Autry filed for Chapter 11 bankruptcy. Thereafter, on 31 December 1997, defendants Sigma, Martin, and American answered, made a motion to dismiss, and raised affirmative defenses against BET and asserted cross-claims against Autry. On 5 January 1998, defendants Sigma and American answered, made a motion to dismiss,

and raised affirmative defenses against Colonial and asserted cross-claims against Autry.

On 16 March 1998, the trial court, citing Autry's proceedings in bankruptcy, *sua sponte* entered Judgments of Discontinuance in Interior Distributors' and Specialties' cases. Those cases were thus closed "with leave to any party to reinstitute the same by motion in the cause if the said claims are not fully adjudicated." Similarly, on 20 April 1998, the trial court, again citing the bankruptcy proceeding, *sua sponte* entered Administrative Orders discontinuing the BET and Colonial suits. Those cases likewise were closed "with leave to any party to reinstitute the same by motion in the cause if the said claims are not fully adjudicated." On 23 September 1998, plaintiffs made "Motion[s] for Determination of Applicability of Stay and for Relief From Stay" in the United States Bankruptcy Court for the Eastern District of North Carolina. Autry's Chapter 11 plan was confirmed on 20 October 1998, and on 28 October 1998 the bankruptcy court entered an order stating that the automatic stay had terminated and that plaintiffs' claims against defendants Sigma, American, and Martin could be pursued.

On 13 January 1999, defendants voluntarily dismissed with prejudice their cross-claims against Autry in all four cases. Plaintiffs each filed notices and motions for reinstatement on 29 January 1999. Plaintiffs' motions were consolidated for hearing, and on 6 May 1999, the trial court entered orders allowing plaintiffs' motions. Defendants Sigma and American appeal from all four orders; defendant Martin joins in the appeal from the order for BET.

The initial matter to be determined is whether defendants' appeal from these orders is interlocutory.

> "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). The rule against interlocutory appeals seeks to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to bring a case to final judgment before its presentation to the appellate courts. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

Turner v. Norfolk Southern Corp., 137 N.C. App. 138, ——, 526 S.E.2d 666, 669 (2000).

The orders from which defendants now appeal do not entirely dispose of the cases. In fact, the orders do not dispose of *any* issue in any case; they merely allow plaintiffs to proceed in their actions against defendants. The orders are therefore interlocutory.

> Although there is generally no right to immediate appeal from an interlocutory order, an interlocutory order is appealable in two instances. First, pursuant to N.C. Gen. Stat. § 1-277 and N.C. Gen. Stat. § 7A-27(d), an interlocutory order is appealable if the order "affects a substantial right." "A substantial right is a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment." Second, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an interlocutory order is appealable in an action with multiple parties and multiple claims "if the trial court enters a final judgment as to a party or a claim and certifies there is no just reason for delay." When an interlocutory order is appealed, "it is the appellant's burden to present argument in his brief to this Court to support acceptance of the appeal."

Lee v. Mutual Community Savings Bank, 136 N.C. App. 808, —, 525 S.E.2d 854, 856 (2000) (internal citations omitted).

The whole of defendants' argument supporting their contention that they are properly before this Court is as follows: "The granting of Plaintiffs-Appellees motions affects Defendants-Appellants' substantial rights and unfairly punishes them if they are forced to continue the defense of this action." This attempt at persuading this Court that a substantial right of defendants will be adversely affected absent immediate review fails to satisfy defendant's " 'burden to present argument in [their] brief to this Court to support acceptance of the appeal.' " *Id.* at —, 525 S.E.2d at 856 (citation omitted).

Regardless, it has long been the law in this state that "the 'avoidance of a rehearing or trial is not a "substantial right" entitling a party to an immediate appeal.' " *Banner v. Hatcher*, 124 N.C. App. 439, 442, 477 S.E.2d 249, 251 (1996) (quoting *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)). Accordingly, this appeal is dismissed as interlocutory.

Dismissed.

Judges TIMMONS-GOODSON and FULLER concur.

CHRISTINE HUSKEY AMBROSE, PLAINTIFF v. MATTHEW THOMAS AMBROSE, DEFENDANT

No. COA99-1375

(Filed 7 November 2000)

Paternity— genetic testing—alleged past due child support

The trial court erred by denying defendant putative father's request for genetic testing to establish paternity after plaintiff mother filed suit for payment of past due child support, because: (1) the issue had not been litigated and defendant never formally acknowledged paternity in the manner prescribed by N.C.G.S. § 110-132; and (2) defendant was not required to present evidence that another man had acknowledged paternity in order for the court to authorize the test.

Appeal by defendant from order entered 8 February 1999 by Judge Kenneth F. Crow in Craven County District Court. Heard in the Court of Appeals 19 September 2000.

No brief filed for plaintiff-appellee.

McCotter, McAfee & Ashton, PLLC, by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellant.

MARTIN, Judge.

Plaintiff, Christine Huskey Ambrose, brought this action seeking custody, child support, and past child support. The record tends to show that plaintiff met defendant, Matthew Thomas Ambrose, in December 1991 and they soon began an intimate relationship. On 18 April 1994, plaintiff informed defendant that she was pregnant and that he was the father of the unborn child. Defendant testified that he had not had sexual relations with plaintiff during the period from 1 March 1994 through 23 April 1994 and that he had doubt as to whether he was the father. However, in a subsequent meeting, plaintiff assured defendant that he was the father because she had not been intimate with any other person.

On 13 May 1994, plaintiff and defendant were married; on 1 January 1995, plaintiff gave birth to a daughter, Elizabeth Ann. The couple separated on 12 November 1995 and subsequently entered into a separation agreement on 19 November 1996 in which defendant agreed to pay child support.

In early 1998, plaintiff allegedly told defendant that he was not the father of Elizabeth Ann. On 10 August 1998, plaintiff filed her complaint in the present action seeking, *inter alia*, past due child support. Defendant did not answer the complaint, and a default judgment was entered 17 September 1998. Defendant then moved to set aside the default judgment and filed an answer to plaintiff's complaint which included a request for an appropriate genetic test to establish paternity. The trial court allowed defendant's motion to set aside the default judgment, but denied defendant's request for a paternity test. Following the court's denial of defendant's request for a paternity test, defendant signed an agreement consenting to pay child support for Elizabeth Ann and resolving all other pending issues, which was reduced to a memorandum of order and judgment. On 8 February 1999, a formal order denying the paternity test and incorporating the memorandum of order and judgment was entered. From this order, defendant appeals.

Defendant assigns error to the district court's denial of his request for genetic testing to establish paternity. Generally, a paternity test is permitted when a dispute over paternity arises:

> [i]n the trial of any civil action in which the question of parentage arises, the court shall, on motion of a party, order the mother, the child, and the alleged father-defendant to submit to one or more blood or genetic marker tests, to be performed by a duly certified physician or other expert . . . .

N.C. Gen. Stat. § 8-50.1(b1). In *State v. Fowler*, the North Carolina Supreme Court noted "[t]here can be no doubt that a defendant's right to a blood test is a substantial right and that, upon defendant's motion, the court must order the test when it is possible to do so." 277 N.C. 305, 309, 177 S.E.2d 385, 387 (1970). Nevertheless, an exception to this rule arises when the issue of paternity has already been litigated, or when the father has acknowledged paternity in a sworn written statement. N.C. Gen. Stat. § 110-132. In cases such as these, the individual questioning paternity is estopped from re-litigating the issue. *Withrow v. Webb*, 53 N.C. App. 67, 280 S.E.2d 22 (1981). In cases where the issue of paternity has not been litigated, however, or in cases where the alleged father has never admitted paternity, G.S. § 8-50.1 controls and the request for a paternity test will be allowed.

In the present case, the trial court found, apparently relying on *Jones v. Patience*, 121 N.C. App. 434, 466 S.E.2d 720, *disc. review*

denied, 343 N.C. 307, 471 S.E.2d 72 (1996), "[d]efendant offered no evidence that any other man had acknowledged paternity of the minor child . . ." and denied defendant's request for a paternity test. In *Jones*, the defendant-mother requested a paternity test in order to prove that her ex-husband was not the child's natural father and thus not entitled to visitation rights. Noting the marital presumption regarding children born during a marriage, the Court said, "North Carolina courts have long recognized that children born during a marriage, as here, are presumed to be the product of the marriage." *Id.* at 439, 466 S.E.2d at 723 (citations omitted). While recognizing that this marital presumption is "ordinarily" rebuttable by evidence of a blood test, the Court stated, *"in the context of a custody dispute between the mother, and her husband or former spouse*, concerning a child born during their lawful marriage, the marital presumption is rebuttable only upon a showing that another man has formally acknowledged paternity . . . ." *Id.* (citations omitted) (emphasis added). The Court rejected the mother's attempts to block the visitation rights of a man willing to maintain his role as father in the absence of a showing that another man had formally admitted paternity. *Id.* Otherwise, the mother would have the authority to illegitimate her own children, which stands in conflict with the public policy of this State. *Id.* at 440, 466 S.E.2d at 723.

In *Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972), the North Carolina Supreme Court permitted the introduction of blood-grouping tests to prove that a man could not be the father of a child when a question of paternity arose in a civil action. In *Wright*, the Supreme Court noted that a blood test can rebut the presumption of paternity which attaches when a child is born during a marriage:

> Although we continue to recognize its primary importance in preserving the status of legitimacy of children born in wedlock, this presumption must give way before dependable evidence to the contrary. Blood-grouping tests which show that a man cannot be the father of a child are perhaps the most dependable evidence we have known.

Id. at 172, 188 S.E.2d at 325-26 (citation omitted). The presumption of paternity is rebuttable because a man will not be required to support a child not his own; conversely, "[t]he father of an illegitimate child has a legal duty to support his child." *Wright v. Gann*, 27 N.C. App. 45, 47, 217 S.E.2d 761, 763 (1975) (citing G.S. § 49-2), *cert. denied*, 288 N.C. 513, 219 S.E.2d 348 (1975). *Jones*, therefore, must be construed

in the narrow context of a custody dispute when the mother challenges the paternity of her former spouse; in that circumstance, the presumption of paternity cannot be overcome unless another man has come forward and formally acknowledged paternity.

In the present case, plaintiff filed suit for payment of past due child support and defendant answered by requesting a genetic test to determine paternity of the child. Defendant is not barred from contesting paternity because the issue had not been litigated and because defendant never formally acknowledged paternity in the manner prescribed by G.S. § 110-132. *Jones v. Patience* does not apply to bar defendant's right to a genetic test under these facts, and defendant was not required to present evidence that another man had acknowledged paternity in order for the court to authorize the test. Pursuant to *Wright v. Wright*, defendant is entitled to an appropriate test to establish paternity. Thus, we remand this case to the district court for a new hearing with instructions to order a test to establish paternity. Because of this determination, we need not address the remaining issues defendant has raised on appeal.

Reversed and remanded.

Judges GREENE and EDMUNDS concur.

STATE OF NORTH CAROLINA v. TIMOTHY LAMONT CATES

No. COA99-1351

(Filed 7 November 2000)

Criminal Law— arraignment and trial—same day

The trial court erred in a prosecution for kidnapping, rape, and statutory sex offense by proceeding to trial on the day in which defendant was arraigned. N.C.G.S. § 15A-943 requires that all arraignments be calendared and defendant's was not—only his trial—but a defendant must demonstrate prejudice from failure to follow this provision. The statute also requires a one-week period between arraignment and trial and violation of this protection constitutes automatic reversible error unless a defendant has waived the protection. Although the State contends that defendant waived the statutory protection because he did not

cite N.C.G.S. § 15A-943 in his motion for a continuance, a defendant is not required to make an explicit § 15A-943 objection when that defendant has made a motion for a week's continuance based upon the same purpose for which the statute was designed—allowing a sufficient interlude to prepare for trial.

Appeal by defendant from judgments entered 9 April 1999 by Judge W. Osmond Smith in Durham County Superior Court. Heard in the Court of Appeals 11 October 2000.

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

Daniel Shatz for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 5 April 1999 Session of Durham County Superior Court for first-degree kidnapping, first-degree rape, and first-degree statutory sex offense. The jury returned a verdict on 9 April 1999, finding him guilty of second-degree kidnapping, attempted second-degree rape, and second-degree statutory sex offense. Defendant now appeals.

Defendant has brought forth six arguments on appeal. However, we will only address his first argument, as we find it to be dispositive. Defendant contends the trial court committed reversible error by beginning his trial the same day on which he was formally arraigned. We agree.

To put defendant's argument in context, we provide the following summary of the events leading up to trial. The court calendar, which had been prepared by the district attorney, listed the offenses for which defendant would be tried as first-degree kidnapping, second-degree rape, and second-degree sex offense. The first-degree kidnapping indictment listed the intended felony as "second degree rape and second degree sexual offense." Based upon the calendar and the kidnapping indictment, defense counsel assumed defendant would be tried for first-degree kidnapping, second-degree rape, and second-degree sex offense. Defense counsel's plea discussions and advice to her client about pleas operated under this assumption.

Defendant's trial was calendared for 5 April 1999. After the district attorney called the case for trial, she announced she would be prosecuting defendant for first-degree kidnapping, *first-degree* rape,

and *first-degree* sex offense. The trial judge then questioned the parties as to whether defendant had ever been formally arraigned. The district attorney and the clerk of court could find no record of either an arraignment or a waiver of arraignment by defendant. The trial judge then formally arraigned defendant on the charges of first-degree kidnapping, first-degree rape, and first-degree sex offense, to which defendant pled not guilty. In light of the revelation that defendant would now be tried for first-degree rape and first-degree sex offense, defense counsel moved for a continuance for one week so that she could reinitiate plea discussions and prepare for trial on these first-degree charges. The trial judge gave the parties a quick recess to discuss possible pleas. The State offered a plea, and defense counsel quickly informed defendant of that offer but did not have an opportunity to discuss the offer thoroughly during the recess. After reconvening, the State informed the trial judge the plea offer expired at the end of the day because the State was ready to proceed to trial. The trial judge then denied defendant's motion to continue and started the trial. All of the above events, including the commencement of defendant's trial, occurred on the same day, 5 April 1999.

Our statutes set forth the following rules with respect to the calendaring and timing of formal arraignments:

> (a) In counties in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, and in other counties the Chief Justice designates, the prosecutor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. No cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared.
>
> (b) When a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned.

N.C. Gen. Stat. § 15A-943 (1999). We take judicial notice that Durham County is a county that regularly schedules twenty or more weeks of criminal sessions a year, thereby making this statute applicable. *State v. Shook*, 293 N.C. 315, 316, 237 S.E.2d 843, 845 (1977).

The statute sets forth two simple rules. First, all arraignments must be calendared. N.C. Gen. Stat. § 15A-943(a). The State unques-

tionably violated this requirement; defendant's arraignment was never calendared—only his trial. However, failure to follow this requirement is not necessarily reversible error; a defendant still must demonstrate prejudice. *State v. Richardson*, 308 N.C. 470, 483, 302 S.E.2d 799, 807 (1983). The second statutory requirement is that there must be a one-week period between a defendant's arraignment and his trial. N.C. Gen. Stat. § 15A-943(b). Unless a defendant has waived the statutory protection, violation of this requirement constitutes automatic reversible error; no prejudice need be shown. *Shook*, 293 N.C. at 319-20, 237 S.E.2d at 847. Again, there is no question that this requirement was violated here; defendant's trial began on the same day he was arraigned. The State, however, contends defendant waived the statutory protection because he never explicitly cited section 15A-943 in his motion for a continuance. The few cases applying this statute illustrate that such explicit citation is not necessarily required.

In *State v. Shook*, our Supreme Court granted the defendant a new trial based upon his trial's having commenced on the same day he was arraigned. *Id.* at 320, 237 S.E.2d at 847. In analyzing the statute, the Court never even states whether the defendant explicitly cited section 15A-943, let alone that such explicit citation is affirmatively required in all instances. Likewise, in *State v. McCabe*, this Court granted the defendant a new trial on exactly the same grounds. 80 N.C. App. 556, 557-58, 342 S.E.2d 580, 581 (1986). No mention was made then of whether the defendant ever explicitly cited section 15A-943. The only case in which we have found a defendant to have waived the statutory protection was when defendant's only objection to the timing of the trial was based upon his not being able to summon an essential defense witness. *State v. Davis*, 38 N.C. App. 672, 675-76, 248 S.E.2d 883, 886 (1978). Based upon these cases, we believe the proper focus is not upon whether a defendant explicitly cites section 15A-943 but upon whether his need for a continuance is based upon the same purposes for which the statute was enacted.

To that effect, the purpose of section 15A-943(b) is to allow both sides a sufficient interlude in order to prepare for trial. *Shook*, 293 N.C. at 318, 237 S.E.2d at 846. Our Supreme Court has explained:

> [B]efore arraignment neither the state nor defendant may know whether the case need proceed to trial. The state may not know since no formal entry of plea has been made. Defendant himself may not know since prior to arraignment he may have been con-

> sidering entering a guilty plea to the charge or pursuant to some plea negotiation which has taken place between him and the state. The week's interim . . . thereby helps to avoid preparation which may well be not only extensive but also unnecessary.

Id. The precise concerns of the statute were at play here. Following the revelation that defendant would be in fact tried for first-degree rape and first-degree sex offense, defense counsel immediately moved for a week's continuance so she could both prepare for trial and resume plea discussions. Defense counsel admitted the brief recess did not provide her with sufficient time to fully discuss the State's latest plea offer with defendant. The statutory one-week requirement would have given her and defendant the time to do so. Thus, when a defendant, as here, has made a motion for a week's continuance based upon the same purposes for which the statute was designed, making an explicit "section 15A-943" objection would be redundant and is not required to invoke the statutory protections. We hold defendant did not waive section 15A-943's one-week requirement between arraignment and trial. As a result, the court committed reversible error in proceeding to trial on the same day in which defendant was arraigned.

New trial.

Judges WYNN and HUNTER concur.

JAYSHREE KHAJANCHI, PLAINTIFF v. KIRIT A. KHAJANCHI, DEFENDANT

No. COA99-1056

(Filed 21 November 2000)

1. Divorce— equitable distribution—unequal division proper

The trial court did not abuse its discretion in an equitable distribution case asserted prior to the divisible property amendments in 1997 by distributing the marital estate unequally by $200,000 more in property in favor of defendant-husband and by giving each party two Hallmark stores even though plaintiff-wife requested all four stores, because: (1) the trial court specifically found that the four Hallmark stores owned by the parties had

greatly appreciated in value since the date of separation, and the appreciation was due to the efforts of defendant; (2) the trial court noted the forty-six percent increase in the value of the four Hallmark stores was created by active appreciation attributable to the post-separation efforts of defendant; (3) the trial court considered as a distributional factor that defendant incurred considerable financial losses from the date of separation onward due to the forced sale of the parties' Georgia residence and his payments of numerous marital debts; (4) the trial court distributed all the other marital debts to defendant and balanced this allocation by distributing additional assets to defendant; (5) the trial court made an interim distribution of $180,000 to plaintiff from the marital assets of the parties; and (6) the trial court distributed two Hallmark stores to each party after considering store locations, the parties' requests, the parties' conduct, and the economic ramifications of each combination.

2. Divorce— equitable distribution—distributional factors—discretion of trial court

The trial court did not abuse its discretion in an equitable distribution case asserted prior to the divisible property amendments in 1997 by failing to classify and distribute as marital debt the sales cost and income taxes incurred in connection with the sale of the parties' Georgia real estate, because: (1) even if post-separation debt payments are treated as a distributional factor, the trial court may in its discretion choose to give no weight to that particular factor; and (2) defendant was not prejudiced in any way by the trial court's actions since those distributional factors resulted in an unequal distribution in his favor.

3. Divorce— equitable distribution—marital debts

The trial court did not err in an equitable distribution case asserted prior to the divisible property amendments in 1997 by its distribution of the assets and debts of the parties' Hallmark stores even though defendant-husband contends the trial court should have used the same method it used for the division of a Wachovia Bank checking account when it distributed the stores' debts owed to Hallmark, Enesco, and Lefton, because: (1) the trial court chose to distribute the amount of the Enesco and Lefton invoices equally since it had no way of determining from the evidence how much of the inventory was in the two stores distributed to plaintiff-wife; (2) neither party chose to incur the expense of a complete inventory to determine whether the mer-

chandise in question was in existence and in which store it was located; and (3) defendant had no objection to an equal division of the Enesco or Lefton accounts at trial.

Appeal by both plaintiff and defendant from judgment entered 8 January 1999 by Judge Shelly S. Holt in New Hanover County District Court. Heard in the Court of Appeals 14 August 2000.

Jayshree Khajanchi (plaintiff) and Kirit A. Khajanchi (defendant) were married on 26 November 1968, separated on 29 February 1996, and divorced on 1 August 1997. Their two children are emancipated. Prior to the entry of their divorce judgment, both plaintiff and defendant asserted claims for equitable distribution of their marital property and debts.

Plaintiff and defendant moved to Wilmington, North Carolina, in 1981. In 1986, the parties purchased a Hallmark franchise (Jay's Hallmark) in Wilmington. Plaintiff-wife operated the business until 1991, when defendant-husband began working in the store with her. In mid-1993, the parties purchased three Hallmark stores in Myrtle Beach, South Carolina. Following the separation of the parties, defendant operated all four Hallmark stores, receiving a salary, bonuses, and other benefits from his management of the stores. Prior to the trial of the equitable distribution claims, the wife received $180,000.00 in interim distributions.

In addition to the four Hallmark stores, on the date of separation the parties also owned a home in Wilmington, another residence in Georgia, and a condominium at Wrightsville Beach. Their personal property included three automobiles, numerous IRAs and other investment accounts, checking accounts, household furnishings, jewelry, Hallmark "collectibles," and a life insurance policy with cash value.

The trial court valued the marital assets of the parties at $2,591,155.00 and the marital debt at $694,940.00 on the date of separation. After hearing evidence on various distributional factors, the trial court concluded that an equal distribution would not be equitable, and ordered an unequal distribution in favor of defendant-husband. Both parties appealed.

Lea, Clyburn & Rhine, by J. Albert Clyburn and James W. Lea, III, for plaintiff appellant-appellee.

Carlton S. Prickett, Jr., for defendant appellant-appellee.

HORTON, Judge.

The division of property between married persons following separation or divorce was relatively simple in North Carolina before the enactment of the Equitable Distribution Act in 1981. Prior to that time, this State was one of a dwindling group of common law "title" jurisdictions, in which property was assigned to the spouse holding its "title." In most cases, that spouse was the husband. Typically, only real property was jointly titled to the spouses. Although the number of women in the work force increased after the end of World War II, the husband's employment was still likely to be the primary source of income for the parties, and any deferred compensation or retirement benefits were "owned" by him. The title system of allocation "tended to reward the spouse directly responsible for its acquisition, while overlooking the contribution of the homemaking spouse." *White v. White*, 312 N.C. 770, 774, 324 S.E.2d 829, 831 (1985). *See also* 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 12.5, at —— (forthcoming publication, 5th ed. December 2000); Sally B. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. Rev. 247 (1983).

The common law "title" system was not only unfair, but also spawned unnecessary litigation. Dependent spouses routinely made claims for alimony and requested possession of the dwelling house and its contents, and absolute divorces were often contested to encourage a more reasonable property settlement. However,

> [w]ith the advent of no-fault divorce, dependent spouses lost the "bargaining power" of refusing to consent to a divorce. . . . The combination of no-fault divorce and a "title only" rule for property distribution sometimes led to unconscionable results. *See, e.g., Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E.2d 793 (1979) (wife worked in home and in husband's closely held corporation for many years but could receive only one-half the marital home upon divorce under prevailing legal theories). Pressure mounted for North Carolina to follow the lead of other states in adopting statutes based on community property or equitable distribution principles. . . . The General Assembly responded in 1981 by enacting "An Act for Equitable Distribution of Marital Property," codified as N.C.G.S. §§ 50-20, -21.

McLean v. McLean, 323 N.C. 543, 549, 374 S.E.2d 376, 380 (1988).

Equitable distribution, as enacted in North Carolina, was grounded in the notion that marriage is a partnership enterprise, both economic and otherwise, "to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship." *White*, 312 N.C. at 775, 324 S.E.2d at 832. "In other words, '[t]he goal of equitable distribution is to allocate to divorcing spouses a fair share of the assets accumulated by the marital partnership.' The heart of the theory is that 'both spouses contribute to the economic circumstances of a marriage, whether directly by employment or indirectly by providing homemaker services.' " *Smith v. Smith*, 314 N.C. 80, 86, 331 S.E.2d 682, 686 (1985) (citations omitted). Thus, the Act authorized our state's district courts to consider factors other than legal title in distributing the marital assets upon the dissolution of the marriage. In keeping with this statutory mandate, we have stated that "the policy behind G.S. 50-20 is basically one of repayment of contribution." *Hinton v. Hinton*, 70 N.C. App. 665, 669, 321 S.E.2d 161, 163 (1984).

In an effort to equitably account for post-separation events, the Equitable Distribution Act was amended in 1997 to add the category of "divisible" property. 1997 N.C. Sess. Laws ch. 302, §§ 2-5. As a result of those amendments, the trial courts were directed to classify, value and distribute certain real and personal property received after the date of separation, including the appreciation and diminution in the value of marital property, passive income from marital property, and certain increases in marital debt. N.C. Gen. Stat. § 50-20(b)(4) (1999). The 1997 amendments were effective 1 October 1997 and applied to actions for equitable distribution filed on or after that date. The claims for equitable distribution in this case were asserted prior to the effective date of the amendments relating to "divisible property"; thus our discussion below is confined to our statutory and case law as it existed prior to the enactment of the 1997 amendments.

Upon a party's application for equitable distribution, the trial court is to determine what is "marital" property and provide for an equitable distribution of such property. N.C. Gen. Stat. § 50-20(b)(1) (definition of marital property); N.C. Gen. Stat. § 50-20(c); *Truesdale v. Truesdale*, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988). The court's task is divided into three parts: classification, valuation, and distribution. *Cable v. Cable*, 76 N.C. App. 134, 137, 331 S.E.2d 765, 767, *disc. review denied*, 315 N.C. 182, 337 S.E.2d 856 (1985).

At the classification stage, the court must determine whether the property was acquired during the marriage by the efforts of one or

both spouses, or whether it is the separate property of one spouse. Marital debts must likewise be classified. "[O]nly those assets *and* debts that are classified as marital property and valued are subject to distribution under the Equitable Distribution Act . . . ." *Grasty v. Grasty*, 125 N.C. App. 736, 740, 482 S.E.2d 752, 755, *disc. review denied*, 346 N.C. 278, 487 S.E.2d 545 (1997) (emphasis added). After classification, the items of marital property must be valued as of the date of the separation of the parties, since the marital estate is "frozen" at that time. *Becker v. Becker*, 88 N.C. App. 606, 607, 364 S.E.2d 175, 176 (1988). A net value for each item must be reached by considering the "market value, if any, less the amount of any encumbrance serving to offset or reduce market value." *Alexander v. Alexander*, 68 N.C. App. 548, 551, 315 S.E.2d 772, 775 (1984). Finally, the court must distribute the marital property and debts in an "equitable" manner between the parties. *Beightol v. Beightol*, 90 N.C. App. 58, 367 S.E.2d 347, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988).

Here, the parties do not take exception to any findings of fact or conclusions of law with regard to the trial court's classification and valuation of any property or debts. Their objections are to the distribution of the marital property, particularly the four Hallmark stores owned by them.

I. Plaintiff's Appeal

Plaintiff-wife appeals from the decision of the trial court to distribute the marital estate unequally in favor of defendant-husband. She contends that, in light of the distributional factors found by the trial court, the trial court abused its discretion in ordering an unequal distribution. After careful review, we disagree and affirm the trial court.

The North Carolina Equitable Distribution Act is

> a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* "unless the court determines that an equal division is not equitable." N.C.G.S. 50-20(c). The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable. Therefore, if no evidence is admitted

> tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally.
>
> When evidence tending to show that an equal division of marital property would not be equitable is admitted, however, the trial court must exercise its discretion in assigning the weight each factor should receive in any given case. It must then make an equitable division of the marital property by balancing the evidence presented by the parties in light of the legislative policy which favors equal division.

White, 312 N.C. at 776-77, 324 S.E.2d at 832-33.

As *White* indicates, the party who desires an unequal division bears evidentiary burdens concerning the relevant statutory factors, and also has the burden of proving by a preponderance of the evidence that an equal division would not be equitable. These burdens become even more significant when we consider the fact that the trial court has broad discretion in determining the weight to be accorded to statutory factors and in distributing the marital estate. *Alexander*, 68 N.C. App. at 552, 315 S.E.2d at 775-76. If the trial court divides property unequally, it must make findings of fact based on the evidence in support of its conclusion that an equal division would not be equitable. *Id.*

The trial court's decision "will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833. See also *Rawls v. Rawls*, 94 N.C. App. 670, 676, 381 S.E.2d 179, 182 (1989) (stating that the manner in which the court distributes or apportions marital debts is a matter committed to the discretion of the trial court); *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994) (upholding trial court's distribution where trial court found the presence of a factor but stated in the final order that it chose not to give any weight to that factor). A single distributional factor can support an unequal distribution of the marital property and debts. *Andrews v. Andrews*, 79 N.C. App. 228, 235, 338 S.E.2d 809, 814, *disc. review denied*, 316 N.C. 730, 345 S.E.2d 385 (1986).

The trial court's distribution will not be disturbed on appeal absent evidence that it is manifestly unsupported by reason. *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986). See also *Nix v. Nix*, 80 N.C. App. 110, 341 S.E.2d 116 (1986) (upholding trial

court's award of 100% of the marital estate to one party due to a finding that significant post-separation appreciation of one marital asset had accrued to the benefit of the other party), and *Godley v. Godley*, 110 N.C. App. 99, 429 S.E.2d 382 (1993) (affirming trial court's award of 90% of the marital estate to one party based upon the presence of several distributional factors).

During their marriage, the Khajanchis acquired four Hallmark stores: Jay's Hallmark in Wilmington, North Carolina, and the Briarcliff, Myrtle Square and Inlet Square stores in Myrtle Beach, South Carolina. The Khajanchis incurred significant debt to purchase these stores, and those debts were still in existence when the marriage ended in 1996. In addition, there were mortgage debts on each of the Khajanchis' three residences, as well as an automobile debt. The trial court was primarily concerned with distributing these marital debts and the four Hallmark stores during the equitable distribution proceeding.

After careful consideration of the evidence, the trial court determined that "an equal division of the marital estate is not equitable. Rather, an unequal distribution of the marital estate in favor of Defendant, as set forth herein, is equitable." The trial court then distributed about $200,000.00 more in property to defendant-husband than to plaintiff-wife. The effect of the division was that the defendant received $100,000.00 more than he would have received under an equal division.

[1] The plaintiff contends that the trial court erred in making an unequal division of the marital assets, that the trial court improperly considered as distributional factors certain post-separation payments made by defendant, and that the trial court improperly distributed the four Hallmark stores, because plaintiff requested all four Hallmark stores and was given only two of them. We disagree with each of plaintiff's arguments.

Because of post-separation changes in the value of property, our trial courts were often required—prior to the 1997 amendments—to make an unequal distribution in order to achieve equity. "If the court determines that an equal division of the marital property is not equitable, the court shall divide the marital property . . . equitably." N.C. Gen. Stat. § 50-20(c). See also *White*, 312 N.C. at 777, 324 S.E.2d at 833 (stating that the trial court must exercise its discretion in considering the factors in N.C. Gen. Stat. § 50-20(c) and then make an

equitable division of the marital property once it determines that an equal division is inequitable.)

Here, the able trial judge meticulously considered a host of distributional factors, such as the value of separate property owned by the parties and the value of business interests acquired by them after the date of separation. As part of its detailed order, the trial court made the following findings:

> 17. After the parties[']' separation and at the time of trial, each party had acquired additional assets which are hers or his separate property: Plaintiff-Wife now owns a 50% interest in five (5) Taco Bell restaurants in California and Defendant-Husband now owns the "Jacksonville" Hallmark store.
>
> 18. In 1997, the five (5) Taco Bell restaurants in which Plaintiff has a 50% interest earned a total net profit of $300,000.
>
> 19. From December 31, 1997, through January 20, 1998, the Defendant had control of bank accounts, both business and personal, which collectively may have had as much as $918,000 on deposit; however, at the time of trial it was shown that there were several outstanding checks and other payments which Defendant had made from these accounts which were not reflected on the account balances shown by Plaintiff and therefore the total balance in these accounts at trial was closer to approximately $350,000.
>
> 20. Of the approximate $350,000 which Defendant had on deposit at the time of trial in the various accounts, approximately $152,000 was in a personal savings account . . . and represented payments received by him from two (2) bonuses in 1997 of $100,000 each from the Wilmington store and the three (3) Myrtle Beach stores less his payment of $45,000 for estimated income taxes on these bonuses.
>
> 21. Two (2) of the bank accounts which were included in the evidence offered by Plaintiff that Defendant had approximately $918,000 at the time of trial were bank accounts which were opened after the date of separation . . . .
>
> . . . .
>
> 26. Defendant preserved marital assets after the parties' separation by paying the monthly payments on the mortgages, and by also paying off the mortgage on the Georgia residence at the time

of its sale; by making the payments on the Ford Explorer debt; and by making the monthly payments on the "Hallmark debt".

27. After the separation, the Defendant paid the sum of $4,987 to or on behalf of Plaintiff . . . .

28. After the parties' separation, the "Georgia house" was sold in December, 1996 . . . . Defendant incurred $6,631 in "closing costs" and $31,985 for income taxes arising from the sale of this property . . . .

29. After the date of separation, the Defendant liquidated [an investment account]. As a result of this sale, Defendant incurred an income tax liability of $24,000.

30. After the date of separation, [the Plaintiff received an interim distribution of $180,000].

31. Any distributional payment by Defendant to Plaintiff would be with "after-tax dollars" of Defendant and would be non-taxable to Plaintiff.

. . . .

33. Since the parties' separation the Defendant has had the sole responsibility for managing and maintaining all four of the Hallmark stores.

. . . .

37. The increase in value of these four (4) stores to $2,062,890 at the time of trial, being an almost forty-six percent (46%) increase in value from their total value of $1,415,366 at the date of separation, is active appreciation attributable primarily to the post-separation efforts of Defendant.

. . . .

39. . . . The principal amount owed [on the "Hallmark debt"] was reduced from $418,469 at the date of separation to $256,145 as of the date of trial, with this reduction in the balance being the result of payments made by Defendant after separation and up to the date of trial. . . .

. . . .

43. The division and distribution of the four (4) stores, . . . is based on location as well as gross sales from 1997. Defendant-

husband lives in Wilmington and the Briarcliff store is the closest store to the Wilmington store. The Myrtle Square and Inlet Square stores had 48% of the gross sales of the four stores in 1997. The Court finds this division and distribution of the stores to be equitable if Defendant is assigned the entire Hallmark debt.

44. The Defendant-husband is being assigned all marital debt.

The trial court specifically found that the four Hallmark stores had greatly appreciated in value since the date of separation, and the court found that the appreciation was due to the efforts of the defendant-husband. At the date of separation, the four stores were collectively worth $1,415,366.00. The trial court also found that:

36. The date of trial values for the four Hallmark stores are as follows:

a. Wilmington (Jay's Hallmark)	$ 815,040
b. Briarcliff (MyrBch)	413,787
c. Myrtle Square (MyrBch)	467,819
d. Inlet Square (MyrBch)	366,244
TOTAL . . .	**$ 2,062,890**

The trial court noted that this change represented an increased value of nearly forty-six percent and was created by "active appreciation attributable primarily to the post-separation efforts of Defendant. For example, after the parties separated the Defendant not only managed these stores without assistance from Plaintiff but he also remodeled the Wilmington store and doubled the size of the Myrtle Square store."

The trial court also considered as a distributional factor that defendant incurred considerable financial losses from the date of separation onward because of the forced sale of the Georgia residence and his payments of numerous marital debts. Plaintiff contends the trial court's consideration of these facts was error. However, after examining the record, we disagree and find the trial court properly weighed the factors.

The judge distributed the Georgia house to defendant at $88,000.00, its date-of-separation value. The house was sold by defendant before the final equitable distribution order was entered. However, defendant did not actually receive the entire $88,000.00

realized from the sale. From that amount, defendant paid $5,298.00 in repair costs to prepare the house for sale, $6,631.00 in sales costs, and $31,985.00 in income taxes on the sale proceeds.

Further, the trial court distributed all the other marital debts to defendant. Defendant-husband incurred a substantial income tax liability of $24,000.00 when he liquidated the couple's 20th Century money fund/investment account after the date of separation to pay bills and expenses associated with his management of the Hallmark stores. The trial court also made an interim distribution of $180,000.00 to plaintiff from the marital assets of the parties. These payments were also properly taken into consideration by the trial court in making its distributional decision. To balance the allocation of these debts to defendant-husband, the trial court distributed additional assets to defendant. This was within the trial court's discretion under our decision in *White*, and was not an abuse of discretion.

Faced with the task of actually dividing the four stores between the parties, the trial court assessed numerous distributive scenarios by evaluating store locations, the parties' requests, the parties' conduct, and the economic ramifications of each combination. The trial court stated that it was initially inclined to distribute all four stores to defendant, since he operated all of them from the date of separation to the time of trial; however, the trial court also considered the plaintiff's request for continued involvement in the businesses. The trial court ultimately distributed the Wilmington and Briarcliff stores to defendant and the Myrtle Square and Inlet Square stores to plaintiff. This was a permissible distribution, because we have previously held that "there appears to be no other guide than the discretion and good conscience of the trial judge in determining which party gets which specific property." *Andrews*, 79 N.C. App. at 236, 338 S.E.2d at 814. Based on the findings of fact made by the trial court, we hold the trial court did not abuse its discretion in making its distributional decision, nor did it abuse its discretion in distributing two of the four Hallmark stores to each of the parties.

II. Husband's Appeal

[2] Defendant-husband first contends that the trial court erred in failing to classify and distribute as marital debt the sales cost and income taxes incurred in connection with the sale of the Georgia real estate. We disagree. As discussed above in section I of this opinion, defendant-husband incurred substantial expenses in connection with the sale of the Georgia real estate, including $5,298.00 for repairs,

$6,631.00 in closing costs, and income tax liability on the sale proceeds of $31,985.00. The trial court distributed the property to defendant-husband at the gross sales price, treated the outstanding mortgage as a marital debt, and treated the other expenditures by defendant-husband as distributional factors.

Prior to the enactment of the divisible property amendments in 1997, the trial court had wide latitude in dealing with debts incurred in connection with the sale or maintenance of jointly owned real estate. Generally speaking, the manner in which the trial court distributes or apportions marital debts is a matter committed to the trial court's discretion. *Rawls*, 94 N.C. App. at 676, 381 S.E.2d at 182. That exercise of discretion is given considerable weight by this Court. For example, in *Truesdale*, we stated that the trial court can award adjustive credits as part of an overall marital property distribution. *Truesdale*, 89 N.C. App. at 450, 366 S.E.2d at 516. See also *Hendricks v. Hendricks*, 96 N.C. App. 462, 386 S.E.2d 84, *cert. denied*, 326 N.C. 264, 389 S.E.2d 113 (1990) (post-separation payments made by a spouse may be treated as credits for that spouse's equitable share of the marital estate).

Post-separation payments may also be treated as a distributional factor. *Haywood v. Haywood*, 106 N.C. App. 91, 96, 415 S.E.2d 565, 568 (1992), *rev'd in part and remanded on other grounds*, 333 N.C. 342, 425 S.E.2d 696 (1993). However, even if post-separation debt payments are treated as a distributional factor, the trial court may, in its discretion, choose to give no weight to that particular factor. *Smith*, 111 N.C. App. at 510, 433 S.E.2d at 226. Here, the trial court had discretion to treat defendant's post-separation payments of the Hallmark debt, the mortgage payments, the car payments, and other marital debts as distributional factors. Defendant-husband was not prejudiced in any way by the action of the trial court because those distributional factors resulted in an unequal distribution in his favor.

[3] Second, defendant argues that the trial court erred in its distribution of the assets and debts of the Hallmark stores. Specifically, defendant complains that the trial court was inconsistent in its division of a Wachovia Bank checking account, and store debts owed to Hallmark, Enesco, and Lefton. We disagree, and affirm the action of the trial court.

From the date of separation through 12 May 1998, defendant-husband operated all four Hallmark stores. Pursuant to the order of equitable distribution, plaintiff began operating two of the Myrtle Beach

stores, Inlet Square and Myrtle Square, on 13 May 1998, and defendant began operating the remaining Myrtle Beach store and the remaining Wilmington store on that date. The Wilmington store, Jay's Hallmark, was a sole proprietorship, while the three Myrtle Beach stores were owned by AJITS, Inc., a corporation formed by the Khajanchis. Proceeds from the three Myrtle Beach stores were deposited in a checking account at Wachovia Bank, which had a net balance of $32,877.00 on 12 May 1998. The trial court prorated the checking account balance between plaintiff and defendant based on the date of trial values of the three Myrtle Beach stores, distributing 66.7% of the account to plaintiff and the remaining 33.3% to defendant. Defendant-husband does not quarrel with that division, but complains that the trial court abused its discretion in failing to use the same method in distributing the debts owed to Hallmark, Enesco, and Lefton by the three Myrtle Beach stores.

As to the debts owed to Enesco and Lefton, the trial court found:

> 55. Enesco supplies both "everyday" merchandise as well as "seasonal" merchandise and the $5,854 owed to Enesco may be for merchandise which was in Plaintiff's two (2) stores when she took over the management on May 13. The parties should share equally in the payment of this total bill.
>
> 56. The $2,803 owed to Lefton represents invoices which predate May 13 and are for "everyday" merchandise which may or may not have been in Plaintiff's two stores when she took control of these stores. The parties should share equally in the payment of this total bill.

It appears that the trial judge had no way of determining from the evidence how much of the inventory represented by the Enesco and Lefton invoices was in the two Myrtle Beach stores distributed to plaintiff on May 13. Therefore, the trial judge chose to distribute the amount of the invoices equally. In that action we find no error.

We first note that, if anyone was prejudiced by the ruling of the trial court, it was plaintiff because the trial judge could not say with any certainty whether the invoiced merchandise was in her two stores. However, plaintiff did not appeal from these findings by the trial court. "Where no exceptions have been taken to the findings of fact, such findings are presumed to be correct and are binding on appeal." *Dull v. Dull*, 265 N.C. 562, 563, 144 S.E.2d 587, 588 (1965).

Second, neither party chose to incur the expense of a complete inventory to determine whether the merchandise in question was in existence on 13 May 1998 and in which store it was located. It is well settled that the party advocating an unequal division in an equitable distribution proceeding has the burden of showing, by a preponderance of the evidence, an error in the trial court's disposition. *White*, 312 N.C. at 776-77, 324 S.E.2d at 832-33. The burden in this case is on defendant to show such error. He cannot meet this burden by relying on his own failure to provide evidence from which the trial court could make a more definitive ruling.

Finally, it appears that at the trial of the matter defendant had no objection to an equal division of the Enesco or Lefton accounts. When defendant was asked about these accounts at a hearing on 7 December 1998, the following exchange occurred:

Q. And what is your position then on Anesco? [sic]

A. I feel that since a lot of this merchandise is, you know, not sold I'd be willing to share half of it if I had to.

Q. That's your position on Anesco? [sic]

A. That's right.

Q. And Lefton is $2,800.00?

A. Right.

As to the Hallmark invoice, the trial court determined that:

54. The Hallmark invoices, which Plaintiff contends Defendant owes, total $69,412; however, $42,616 of this $69,412 debt represents "Season Rebills" which are invoices for unsold "seasonal" merchandise that are not owing and due until May of 1999. The merchandise represented by these "Season Rebills" invoices was part of the inventory of Plaintiff's two stores when she took over on May 13 and may be sold in the future out of her two stores. Plaintiff should be responsible for payment of $23,514 on the "Season Rebills" invoices and Defendant should pay $19,102 on said invoices. The balance of $26,796 are for invoices which pre-date May 13 and are for merchandise received by Plaintiff's two stores prior to May 13 and which may or may not have been sold by Defendant prior to Plaintiff assuming control of these stores. Defendant should pay this $26,796 balance on invoices owed to Hallmark.

Again, the trial court made a diligent effort to account for merchandise associated with holidays and special occasions, as distinguished from everyday merchandise. As to the merchandise for holidays, the trial court apparently divided it between plaintiff and defendant, assigned to defendant the portion of the invoice based on holidays prior to 13 May 1998, and assigned the balance to plaintiff. As to the invoice for "everyday" merchandise, the trial court assigned the entire balance to defendant, apparently reasoning that the invoice represented merchandise already sold by defendant. Given the evidence and testimony presented by the parties, the trial court made an equitable distribution of the Hallmark debt and the entire marital estate. This assignment of error is overruled.

There being no abuse of discretion in the division of the marital estate and debt, the judgment of the trial court is

Affirmed.

Chief Judge EAGLES and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. CHRISTIAN ARIC SALMON

No. COA99-1259

(Filed 21 November 2000)

1. Constitutional Law— self-incrimination—exercise of right to counsel—pre-Miranda warning—admissible

The trial court did not err in a second-degree murder prosecution by admitting the statement of a police officer on cross-examination that defendant had been informed that a youth detective would be speaking with him at the police station and defendant had responded, "Not without my lawyer." The officer had testified on direct examination for defendant that before defendant had been given his Miranda warnings he had volunteered that "I didn't mean to do it." The Fifth Amendment Self-Incrimination Clause rather than the Sixth Amendment Right to Counsel is involved here since no indictment or juvenile petition had been filed, and the Fifth Amendment's Self-Incrimination Clause does not prevent the use of defendant's right to counsel

against him at trial when defendant exercises that right prior to his being advised of his Miranda rights.

2. Homicide— second-degree murder—provocation—insufficient as matter of law

The trial court correctly denied defendant's motion to dismiss the charge of second-degree murder, properly leaving the issue of provocation for the jury to decide, where the victim told defendant he was going to have sex with the defendant's sister; defendant said that the victim would not and that he would shoot the victim; defendant pointed a gun at the victim; the victim shoved defendant, who shoved back; and defendant shot the victim. The victim never assaulted or threatened to assault defendant; his statement was inflammatory, but the statement and the shoving were not sufficient to negate malice as a matter of law.

3. Homicide— second-degree murder—instructions—malice

There was no plain error in a second-degree murder prosecution where defendant contended that the prosecutor incorrectly stated the law by arguing that the law "presumes" that a pointed weapon is inherently dangerous. The remarks were, at most, technical misstatements of the law, and not prejudicial because the court subsequently gave a correct instruction on malice.

4. Criminal Law— prosecutor's argument—comment on defendant's demeanor

There was no error in a prosecution for second-degree murder in the State's closing argument on defendant's demeanor and lack of emotion during the trial where the prosecutor veered toward the line marking comment on defendant's credibility but did not cross it.

5. Sentencing— restitution—payment of funeral expenses—effective date

An order of restitution requiring a second-degree murder defendant to pay the victim's funeral expenses was vacated because the crime was committed on 29 September 1997 and N.C.G.S. § 15A-1340.34, authorizing the payment of restitution to a victim's estate, became effective on 1 December 1998.

Appeal by defendant from judgment entered 27 January 1999 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 20 September 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas B. Wood, for the State.

John Bryson for defendant-appellant.

LEWIS, Judge.

On 2 October 1997, defendant was charged by way of a juvenile petition with the murder of fifteen-year-old Brian Jason Dragon. Defendant was also fifteen years old at the time of the alleged offense and was supposedly a close friend of the victim. After a probable cause hearing, the juvenile court judge bound defendant over to be tried as an adult in superior court. Defendant was then tried at the 11 January 1999 Session of Guilford County Superior Court. On 26 January 1999, the jury returned a verdict finding him guilty of second-degree murder. The trial judge sentenced defendant to a term of 157 to 198 months' imprisonment, from which he appeals.

[1] Defendant first contests the admission of certain testimony by defense witness Michael J. Edmundson, a former police officer with the Greensboro Police Department. Following his arrest, defendant was placed in a patrol car with then-Officer Edmundson. Defendant was not at this time advised of his *Miranda* rights. (Simply being taken into custody does not trigger the protections of *Miranda*; a defendant must also be subject to police *interrogation*. *State v. Ladd*, 308 N.C. 272, 280, 302 S.E.2d 164, 170 (1983)). During defendant's direct examination, Officer Edmundson testified that, during the ride to the police station, defendant voluntarily stated, "I didn't mean to do it." (Tr. at 819). Defendant used this statement to support his primary defense—i.e., that he did not mean to kill Brian Dragon because he did not believe the gun was loaded.

On cross-examination by the State, Officer Edmundson testified that, following this voluntary statement, defendant was informed that a youth detective would be speaking with him upon arrival at the station, to which defendant responded, "Not without my lawyer." (Tr. at 825). The State used this second statement to rebut defendant's mistake-of-fact defense. Specifically, the State argued to the jury that, if it truly was a mistake, defendant would not have needed to speak with a lawyer. Defendant now claims that, by introducing defendant's statement "Not without my lawyer," the State unconstitutionally used defendant's exercise of his right to counsel against him.

We begin with a brief overview of the Constitutional right to counsel. There are two separate rights to counsel embodied in the

Constitution. The first is the explicit right to counsel contained in the Sixth Amendment. That right is only triggered once formal adversarial proceedings are initiated. *Kirby v. Illinois*, 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417 (1972). Here, no indictment or juvenile petition had been filed at the time, and so that right is not at issue. *See generally Sulie v. Duckworth*, 689 F.2d 128, 130 (7th Cir. 1982) (explaining that a defendant's pre-arraignment exercise of his right to counsel does not trigger the Sixth Amendment protections), *cert. denied*, 460 U.S. 1043, 75 L. Ed. 2d 796 (1983). The second right to counsel is embodied within the Fifth Amendment's Self-Incrimination Clause and is a necessary corollary to defendant's right to silence. *Miranda v. Arizona*, 384 U.S. 436, 469, 16 L. Ed. 2d 694, 721 (1964). It is this Fifth Amendment right to counsel (as incorporated through the Due Process Clause of the Fourteenth Amendment) that is at issue here.

Having clarified the specific right involved, we next outline the relevant case law in this area. In *Doyle v. Ohio*, the United States Supreme Court held that, after a defendant is given the *Miranda* warnings, the exercise of his right to silence cannot be used against him. 426 U.S. 610, 618, 49 L. Ed. 2d 91, 98 (1976). The Supreme Court later clarified it is only when silence is induced by the State by the *Miranda* warnings that the Constitutional proscription applies. *Fletcher v. Weir*, 455 U.S. 603, 606-07, 71 L. Ed. 2d 490, 494 (1982) (per curiam). The Court reasoned, "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence." *Id.* at 607, 71 L. Ed. 2d at 494; *see also Wainwright v. Greenfield*, 474 U.S. 284, 295, 88 L. Ed. 2d 623, 632 (1986) ("What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights *after the State's assurance* that the invocation of those rights will not be penalized." (emphasis added)); *State v. Mitchell*, 317 N.C. 661, 667, 346 S.E.2d 458, 462 (1986) (allowing evidence of defendant's post-arrest, pre-*Miranda* silence because "[t]he defendant had not relied on those implicit assurances [in the *Miranda* warnings] and had not been induced to remain silent.").

Our own Supreme Court later extended *Doyle's* holding regarding a defendant's right to silence to encompass a defendant's right to counsel as well, such that invocation of that right after defendant is read the *Miranda* warnings also cannot be used against him. *Ladd*, 308 N.C. at 284, 302 S.E.2d at 172. This case presents the issue of

whether the same reasoning in *Fletcher* serves to limit the application of *Ladd*. In other words, we must now determine whether *Ladd*'s proscription against the use of a defendant's right to counsel against him still applies when the defendant has *not* been given the *Miranda* warnings.

Before proceeding further, we do point out that, because the evidence of defendant's exercise of his right to counsel was used to rebut his mistake-of-fact defense and thus implicitly attack the veracity of his statement "I didn't mean to do it," there is at least some potential debate over whether it was used here for impeachment purposes or for substantive purposes. We need not answer that question as we do not believe it to be decisive. *See, e.g., Wainwright*, 474 U.S. at 292, 88 L. Ed. 2d at 630 (expressly refusing to answer whether use of a defendant's post-*Miranda* silence to rebut an insanity defense was for impeachment or substantive purposes and instead focusing just on the fact that the warnings were given). Instead, we will simply focus on the narrow issue of whether the *Ladd* prohibition against the use of a defendant's right to counsel applies in the absence of the *Miranda* warnings being read.

No case in North Carolina has squarely addressed this precise issue. We acknowledge that, in *State v. Sowell*, 80 N.C. App. 465, 342 S.E.2d 541, *rev'd on other grounds*, 318 N.C. 640, 350 S.E.2d 363 (1986), this Court held that defendant's silence and his exercise of the right to counsel could not be used against him. *Id.* at 468, 342 S.E.2d at 543. The facts of that case seem to suggest that, at the time of defendant's invocation of his rights, no *Miranda* warnings had been given. The *Sowell* Court, however, did not specifically address the issue.

For the answer, we look back to *Ladd*. In that case, the defendant was arrested for murder and armed robbery and then read his *Miranda* rights. *Ladd*, 308 N.C. at 281, 302 S.E.2d at 170. Police officers then began questioning him in their squad car about the whereabouts of some of the stolen money. *Id.* at 282, 302 S.E.2d at 170-71. Defendant initially stated there was no more money, but then told them, "I don't want to say where the rest of the money is now, but I will tell you where the rest of the money is after I talk to my lawyer." *Id.* at 282, 302 S.E.2d at 171. At trial, a police officer testified as to defendant's exercise of his right to counsel. *Id.* In holding this testimony to be constitutionally inadmissible, the *Ladd* Court reasoned:

> By giving the *Miranda* warnings, the police officers indicated to defendant that they were prepared to recognize his right to the presence of an attorney should he choose to exercise it. Therefore, we conclude that the words chosen by defendant to invoke this constitutional privilege should not have been admitted into evidence against him.

Id. at 284, 302 S.E.2d at 172. Thus, our Supreme Court implicitly used the same rationale employed by the United State Supreme Court in *Fletcher*: the constitutional prohibition is a prohibition against trickery by the State. *Cf. Dean v. Young*, 777 F.2d 1239, 1241 (7th Cir. 1985) ("*Flecther* treats *Doyle* as a prohibition of trickery by the government . . . ."), *cert. denied*, 475 U.S. 1142, 90 L. Ed. 2d 339 (1986). In other words, the State may not assure defendant he has the right to counsel and then turn around and use a defendant's exercise of that assurance against him. Consequently, when no assurances have been made by the State by a *Miranda* warning, the concern for trickery by the State is not at issue. The State is not breaching any promises because it never made any to the defendant in the first place.

We believe *Fletcher* also mandates this result. *Fletcher* affirmatively holds that a defendant's pre-*Miranda* silence can be used against him. *Fletcher*, 455 U.S. at 606-07, 71 L. Ed. 2d at 494. To that end, we do not think any distinction should be drawn between using a defendant's pre-*Miranda* silence (as was involved in *Fletcher*) and using his pre-*Miranda* right to counsel (as is involved here). As stated earlier, the right to remain silent and the right to counsel are necessary corollaries. If the rights themselves are related, then the exercise of those rights should be treated similarly. But were we to distinguish between the two rights, the constitutional analysis would become simply a matter of linguistics: Was defendant invoking his right to remain silent or his right to counsel? This will not always be self-evident. For instance, if a defendant were to state, "I'm keeping silent because I want to talk to my lawyer," which right has he invoked? Has he invoked both? In that case the first half of his statement could come in, but the second half could not. Constitutional analysis should not hinge on linguistic technicalities. As a result, we conclude *Fletcher* mandates similar treatment of both the right to remain silent and the right to counsel.

We therefore hold that the Fifth Amendment's Self-Incrimination Clause (as incorporated through the Due Process Clause of the

Fourteenth Amendment) does not prevent the use of defendant's right to counsel against him at trial when defendant exercises that right prior to his being advised of his *Miranda* rights. Because defendant exercised his right to counsel before being informed of his *Miranda* rights (and before the warnings were even required), the State was not constitutionally prohibited from introducing Officer Edmundson's testimony at trial. We therefore overrule defendant's assignment of error.

[2] Defendant next contends that the trial court erred in refusing to dismiss the charge of second-degree murder. The evidence at trial can be summarized as follows: Brian Dragon (the victim) told defendant he was going to have sex with defendant's sister, to which defendant responded, "You ain't going to do nothing to my sister. I'll shoot you." (Tr. at 670). Defendant then got a gun and pointed it at Dragon. Dragon then shoved defendant, defendant shoved him back, Dragon shoved him once more, and defendant then shot Dragon. Defendant contends this evidence showed he was legally provoked so as to negate the element of malice required for second-degree murder. We disagree.

Our Supreme Court has summarized the law with respect to provocation in the following manner:

> There are two kinds of provocation relating to the law of homicide: One is that level of provocation which negates malice and reduces murder to voluntary manslaughter. Mere words, however abusive or insulting are not sufficient to negate malice and reduce the homicide to manslaughter. Rather, this level of provocation must ordinarily amount to an assault or threatened assault by the victim against the perpetrator.
>
> The other kind of provocation is that which, while insufficient to reduce murder to manslaughter, is sufficient to incite defendant to act suddenly and without deliberation. Thus, words or conduct not amounting to an assault or threatened assault, may be enough to arouse a sudden and sufficient passion in the perpetrator to negate deliberation and reduce a homicide to murder in the second degree.

State v. Watson, 338 N.C. 168, 176-77, 449 S.E.2d 694, 699-700 (1994) (citations omitted), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569 (1995). Here, the victim never assaulted or threatened to assault defendant prior to the homicide. His statement to defendant, cer-

tainly inflammatory, and his shoving of defendant, even twice, were not sufficient legal provocation as to negate malice as a matter of law. Rather, the evidence required the jury to decide.

In this regard, we find *State v. Barr*, 15 N.C. App. 116, 189 S.E.2d 638, *cert. denied*, 281 N.C. 760, 191 S.E.2d 357 (1972), particularly instructive. In that case, the victim and the defendant started a verbal altercation. *Id.* at 117, 189 S.E.2d at 639. The victim then hit the defendant with her shoe, and the defendant returned a blow. *Id.* The two then exchanged blows, to the point that defendant began bleeding. *Id.* Finally, the defendant pulled out a gun and shot the victim. *Id.* at 118, 189 S.E.2d at 640. This Court held it was proper to submit the case to the jury on both second-degree murder and voluntary manslaughter. *Id.* at 119, 189 S.E.2d at 640. We find these facts to be quite analogous to the facts in the present case, as both involved an acrimonious verbal exchange followed by a physical altercation. We therefore hold the trial court properly denied defendant's motion to dismiss the charge of second-degree murder, thereby properly leaving the issue of provocation for the jury to decide.

[3] In another assignment of error, defendant objects to a portion of the prosecutor's closing argument regarding the inference of malice. Specifically, defendant objects to the following language:

> I say to you, ladies and gentlemen, and the law presumes, you see, that when somebody points this type of deadly weapon at somebody, has cocked it, is aiming it, and is threatening to use it, that that is inherently dangerous.

(Tr. at 1027). Defendant claims this is an incorrect statement of the law and thus prejudicial to defendant. *See generally State v. Ratliff*, 341 N.C. 610, 616, 461 S.E.2d 325, 328 (1995) ("Incorrect statements of law in closing arguments are improper . . . ."). Specifically, he claims that by using the phrase "the law presumes," the prosecutor shifted the burden of proof to the defendant.

We begin by noting defendant did not object to these closing remarks. Thus, our standard of review is to determine whether the remarks "were so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error." *State v. Oxendine*, 330 N.C. 419, 422, 410 S.E.2d 884, 886 (1991). We hold that they were not.

At most, the prosecutor's remarks were technical misstatements of the law. Defendant's actions in cocking the gun, pointing it, and

threatening to use it were only *evidence* from which malice might be inferred. The effect of the remarks was not prejudicial, in that the trial court subsequently instructed the jury correctly on the element of malice. *See also State v. Brown*, 320 N.C. 179, 195, 358 S.E.2d 1, 13 (holding that the prosecutor's remark "when a deadly weapon is used in certain ways and fashions, it gives rise to the crime of murder in the first degree" was "so general as to be unobjectionable."), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987); *State v. Byrd*, 60 N.C. App. 624, 631, 300 S.E.2d 49, 53-54 (holding a prosecutor's technical misstatement of the law was not prejudicial in light of the trial judge's subsequent correct instruction), *rev'd on other grounds*, 309 N.C. 132, 305 S.E.2d 724 (1983). We therefore reject defendant's argument.

[4] Defendant also assigns error to the prosecutor's statement in closing arguments regarding defendant's lack of emotion. Specifically, defendant objects to the following remarks:

> You see, all of his conduct, all of his statements, are telling you something about his character, or his lack of character might be a better term. You've had a chance to observe his demeanor here in the courtroom. Have you seen the slightest bit of emotion on his part as we're talking for a week about the death of his so-called best friend? I've watched him. I haven't seen any. He is a cold fish. He's the kind of individual, when you think about it, you see, who would do exactly what the evidence shows he did.

(Tr. at 1102).

A lawyer may not assert his own opinions about a defendant's credibility in open court; issues of credibility are solely the province of the jury. *State v. Locklear*, 294 N.C. 210, 218, 241 S.E.2d 65, 70 (1978); N.C.R. Professional Conduct 3.4. A lawyer may, however, urge the jury to observe and consider a defendant's demeanor during trial. *Brown*, 320 N.C. at 199, 358 S.E.2d at 15. This is because the evidence in a case "is not only what [jurors] hear on the stand but what they witness in the courtroom." *Id.*

Here, although the prosecutor veered toward the line marking comment on defendant's credibility, we do not believe he crossed it. The prosecutor was simply urging the jury to take into account defendant's lack of emotion and "cold fish" demeanor during the trial. In the end, this is sufficiently similar to the case of *State v. Myers*, 299

N.C. 671, 263 S.E.2d 768 (1980), in which our Supreme Court held that the following prosecutorial remarks were proper:

> I watched specifically to see [defendant's] reaction as those pictures of the blood were handed to him and then finally the three pictures of his wife, the woman that he said that he loved, with a gaping hole in her head. He didn't flinch. Didn't bat an eye. I don't know if you were watching him but no remorse and that I contend to you, ladies and gentlemen of the jury, is the first among many things that the State asks that you consider on the question of premeditation and deliberation.

Id. at 679-80, 263 S.E.2d at 773-74. We therefore conclude the prosecutor's remarks here were not improper.

[5] Finally, defendant assigns error to the trial court's imposition of a civil judgment against him in the amount of $11,000 to cover the victim's funeral expenses. Our statutes now authorize a judge to order the payment of restitution to a victim's estate. N.C. Gen. Stat. § 15A-1340.34(a) (1999). For certain offenses, such as second degree murder, restitution is mandatory. N.C. Gen. Stat. § 15A-1340.34(b). For other offenses, restitution is permissive. N.C. Gen. Stat. § 15A-1340.34(c). However, section 1340.34 became effective 1 December 1998 and thus does not apply to crimes committed before that date. 1998 N.C. Sess. Laws 212 § 19.4(r). The crime here was committed on 29 September 1997, before the statute's effective date. We therefore vacate the trial court's order of restitution.

In all other respects, however, we conclude defendant received a fair trial, free from prejudicial error.

No error in part, vacated in part.

Judges WYNN and HUNTER concur.

CARLTON JOEDY CAHOON, PLAINTIFF v. CANAL INSURANCE COMPANY, CHRISTY YVONNE ANGE, AND HENRY REYNOLDS SNELL, JR., DEFENDANTS v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INTERVENOR AND CANAL INSURANCE COMPANY, THIRD PARTY PLAINTIFF v. AGENCY SERVICES, INC. AND AGENCY PREMIUM SERVICES, INC., THIRD PARTY DEFENDANTS

No. COA99-1412

(Filed 21 November 2000)

Insurance— automobile liability—cancellation by premium finance company

Plaintiff's automobile liability policy was effectively canceled by defendant premium finance company for nonpayment of premiums in compliance with N.C.G.S. § 58-35-85 and regulatory requirements. Plaintiff was given an 18-day period in which to make his past-due premium payment; furthermore, assuming that the notice of cancellation should not have been mailed until after the end of the 18-day period (30 December) as plaintiff contends, there was no prejudice because the Notice of Intent to Cancel and the Notice of Cancellation state the effective date as 30 December, and the policy was not canceled until the North Carolina agent for the insurance company received the notice on 2 January. Moreover, it appears from the record that a copy of the Notice of Intent to Cancel was forwarded to plaintiff's insurance agent, as required by regulations.

Appeal by defendant and third-party plaintiff Canal Insurance Company, and third-party defendants Agency Services, Inc., and Agency Premium Services, Inc., from judgment entered 9 July 1999 by Judge Richard B. Allsbrook in Martin County Superior Court. Heard in the Court of Appeals 21 September 2000.

At all times relevant hereto, Carlton Joedy Cahoon (plaintiff) owned a 1987 Kenworth tractor-trailer. On 4 September 1996, plaintiff obtained automobile liability insurance coverage (the policy) in the amount of $1,000,000.00 for the Kenworth vehicle through Piedmont Transportation Underwriters, Inc. (Piedmont), the licensed North Carolina agent for defendant Canal Insurance Company (Canal). Piedmont arranged financing for plaintiff's insurance premiums through defendant Agency Services, Inc. and Agency Premium Services, Inc. For the sake of clarity, we refer to both of these entities herein as "Agency." Plaintiff executed a power of attorney to Agency,

authorizing Agency to request Canal to cancel plaintiff's policy if plaintiff failed to pay the premiums when due.

On 5 December 1996, plaintiff failed to make a scheduled premium payment. Agency mailed a "Notice of Intent to Cancel" the policy to plaintiff on 12 December 1996. The Notice of Intent to Cancel stated that the effective cancellation date would be 30 December 1996 unless plaintiff paid the past-due premiums. On 26 December 1996, Agency mailed a "Notice of Cancellation" to plaintiff Cahoon, which Notice stated that 30 December 1996 was the effective date of cancellation. On 30 December 1996, Agency mailed a copy of the Notice of Cancellation to Piedmont; the Notice was received by Piedmont on 2 January 1997.

On 8 January 1997, the Kenworth tractor-trailer owned by plaintiff and driven by Henry Snell, his employee, was involved in an accident. Snell was operating the Kenworth vehicle in the course and scope of his employment with plaintiff when he collided with a 1985 Pontiac driven by Christy Ange. Ms. Ange sustained injuries in the accident and asserted a personal injury claim against both plaintiff Cahoon and Snell. Five days after the accident, on 13 January 1997, Cahoon unsuccessfully attempted to pay the full amount of the past-due premium. Canal denied coverage and plaintiff filed this request for a declaratory judgment, seeking a declaration that the Canal automobile policy provided him coverage. Canal also moved for summary judgment. The trial court found that the purported cancellation of the Canal policy was ineffective, and granted summary judgment for plaintiff. Canal and Agency appealed.

Barber & Associates, P.A., by Timothy C. Barber and Eric J. Howland, for Agency Services, Inc. and Agency Premium Services, Inc., third-party defendant appellants; and Walker, Clark, Allen, Herrin & Morano, by Mickey A. Herrin, for Canal Insurance Company defendant appellant.

Irvine Law Firm, PC, by David J. Irvine, Jr., for Carlton Joedy Cahoon, plaintiff appellee.

Rodman, Holscher, Francisco & Peck, P.A., by R. Brantley Peck, Jr., for Christy Yvonne Ange, defendant appellee.

The Wells Firm, PLLC, by J. Warner Wells, II, for Henry Reynolds Snell, Jr., defendant appellee.

HORTON, Judge.

Appellants contend that they complied with the provisions of N.C. Gen. Stat. § 58-35-85 in cancelling the policy issued to plaintiff Cahoon, and argue that the trial court erred in ruling otherwise. We agree, and grant summary judgment in favor of the appellants, Agency and Canal.

N.C. Gen. Stat. § 58-35-85 sets out the procedure for cancellation of an insurance policy by an insurance premium finance company:

> When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled unless the cancellation is effectuated in accordance with the following provisions:
>
> (1) Not less than 10 days' written notice is sent by personal delivery, first-class mail, electronic mail, or facsimile transmission to the last known address of the insured or insureds shown on the insurance premium finance agreement of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. Notification thereof shall also be provided to the insurance agent.
>
> (2) After expiration of the 10-day period, the insurance premium finance company shall send the insurer a request for cancellation and shall send notice of the requested cancellation to the insured by personal delivery, first-class mail, electronic mail, electronic transmission, or facsimile transmission at his last known address as shown on the records of the insurance premium finance company and to the agent. Upon written request of the insurance company, the premium finance company shall furnish a copy of the power of attorney to the insurance company. The written request shall be sent by mail, personal delivery, electronic mail, or facsimile transmission.
>
> (3) Upon receipt of a copy of the request for cancellation notice by the insurer, the insurance contract shall be cancelled with the same force and effect as if the request for cancellation had been submitted by the insured, without requiring the return of the insurance contract or contracts.

N.C. Gen. Stat. § 58-35-85 (1999). Thus, written notice of the intent to cancel a policy must be given to the insured at least ten days before cancellation of the policy, giving the insured an opportunity to pay the past-due premium and retain insurance coverage. Plaintiff does not contest receipt of the Notice of Intent to Cancel dated 12 December 1996. Nor does he contend that he tendered the past-due premium prior to 30 December 1996, the effective date of cancellation. He argues, however, that there were several defects in the purported cancellation of his policy.

Plaintiff contends, and we agree, that the burden of proving compliance with N.C. Gen. Stat. § 58-35-85 is on the insurance company. We have repeatedly held that "the burden is upon the insurance company to show that all statutory requirements have been complied with, including the ten days written notice by the premium finance company to the insured together with said notice to the insurance agent, prior to the premium financing company requesting cancellation of the policy." *Grant v. Insurance Co.*, 1 N.C. App. 76, 80, 159 S.E.2d 368, 371, *cert. denied*, 273 N.C. 657 (1968). "[T]he burden of proving cancellation by the insured or his agent [is] on the insurance company." *Ingram v. Insurance Co.*, 5 N.C. App. 255, 258, 168 S.E.2d 224, 227, *cert. denied*, 275 N.C. 595 (1969). "In order to cancel a policy the carrier must comply with the procedural requirements of the statute or the attempt at cancellation fails and the policy will continue in effect despite the insured's failure to pay in full the required premium." *Pearson v. Nationwide Mutual Ins. Co.*, 325 N.C. 246, 254, 382 S.E.2d 745, 748 (1989). The policy is considered cancelled as of the date the insurance company receives the request for cancellation. *Unisun Ins. Co. v. Goodman*, 117 N.C. App. 454, 457, 451 S.E.2d 4, 6 (1994), *disc. review denied*, 339 N.C. 742, 454 S.E.2d 662 (1995); N.C. Gen. Stat. § 58-35-85(3).

Plaintiff first argues that the defendants violated the express terms of the policy in their cancellation effort. Plaintiff's insurance policy stated, however, that "[t]his policy may be cancelled by the named insured by surrender thereof to the company or any of its authorized agents or by mailing to the company written notice stating when thereafter the cancellation shall be effective." Agency Services, Inc. (Agency), the premium finance company, used a Finance Agreement throughout its dealings with plaintiff. The Finance Agreement appointed Agency as plaintiff's "attorney in fact" and allowed Agency "in the event of nonpayment of the installments . . . to authorize and give notice of the cancellation of the insurance pol-

icy[] . . . ." Furthermore, "[i]n the event the insured defaults under these conditions, and after notice is given under applicable state law [Agency] may request cancellation of any policy . . . ." If a default occurred, Agency was to send written notice of default to plaintiff Cahoon; if the default was not rectified, Agency was to then send written Notice of Cancellation to Canal and give plaintiff a copy of that Notice. We hold that Agency complied with the cancellation provisions of the Finance Agreement, which provisions track the language of N.C. Gen. Stat. § 58-35-85.

On 12 December 1996, following plaintiff's failure to pay his December premium, Agency sent him a Notice of Intent to Cancel his policy effective 30 December 1996. On 26 December 1996, Agency mailed plaintiff a Notice of Cancellation, again advising him that his policy would be cancelled effective 30 December 1996. Finally, on 30 December 1996, Agency mailed to Canal and its agent, Piedmont, a Request for Cancellation of plaintiff's policy.

In summary, N.C. Gen. Stat. § 58-35-85 requires that an insured be given at least ten days in which to make any past-due premium payments and retain insurance coverage. Here, the uncontradicted evidence is that plaintiff Cahoon was given *more* than 10 days' notice before his policy was cancelled. Thus, the statutory notice requirement was satisfied and this assignment of error is overruled.

Next, plaintiff argues that Agency failed to comply with several other mandatory requirements of N.C. Gen. Stat. § 58-35-85. Specifically, plaintiff contends that Agency did not ensure that Canal received a copy of the power of attorney executed by him, either prior to or together with the "Request for Cancellation." Plaintiff ignores the explicit language of N.C. Gen. Stat. § 58-35-85(2), however, which provides that "*[u]pon written request of the insurance company*, the premium finance company shall furnish a copy of the power of attorney to the insurance company." (Emphasis added.) Nothing in this record indicates that either Canal or its agent Piedmont made a request, written or otherwise, for a copy of the power of attorney.

Plaintiff also argues that Agency prematurely sent the Notice of Cancellation to Piedmont. The original Notice of Intent to Cancel was dated 12 December 1996 and informed plaintiff that his policy would be cancelled effective 30 December 1996 for non-payment of premium. The Notice of Cancellation was dated 26 December 1996 and requested that the insurance policy issued to plaintiff be cancelled

effective 30 December 1996. Plaintiff argues that the Notice of Cancellation should have been mailed *after* 30 December 1996, the period of time within which he could make payment of his past-due premium. Plaintiff's argument centers around the language of N.C. Gen. Stat. § 58-35-85(2), which provides that "*[a]fter expiration of the 10-day period,* the insurance premium finance company shall send the insurer a request for cancellation . . . ." (Emphasis added.) After careful consideration, we disagree with plaintiff's contention.

The requirement that an insured have a full ten days' notice has been examined and upheld in several of our decisions. See *Paris v. Woolard*, 128 N.C. App. 416, 497 S.E.2d 283, *disc. review denied*, 348 N.C. 283, 502 S.E.2d 843 (1998) (seven days' notice held insufficient); *Graves v. ABC Roofing Co.*, 55 N.C. App. 252, 284 S.E.2d 718 (1981) (five days' notice held insufficient); *Grant*, 1 N.C. App. at 80, 159 S.E.2d at 371 (premium finance company's request "that subject policy be cancelled *effective as soon after this date as statutory requirements permit*" deemed an ineffective cancellation because of vagueness and because less than ten days elapsed between Notice of Cancellation and Request for Cancellation).

Here, Agency gave plaintiff an 18-day period—from 12 December 1996 to 30 December 1996—within which to make his past-due premium payment. Plaintiff argues that Agency should not have mailed the Notice of Cancellation sooner than 31 December 1996, *after* the end of that 18-day period. Assuming for the sake of argument that the Notice of Cancellation was prematurely mailed to plaintiff, we fail to discern any prejudice to him. Both the Notice of Intent to Cancel and the Notice of Cancellation state the effective date of cancellation as 30 December 1996. Further, the Notice of Cancellation was mailed by Agency to Piedmont, as agent for Canal, on 30 December 1996 and received by Piedmont on 2 January 1997. The applicable statute provides for cancellation of the insurance contract "[u]pon receipt of a copy of the request for cancellation notice by the insurer . . . ." N.C. Gen. Stat. § 58-35-85(3). Thus, the policy in question was not cancelled until Piedmont, as agent for Canal, received the Notice of Cancellation on 2 January 1997. *See Unisun*, 117 N.C. App. at 457, 451 S.E.2d at 6 (stating that an insurance policy is deemed cancelled as of the date the insurance company receives the Request for Cancellation).

Finally, plaintiff argues that the purported cancellation of his policy violates regulations promulgated pursuant to N.C. Gen. Stat.

§ 58-35-85. North Carolina Administrative Code title 11, r. 13.0317 requires "ten-day written notice of intent to cancel as described in G.S. § 58-35-85(1)," and requires that a copy of the Notice of Intent to Cancel must be "sent to the insurance agent shown on the premium finance agreement at the same time notice is given to the insured." N.C. Admin. Code tit. 11, r. 13.0317 (June 1998). It appears from the record that a copy of the Notice of Intent to Cancel was forwarded to plaintiff's insurance agent. An affidavit prepared by Barbara Thomas, the Customer Service Manager at Agency Premium Services, Inc., states in pertinent part:

> 6. That based on her review of her file, a Notice of Intent to Cancel was mailed on December 12, 1996 to Carlton Joedy Cahoon to the last known address of Carlton Joedy Cahoon shown on the Premium Finance Agreement; *further, that a Notice of the intent to cancel was also mailed to SIA Tideland, the insurance agent.*

(Emphasis added.)

It appears from Ms. Thomas's affidavit that the Notice of Intent to Cancel was mailed to SIA Tideland, the insurance agent, and plaintiff Cahoon, as required by the regulations. Ms. Thomas's affidavit is neither impeached nor contradicted by evidence for plaintiff. This assignment of error is also overruled.

While we agree with the trial court that there are no genuine issues of material fact with regard to the circumstances surrounding the cancellation of plaintiff's policy, we hold that Agency complied with the statutory and regulatory scheme for the cancellation of plaintiff's insurance policy and that the trial court erred in entering summary judgment for plaintiff. Instead, summary judgment should be entered for defendant appellants Canal and Agency.

Therefore, the trial court's grant of summary judgment in favor of plaintiff is hereby reversed and the case is remanded to the trial court with directions that summary judgment be entered in favor of Canal Insurance Company, Agency Services, Inc., and Agency Premium Services, Inc.

Reversed and remanded with directions.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. MICHAEL ODELL SIBLEY

No COA99-1206

(Filed 21 November 2000)

1. Evidence-videotape— not properly authenticated

The trial court erred in a prosecution for cocaine possession and possession of a firearm by a felon by admitting videotapes found in a search of the house in which defendant was arrested in which defendant was shown holding money, talking on a cell phone, holding a beer and handling weapons similar to those seized in the house. The only testimony purporting to authenticate the tape was evidence that the chain of custody had not been broken; the State did not call any witnesses to testify that the camera was operating properly or that the information depicted on the videotape was an accurate representation of the events at the time of filming.

2. Evidence— videotape—date—inadmissible hearsay

The trial court erred in a prosecution for possession of a firearm by a convicted felon (reversed on other grounds) in admitting a videotape with a date in a corner to prove possession of a weapon after the date of a prior felony conviction.

3. Evidence— statements on videotape—not adopted admissions

The trial court erred in a prosecution for possession of a firearm by a felon (reversed on other grounds) by admitting a videotape on which statements were made concerning defendant's guns. The circumstances under which the statements were made were not such that a denial by defendant would naturally be expected, and the statements were not adopted by defendant. N.C.G.S. § 8C-1, Rule 801(d).

Appeal by defendant from judgment entered 19 February 1999 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 18 September 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Lisa Granberry Corbett, for the State.

Clifford Clendenin O'Hale & Jones, LLP, by Walter L. Jones, for the defendant-appellant.

EAGLES, Chief Judge.

The defendant was indicted and tried on charges of possession with intent to sell and deliver a controlled substance and possession of a firearm by a felon. Defendant was convicted of possession of a firearm by a felon and the lesser offense of possession of cocaine. Judge Greeson imposed an active sentence of 15-18 months for the possession of a firearm by a felon count and a sentence of 6-8 months incarceration for the possession of cocaine count, suspended on condition that defendant serve a 2 month split sentence and pay a $2,000 fine.

The evidence tended to show the following. On 16 January 1998, the Greensboro Police Department obtained a valid search warrant for 412 Spicewood Drive, Greensboro, a residence neither owned nor occupied by defendant. At approximately 9:00 p.m. the officers knocked on the door and announced their presence. Because no one answered, the officers "rammed" the door to gain entry. Defendant was found in a bedroom with James Simpson. There were seven people in the home at the time and all were arrested. The officers searched the home and found two rocks of crack cocaine under the bed where defendant was sitting. The officers could "not recall exactly if it was underneath the mattress or exactly underneath the bed." The officers also found several weapons in the home, two of which were a Faradon 9 millimeter semi-automatic pistol and a .380 caliber Llama semi-automatic pistol. The guns were found in the hallway, about 10 feet from the entrance to the room in which defendant and Mr. Simpson were located. Further, the officers seized two videotapes from the living room. From the defendant's person, the officers recovered $433 in cash, a Motorola cell phone and a pager.

The videotapes were admitted as substantive evidence at trial over defendant's objections. The first tape shows a date of 1/6/98 at the very beginning. It also shows people in a room that the officers identified as 412 Spicewood Drive. That tape shows defendant holding money, talking on a cell phone and holding a beer.

The second tape is labeled with titles "Monster Dog," "Eliminators" and "Devil Time." During the entire course of this tape a date, 1/10/98, appears in the bottom left hand corner. In this tape defendant is shown handling weapons similar to those seized. There were many comments made by other people on the tape about the defendant holding the guns. One person is shown on the videotape referring to "Mike's big old gun."

Defendant appeals on two grounds. First he argues that the trial court committed reversible error in allowing these videotapes to be admitted as substantive evidence and second, that the trial court erred in failing to dismiss at the close of the State's evidence based on the insufficiency of the evidence. Because we hold that these videotapes were not authenticated and contained inadmissible hearsay, we agree with defendant's first contention and reverse.

[1] Defendant's argument is that the State failed to lay a proper foundation for the admissibility of these confiscated videotapes. Upon laying of the proper foundation, videotapes are admissible in evidence for both substantive and illustrative purposes under G.S. § 8-97 (1981). *State v. Mewborn*, 131 N.C. App. 495, 498, 507 S.E.2d 906, 909 (1998). *State v. Cannon*, 92 N.C. App. 246, 374, 254 S.E.2d 604, 608 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990). In *Cannon*, this Court discussed how to lay a proper foundation for the admission of videotape evidence.

> The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . ."; (3) testimony that "the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing," (substantive purposes); or (4) "testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area 'photographed.' "

Cannon, 92 N.C. App. at 254, 374 S.E.2d at 608-09 (citations omitted). Defendant argues that there was no testimony by anyone present at the time of filming as to the "checking and operation" of the video equipment. In *Mewborn*, the State was able to offer testimony from three people that, when taken together, fulfilled the authentication requirement. There was testimony from the store owner as to the workings of the video equipment and testimony as to the chain of custody of the tape after it had been seized. *Mewborn*, 131 N.C. App. at 499, 507 S.E.2d at 909. Here, the only testimony purporting to authenticate the tape was evidence that the chain of custody had not been broken. The State did not call any witnesses to testify that the camera was operating properly or that the information depicted on the videotape was an accurate representation of the events at the time of filming.

The State argues that *State v. Rael* should guide us here. *Id.*, 321 N.C. 528, 364 S.E.2d 125 (1988). Our Supreme Court in *Rael* allowed pornographic videotapes and magazines seized from a defendant's home to corroborate the testimony of the victim; that the victim had been there and that the defendant forced the victim to view the tapes. *Id.* at 533, 364 S.E.2d at 129. The detective testified only that he seized the tapes pursuant to the defendant's consent, and that the tapes had not been altered since their seizure. *Id.* However, the defendant in *Rael* objected only on the grounds that the tapes and magazines were inadmissible character evidence. The question of the videotapes' authenticity was neither raised nor addressed by any of the parties. Thus, *Rael* does not control here. The *Cannon* test is the inquiry when determining admissibility of videotape evidence for its substance. *Cannon*, 92 N.C. App. at 254, 374 S.E.2d at 608. Accordingly, we hold that the videotapes were not properly authenticated and thus are not inadmissible for any purpose.

Since several other admissibility issues raised on appeal appear likely to reoccur upon retrial, we address them as well.

1. THE DATE APPEARING IN THE VIDEO

[2] The first hearsay objection is whether the trial court properly admitted the videotapes bearing the date, "1/10/98," appearing on the lower lefthand corner as substantive evidence. The evidence was admitted as substantive evidence to prove that defendant was in possession of a weapon after the date of his prior felony conviction. Defendant's conviction of possession of a firearm after the date of his felony conviction was based on this evidence alone.

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." G.S. § 8C-1, Rule 801(c) (1992). A "statement" may be a written or oral assertion or nonverbal conduct intended by the declarant as an assertion. *State v. Satterfield*, 316 N.C. 55, 340 S.E.2d 52 (1986). An act, such as a gesture, can be a statement for purposes of applying rules concerning hearsay. *Id.*; *State v. Fulcher*, 294 N.C. 503, 517, 243 S.E.2d 338, 348 (1978) (decided before adoption of the North Carolina Rules of Evidence). Here, the declarant is unknown. There is no testimony as to the identity of the operator of the camera. The statement, that this video was filmed on 1/10/98, is offered for its truth, e.g., that defendant was in possession of a weapon on that date. "An assertion of one

other than the presently testifying witness is hearsay and inadmissible if offered for the truth of the matter asserted." *Livermon v. Bridgett*, 77 N.C. App. 533, 540, 335 S.E.2d 753, 757 (1985). 1 Brandis, North Carolina Evidence § 138 (2d Rev. Ed. 1982); G.S. § 8C-1, Rules 801 (c) and 802 (1983).

It is conceded by the State that the only evidence of defendant possessing a weapon after the commission of a felony is this videotape. The Virginia Court of Appeals addressed a similar issue in *Hanson v. Commonwealth*, 416 S.E.2d 14 (Va.App. 1992). In *Hanson*, the issue was whether the postmark on an envelope was admissible to prove the date upon which it was affixed. *Id.* at 20. The court held that "although a postmark is within the traditional definition of hearsay, it is admissible as an exception to the hearsay rule when used to prove the date on which the postal service affixed its postmark in the regular course of business." *Id.* at 21. The Virginia court held that using the postmark to prove the day upon which it was affixed is hearsay, admissible under the public records and business records exceptions to the hearsay rule. *Id.* Here, this videotape contains inadmissible hearsay for which there is no exception to the hearsay rule. We hold that the admission of this videotape bearing the date notation on this record was reversible error.

2. ADOPTIVE ADMISSIONS

[3] The second hearsay objection made by the defendant is that all other information with regard to the defendant on the videotape is inadmissible hearsay. The State argues that statements made by others on the videotape, e.g., "[t]his is Mike's big old gun" are admissible against Mr. Sibley because they are adoptive admissions. An admission may be express or may be implied from conduct. Rule 801 of the North Carolina Rules of Evidence states:

> (d) Exception for Admissions by a Party-Opponent. A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . (B) a statement of which he has manifested his adoption or belief in its truth . . . .

G.S. § 8C-1, 801(d). *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 278, 354 S.E.2d 767, 772 (1987). A person may expressly adopt another's statement as his own, or an adoptive admission may be inferred from "other conduct of a party which manifests circumstantially the party's assent to the truth of a statement made by another person." *FCX, Inc.*, 85 N.C. App. at 278, 354 S.E.2d at 772. Adoptive admissions

fall generally into two categories—those inferred from an affirmative act of a party, and those inferred from silence or a failure to respond in circumstances that call for a response. *Id.* The State also argues that defendant's actions on the videotape were implied admissions that he possessed these weapons. Our Supreme Court in *State v. Spaulding*, 288 N.C. 397, 219 S.E.2d 178 (1975) stated:

> Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having first hand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in a position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission.

Id. at 406, 219 S.E.2d at 184; *see State v. Whitley*, 58 N.C. App. 539, 541, 293 S.E.2d 838, 839, *disc. rev. denied and appeal dismissed*, 306 N.C. 750, 295 S.E.2d 763 (1982). The videotape in question seems to be attempting to communicate some sort of intimidation or threat. To whom, or in what capacity is unclear; but it is clear that the circumstances under which these videotaped third person statements were made are not circumstances where a denial by the defendant would naturally be expected. *Id.* Additionally, we hold that the statements made by persons other than the defendant on this tape were not adopted by the defendant.

Since these videotapes were inadmissible because they were not properly authenticated, we hold that it was reversible error for the trial court to have admitted them. We further hold that the date, "1/10/98," on the video recording is inadmissible hearsay. Finally we hold that any statements made by out of court declarants on these videotapes are not admissible here as adoptive admissions by the defendant.

The only other evidence the State presented on the defendant's drug charge was that defendant was arrested in a home containing drugs, as well as seven other people, and the defendant had $433 in cash, a cell phone and a beeper on his person. The content of these tapes is so prejudicial that their improper admission infected the entire trial proceeding. Thus we need not reach defendant's remaining assignments of error. Accordingly the judgment in both cases is reversed and the cause remanded.

New trial.

Judges TIMMONS-GOODSON and FULLER concur.

WILLIAM HENRY ONUSKA AND WIFE, CAROL ALICE ONUSKA, PETITIONERS v. GEORGE HENRY BARNWELL; GEORGE BARNWELL [NOW ESTATE OF GEORGE BARNWELL]; PATRICIA CONNER REDDEN; MAE CONNER AND HUSBAND, HOMER CONNER; ROY BARNWELL; ESTATE OF KATHERINE L. CARLISLE, HILLIARD L. CARLISLE, JR., EXECUTOR; ODELL C. BARNWELL (INDIVIDUALLY AND AS TRUSTEE OF THE ODELL C. BARNWELL REVOCABLE TRUST DATED FEBRUARY 28, 1994) AND WIFE, GLADYS EDMONDS BARNWELL; JACKIE A. HENDERSON; LOWELL E. JARRETT, JR. AND JANICE LEE JARRETT (INDIVIDUALLY AND AS TRUSTEES UNDER TRUST DATED SEPTEMBER 9, 1988); AND UNKNOWN RESPONDENTS, RESPONDENTS

No. COA99-1076

(Filed 21 November 2000)

Appeal and Error— appealability—grant of partial summary judgment—interlocutory order—no substantial right

Respondents' appeal from the trial court's order granting partial summary judgment in favor of petitioners in a special proceeding to establish a cartway under N.C.G.S. §§ 136-68 and 136-69 is dismissed since the order is interlocutory and not immediately appealable, because: (1) it does not affect a substantial right that will be lost, prejudiced, or less than adequately protected absent immediate appeal; and (2) N.C.G.S. § 136-68 expressly provides that appeals to superior court are available upon a final order or judgment, and that all issues may be addressed on appeal.

Appeal by respondents from order entered 10 February 1999 by Judge Zoro J. Guice, Jr., and from order entered 3 May 1999 by Judge Robert P. Johnston, in Henderson County Superior Court. Heard in the Court of Appeals 15 August 2000.

Mullinax & Alexander, by William M. Alexander Jr., for petitioners-appellees.

Jackson & Jackson, by Phillip T. Jackson, and Stepp, Groce & Associates, by Edwin R. Groce, and Howe, Waters & Carpenter, P.A., by Walter C. Carpenter, and Samuel H. Fritschner, for respondents-appellants.

Sue Ballard Gilliam, Guardian Ad Litem, for unknown respondents.

SMITH, Judge.

On 25 June 1997 petitioners instituted a special proceeding before the Clerk of Superior Court for Henderson County to establish a cartway across the property of respondents pursuant to N.C. Gen. Stat. §§ 136-68 and 136-69 (1999). Respondents filed answers raising two issues: (1) respondents claimed petitioners were not "landowners" within the context of the pertinent statutes; and (2) respondents counterclaimed for trespass. The Clerk entered an order on 27 August 1998 transferring these two issues to the Superior Court civil docket of Henderson County for trial.

We note in passing that the 27 August 1998 order cites N.C. Gen. Stat. § 1-399 (1996) (repealed effective 1 January 2000) as authority. Although this statute was in effect at that time, this citation appears to be incorrect, as G.S. § 1-399 required the transfer of an entire cause of action to the "civil issue docket" where a party in a special proceeding "plead[s] any equitable or other defense, or ask[s] any equitable or other relief in the pleadings." G.S. § 1-399. In fact, the order should have cited N.C. Gen. Stat. §§ 1-273 and 1-276 (1996) (repealed effective 1 January 2000). N.C. Gen. Stat. § 1-273 provided that "if issues of law and of fact, or of fact only, are raised before the clerk, the clerk shall transfer the case to the civil issue docket *for trial of the issues*." G.S. § 1-273 (emphasis added). N.C. Gen. Stat. § 1-276 further provided that when a special proceeding is transferred to the superior court for any reason, the judge may either determine the entire controversy or remand the cause to the clerk for further proceedings. *See* G.S. § 1-276.

Respondents timely appealed the Clerk's 27 August 1998 order. The order was affirmed on appeal by the Superior Court on 10 February 1999, and respondents entered written exceptions to this order. On a motion of petitioners, the Superior Court entered an order on 3 May 1999 granting partial summary judgment in favor of petitioners on the first of the two issues, declaring that petitioners are owners of marketable fee simple title to the property at issue.

Respondents purport to appeal from the 3 May 1999 order of the Superior Court granting partial summary judgment. Respondents also purport to appeal from the 10 February 1999 order of the Superior

Court, affirming the 27 August 1998 order of the Clerk which transferred the two issues to the Superior Court docket. Petitioners have filed a motion to dismiss respondents' appeal as interlocutory. We conclude that respondents' appeal is interlocutory and must be dismissed.

"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 (1950) (citation omitted). Respondents acknowledge the interlocutory nature of this appeal. However, respondents argue that the Superior Court's order granting partial summary judgment in favor of petitioners is properly before us because it affects a substantial right. We disagree.

An otherwise interlocutory order may be appealed where the order affects a "substantial right," and where, absent immediate appeal, "the enforcement of the substantial right [will] be lost, prejudiced or be less than 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) (citations omitted). Determination of whether this standard has been satisfied requires consideration of the particular facts of the case and the procedural context in which the order was entered. *See Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

The present case involves a special proceeding to establish a cartway pursuant to G.S. §§ 136-68 and 136-69. The appropriate procedure for an appeal in a cartway proceeding is set forth in G.S. § 136-68, which provides that

> [f]rom any final order or judgment in [a special proceeding to establish a cartway], any interested party may appeal to the superior court for a jury trial de novo *on all issues including the right to relief*, the location of a cartway, tramway or railway, and the assessment of damages.

(Emphasis added).

A careful reading of this language leads us to conclude that dismissal of this appeal will not ultimately preclude respondents from addressing the issue of whether petitioners are "landowners" within the context of G.S. §§ 136-68 and 136-69. If petitioners are

granted the cartway they seek, respondents would be permitted to appeal to the Superior Court for a jury trial *de novo* on all the issues, and from a final judgment of the Superior Court respondents would be entitled to appeal to this Court. In the course of that appeal, respondents would be entitled to set forth their present argument that petitioners do not have a "right to relief" because they are not "landowners" within the context of G.S. §§ 136-68 and 136-69. *See Davis v. Forsyth County*, 117 N.C. App. 725, 453 S.E.2d 231 (on appeal to Superior Court from Clerk's final order in cartway proceeding, respondents entitled to move for dismissal pursuant to Rule 12(b)(6) on grounds that County is not "other person" within context of G.S. § 136-69), *disc. review denied*, 340 N.C. 110, 456 S.E.2d 313 (1995). Therefore, the Superior Court's interlocutory order may not be appealed because it does not affect a substantial right that will be lost, prejudiced, or less than adequately protected absent immediate appeal.

Respondents argue that the holding in *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967), controls the outcome in this case. We disagree. *Nuckles* involved a condemnation proceeding brought by the North Carolina State Highway Commission. Within the context of a condemnation proceeding, N.C. Gen. Stat. § 136-108 (1999) provides for a hearing to determine "any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken." G.S. 136-108. One of the purposes of this statute is to resolve any issues concerning title or area taken prior to the jury trial on the issue of damages, which is why the Court in *Nuckles* determined that interlocutory orders from a condemnation hearing concerning title or area taken must be immediately appealed. *See Nuckles*, 271 N.C. at 14, 155 S.E.2d at 784. The result in *Nuckles* was simply a pragmatic means of ensuring that the specific objectives of G.S. § 136-108 would not be undermined.

The case at bar involves a cartway proceeding, not a condemnation proceeding. The statutes governing cartway proceedings, G.S. §§ 136-68 and 136-69, do not include a provision similar to G.S. § 136-108 requiring a hearing to determine issues raised by the pleadings other than the issue of damages. Instead, G.S. § 136-68 expressly provides that appeals to Superior Court are available upon a final order or judgment and that all issues may be addressed on appeal. G.S. § 136-68.

Appeal dismissed.

Judges GREENE and EDMUNDS concur.

STATE OF NORTH CAROLINA v. JERALD VAN JORDAN

No. COA99-1484

(Filed 21 November 2000)

Burglary and Unlawful Breaking or Entering— first-degree burglary—submission of second-degree murder as intended felony error

A defendant is entitled to a new trial in a first-degree burglary case based on the trial court's improper submission of second-degree murder as the intended felony, because: (1) the trial court was required to submit first-degree murder as the intended felony since one cannot have the specific intent to commit second-degree murder; (2) the trial court instructed the jury on second-degree murder in an inherently inconsistent manner by improperly including deliberation as a required element and by improperly instructing on intent; and (3) the trial court instructed the jury it could use defendant's intoxication to negate the element of specific intent when that element was not even required.

Appeal by defendant from judgment entered 26 May 1999 by Judge Donald W. Stephens in Johnston County Superior Court. Heard in the Court of Appeals 18 October 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Douglas W. Hanna, for the State.

Michael J. Reece for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 24 May 1999 Criminal Session of Johnston County Superior Court on the charge of first-degree burglary. The jury returned a verdict of guilty on 26 May 1999. After the jury later also found him guilty of being an habitual felon, defendant

was sentenced to life imprisonment without the possibility of parole. Defendant now appeals.

Defendant first contends the trial court erroneously submitted for the jury's consideration an offense that does not exist in North Carolina. First-degree burglary involves breaking and entering at night into an occupied dwelling with the intent to commit a felony therein. *State v. Simpson*, 303 N.C. 439, 449, 279 S.E.2d 542, 548 (1981). The trial judge submitted second-degree murder as the intended felony here. Based upon our Supreme Court's recent holding in *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000), we conclude the trial judge was required to submit first-degree murder as the intended felony because one cannot have the intent to commit second-degree murder. We must therefore award defendant a new trial.

In *Coble*, our Supreme Court addressed the issue of whether the offense of attempted second-degree murder existed in North Carolina. The Court held that no such offense existed. *Id.* at 453, 527 S.E.2d at 49. The Court began by reaffirming the principle that a specific intent to kill is required for first-degree murder but not for second-degree murder. *Id.* at 450, 527 S.E.2d at 47. The Court then took it one step further. It rejected this Court's proposition that there are two types of second-degree murder: one without an intent to kill and one with an intent to kill but without premeditation and deliberation. *Id.* In so doing, the Court necessarily concluded that, not only is an intent to kill not *required* for second-degree murder, it cannot *exist* in second-degree murder. *Id.* at 450-51, 527 S.E.2d at 47-48. Next, the Court reiterated that an attempted crime requires the specific intent to carry out that crime. *Id.* at 451, 527 S.E.2d at 48. This led the Court to conclude that, because attempt requires an intent to commit the underlying offense and because the offense of second-degree murder does not involve an intent to kill, the crime of attempted second-degree murder is a logical impossibility. *Id.* Specifically, the Court stated, "It is logically impossible, therefore, for a person to specifically intend to commit a form of murder which does not have, as an element, specific intent to kill." *Id.*

The same logic employed in *Coble* must also apply here. As stated previously, the crime of first-degree burglary requires the specific intent to commit some underlying offense. In this regard, it is similar to the crime of attempt. When that underlying offense is murder, *Coble* requires that form of murder to have a specific intent to kill. Because second-degree murder does not involve the intent to kill, it

cannot serve as the felonious intent element for purposes of burglary. Just as attempted second-degree murder is a logical impossibility, so too is the felonious intent to commit second-degree murder. "[A] defendant [cannot] specifically intend what is by definition not a specifically intended result." *Id.* at 452, 527 S.E.2d at 48.

We also point out that, in addition to submitting a logical impossibility for the jury's consideration, the trial judge also instructed the jury on second-degree murder in an inherently inconsistent manner. First, the trial judge included deliberation (but not premeditation) as a required element for second-degree murder. This of course is not the law; second-degree murder requires no deliberation. *Id.* at 449, 527 S.E.2d at 46. Second, in defining intent for the purposes of second-degree murder, the trial judge instructed, "An *intent to kill* may be inferred from the nature of the assault, the manner in which it was made, any threats that preceded or accompanied the assault, the conduct of the parties and other relevant circumstances." (2 Tr. at 361) (emphasis added). As stated previously, second-degree murder does not involve the intent to kill, and the trial court's instructions were somewhat misleading as a result. Although we note the court's language comes straight from the second-degree murder pattern jury instructions, N.C.P.I., Crim. 206.30, this fact does not obviate the trial judge's duty to instruct the law correctly. *See, e.g., Johnson v. Friends of Weymouth, Inc.*, 120 N.C. App. 255, 258-59, 461 S.E.2d 801, 804 (1995) (ordering a new trial when the pattern jury instructions did not accurately reflect the law), *disc. review denied*, 342 N.C. 895, 467 S.E.2d 903 (1996). Finally, in instructing on defendant's voluntary intoxication defense, the trial court explained to the jury, "If, as a result of intoxication, the defendant did not have the *specific intent to kill*, you must not find the defendant guilty of first-degree burglary." (2 Tr. at 362) (emphasis added). The trial court thus instructed that the jury could use defendant's intoxication to negate an element that was not even required in the first place.

We simply point out these inconsistencies in the court's instructions to further buttress our holding that the felonious intent to commit second-degree murder is a logical impossibility. We express no opinion on whether the inconsistent instructions, standing alone, would be sufficiently prejudicial to warrant a new trial. Instead, we award a new trial solely on the ground that the trial court used second-degree murder instead of first-degree murder as the intended felony for purposes of defendant's burglary charge.

In light of our disposition as to this issue, we need not address defendant's remaining assignments of error.

New trial.

Judges WYNN and HUNTER concur.

STATE OF NORTH CAROLINA v. KENNETH FORREST NICHOLS

No. COA99-1358

(Filed 21 November 2000)

Appeal and Error— appealability—order reinstating dismissed charge—interlocutory order

A defendant's appeal from the superior court's order reinstating the dismissed charge of assault on a female in violation of N.C.G.S. § 14-33(c)(2) and remanding the case to district court to be tried on the merits is dismissed because: (1) the order is interlocutory; and (2) although there is a statutory exception for interlocutory criminal appeals under N.C.G.S. § 15A-1432(d), there is nothing in the record to show that defendant or his attorney certified to the superior court that the appeal was not being taken for the purpose of delay, nor does the superior court's order reflect that it found defendant's cause was appropriately justiciable in the appellate division as an interlocutory matter.

Appeal by defendant from an order entered 29 September 1999 by Judge James U. Downs in Catawba County Superior Court. Heard in the Court of Appeals 11 October 2000.

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

The Law Firm of J. Richardson Rudisill, Jr., by John M. Lewis, for defendant-appellant.

HUNTER, Judge.

Kenneth Forrest Nichols ("defendant") appeals the superior court's order, reinstating the dismissed charge of assault on a female

against him, on the basis that the statute allegedly violated is unconstitutional under the Equal Protection Clause of the 14th Amendment to the United States Constitution. Because the superior court's order is interlocutory and defendant has failed to meet the statutory requirements for appealing the interlocutory criminal order, we dismiss defendant's appeal and thus remand the case to the district court for trial.

In its brief to this Court, the State objects to defendant's statement of facts "because such a statement is not based on the record as it now stands[,]" due to the fact that defendant's case has not been tried on the merits. We find that the underlying facts regarding how defendant came to be charged with assault on a female are insignificant to the determination of his appeal. Therefore, we deal only with the issue at hand and the facts pertinent to that issue. On 23 February 1999, defendant was charged with assault on a female in violation of N.C. Gen. Stat. § 14-33(c)(2) (1999). In response, defendant's counsel filed a motion in district court to dismiss on the grounds that the statute was unconstitutional on its face because it deprived defendant of equal protection under the law by "providing additional protection for the females of this State." On 15 April 1999 following a hearing on defendant's motion, Catawba County District Court Judge Robert M. Brady allowed defendant's motion to dismiss and entered an order quashing the misdemeanor warrant against defendant, finding that the statute is facially unconstitutional. The State appealed to the superior court. On 29 September 1999 following a hearing on the matter, Superior Court Judge James U. Downs entered an order overruling the district court's finding that the statute is unconstitutional on its face. Judge Downs reinstated the charge against defendant and remanded the case back to the district court for trial. Defendant appeals.

The issue before this Court is whether the superior court committed reversible error by overruling the district court's order and finding that N.C. Gen. Stat. § 14-33(c)(2) does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. However, we do not reach the merits of defendant's claim because we must grant the State's motion to dismiss on the grounds that defendant's appeal is interlocutory.

"[A]n order is interlocutory if it does not determine the issues in an action, but instead merely directs some further proceeding preliminary to the final decree." *Collins v. Talley*, 135 N.C. App. 758, 759, 522 S.E.2d 794, 796 (1999). Additionally, "[t]he right to appeal in a

criminal proceeding is purely statutory. Generally, there is no right to appeal in a criminal case except from a conviction or upon a plea of guilty." *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876, *appeal dismissed and disc. review allowed in part*, 340 N.C. 572, 460 S.E.2d 328 (1995), *aff'd*, 342 N.C. 638, 466 S.E.2d 277 (1996) (citation omitted). Thus, in the case *sub judice*, where the superior court reinstated the charge against defendant and remanded the case back to the district court to be tried on the merits, defendant's appeal is interlocutory because it is not from a final judgment against him. Therefore, in order for this Court to review the merits of defendant's appeal, we must find that defendant has a statutory right to be here. *Id. (See also, State v. Black*, 7 N.C. App. 324, 328, 172 S.E.2d 217, 219-20 (1970)). However, we do not so find.

In response to the State's motion to dismiss, defendant argues that his appeal falls under an exception pursuant to N.C. Gen. Stat. § 15A-1432(d) (1999). Thus, defendant contends that his appeal is properly before this Court. We agree that there is a statutory exception for interlocutory criminal appeals under N.C. Gen. Stat. § 15A-1432(d) (1999) which reads:

> (d) If the superior court finds that a judgment, ruling, or order dismissing criminal charges in the district court was in error, it must reinstate the charges and remand the matter to district court for further proceedings. *The defendant may appeal this order to the appellate division* as in the case of other orders of the superior court, including by an interlocutory appeal *if the defendant, or his attorney, certifies to the superior court judge who entered the order that the appeal is not taken for the purpose of delay and if the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter.*

Id. (emphasis added). Therefore, if the record before us reflects that defendant met the requirements for appealing under the statute, defendant would be correct that his appeal is properly before this Court. However, the record does not so reflect. In fact, there is nothing in the record before this Court to show that "defendant, or his attorney, certifie[d] to the superior court . . . that the appeal [wa]s not [being] taken for the purpose of delay . . . ." *Id.* Neither does the superior court's order reflect that it found defendant's cause was "appropriately justiciable in the appellate division as an interlocutory matter." *Id.*

Therefore, since defendant has not met the statutory requirements for bringing his interlocutory appeal before this Court, the appeal is dismissed. Defendant's alternative request that his appeal be treated as a petition for writ of certiorari is denied.

Dismissed.

Judges LEWIS and WYNN concur.

STATE OF NORTH CAROLINA v. DONALD CLAYTON MADRY, JR.

No. COA99-1271

(Filed 21 November 2000)

1. **Hunting and Fishing— taking bear with bait—aiding and abetting—insufficient allegations**

A warrant for taking bear with bait was properly dismissed where the warrant charged that defendant "did aid and abet Richard G. McCormack by taking bear with the use and aid of bait" because the phrase "by taking bear with use and aid of bait" simply describes the way in which defendant aided and abetted McCormack, and does not specifically state the underlying offense committed by McCormack for which defendant would be on trial under the aiding and abetting theory. The aiding and abetting language cannot be treated as surplusage because the warrant as worded would then make no sense. N.C.G.S. § 113-294(c1).

2. **Indictment and Information— defective warrant—amended—fatal error not cured**

A fatally defective warrant charging a misdemeanor was not cured by an amendment in district court. Instead of issuing an amendment, the State should have filed a statement of charges.

3. **Statute of Limitations— misdemeanor—invalid warrant**

Further prosecution for taking bear with bait was barred by the statute of limitations where the warrant was dismissed as ineffective. While the statute of limitations may be tolled upon the issuance of a valid warrant, a void or invalid warrant does not

toll the statute and, while defective indictments may be refiled within one year, no such exception exists for warrants.

Appeal by the State from order entered 30 June 1999 by Judge Dennis J. Winner in Tyrrell County Superior Court. Heard in the Court of Appeals 20 September 2000.

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

The Robinson Law Firm, by Leslie S. Robinson, for defendant-appellee.

LEWIS, Judge.

[1] The only issue before us is the validity of the warrant allegedly charging defendant with the crime of taking bear with bait, in violation of N.C. Gen. Stat. § 113-294(c1). Defendant was convicted in district court but appealed to the superior court for a trial de novo. Defendant then filed a motion to dismiss the warrant as insufficient, which motion was granted. The State now appeals.

To be sufficient, any charging instrument, whether an indictment, arrest warrant, or otherwise, must allege all essential elements of the crime sought to be charged. N.C. Gen. Stat. § 15A-924(a)(5) (1999). The purpose of this requirement is to ensure that a defendant may adequately prepare his defense and be able to plead double jeopardy if he is again tried for the same offense. *State v. Westbrooks*, 345 N.C. 43, 58, 478 S.E.2d 483, 492 (1996). We conclude that the warrant here was insufficient because it did not adequately apprise defendant of the specific offense with which he was being charged.

The arrest warrant here charged defendant as follows:

> [T]he defendant named above unlawfully, willfully did aid and abet Richard G. McCormack by taking bear with use and aid of bait.

Ultimately, the "aid and abet" language is what renders this warrant flawed. Specifically, the warrant charges that defendant aided and abetted Richard G. McCormack, but it does not allege the underlying offense that *Mr. McCormack* committed. The warrant does cite section 113-294(c1) as the statute defendant allegedly violated. That statute makes it a misdemeanor to "take[], possess[], transport[], sell[], possess[] for sale, or buy[] any bear or bear part." N.C. Gen.

Stat. § 113-294(c1). Significantly, under the statute, each of the above acts constitutes a separate offense. *Id.* The warrant here does not denominate which offense or offenses Mr. McCormack committed.

In this context, the phrase "by taking bear with use and aid of bait" is purely descriptive; it simply describes the way in which defendant aided and abetted Mr. McCormack. Under an aiding and abetting theory, defendant would be guilty of the offense committed by Mr. McCormack. *See State v. Polk*, 309 N.C. 559, 567, 308 S.E.2d 296, 300 (1983) ("[A] person who is present and aids and abets another in the commission of a criminal offense is as guilty as the principal perpetrator of the crime."). But here, we do not know what that offense is. As stated earlier, the statute cited in the warrant criminalizes not only the taking of bear but also the sale, possession, transportation, and buying of bear as well. Perhaps defendant took the bear by bait and then Mr. McCormack sold it. If so, under the aiding and abetting theory alleged in the warrant, defendant would be guilty of the *sale* of bear—not the taking of it. On the other hand, perhaps defendant took the bear with bait and then Mr. McCormack transported it. If so, under the aiding and abetting theory, the alleged offense again would be the *transportation* of the bear—not the taking of it. Or perhaps both Mr. McCormack and defendant played a role in taking the bear. If so, then the charged offense would be the taking of the bear. Quite simply, we just do not know because the warrant does not specifically state the underlying offense allegedly committed by Mr. McCormack for which defendant would be on trial under the aiding and abetting theory.

The State responds that we should simply ignore the "aiding and abetting" language. Because aiding and abetting is not a substantive offense but just a theory of criminal liability, allegations of aiding and abetting are not required in an indictment or warrant. *State v. Ainsworth*, 109 N.C. App. 136, 142-43, 426 S.E.2d 410, 414-15 (1993). And because it is not required, the State argues the language may be treated as surplusage. We completely agree; the "aiding and abetting" language could be treated as surplusage here. *Cf. Westbrooks*, 345 N.C. at 57, 478 S.E.2d at 492 (1996) ("Thus, the allegation of the indictment that defendant acted in concert . . . is an allegation beyond the essential elements of the crime charged and is, therefore, surplusage."). However, were we to do so, the warrant simply makes no sense. All that would be left is the charge that "the defendant named above unlawfully, willfully did by taking bear with use and aid of

bait." This no more saves the warrant than leaving the "aiding and abetting" language in. The warrant is flawed either way. Accordingly, we conclude the superior court judge properly dismissed the warrant.

[2] We note that the State amended the warrant before trial in the district court pursuant to N.C. Gen. Stat. § 15A-922(f). We need not consider this amendment, however, because the original warrant was fatally deficient. "[W]here the warrant does not contain sufficient information to notify the defendant of the nature of the crime charged and fails to contain even a defective statement of the offense, it is fatally defective and cannot be cured by amendment." *State v. Bohannon*, 26 N.C. App. 486, 488, 216 S.E.2d 424, 425 (1975). Instead of issuing an amendment, the State should have filed a statement of charges to rectify the situation. N.C. Gen. Stat. § 15A-922(b). For whatever reason, the State chose not to do so.

[3] Finally, we point out that the result of our disposition is that the statute of limitations has now run and defendant may not be re-tried under a valid warrant or statement of charges. N.C. Gen. Stat. § 15-1 prescribes a two-year statute of limitations for all misdemeanors except "malicious misdemeanors." The alleged offense here occurred on 15 November 1997, well over two years ago. Our Supreme Court has affirmatively stated that this statutory period is tolled upon the issuance of a *valid* warrant. *State v. Hundley*, 272 N.C. 491, 493-94, 158 S.E.2d 582, 583-84 (1968). The issuance of a void or invalid warrant, however, does not toll the statute. *Id.* Our legislature has set forth a limited exception to this two-year period: defective *indictments* may be refiled within one year of dismissal. N.C. Gen. Stat. § 15-1. But this exception only applies to indictments; no such exception exists for warrants. *Hundley*, 272 N.C. at 493, 158 S.E.2d at 583. Accordingly, any attempt to issue a new criminal pleading now would be barred by the two-year statute of limitations.

Affirmed.

Judges WYNN and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 NOVEMBER 2000

CONTINENTAL PROGRAMMING GRP., INC. v. DALTON PETROLEUM, INC. No. 00-173	Forsyth (99CVS5745)	Reversed and remanded
COUNTY OF DURHAM ex rel. WAYNES v. LOFTIN No. 99-1212	Durham (93CVD4968)	Vacated and remanded
GOODIN v. SOLARIS DEV. CORP. No. 99-1568	Wake (98CVS08444)	Affirmed
JOE PECHELES VOLKSWAGEN, INC. v. PECHELES No. 99-1251	Pitt (96CVS1826)	Dismissed
MANN v. THOMPSON No. 00-345	Alamance (98CVS2096)	Appeal dismissed
MANN v. THOMPSON No. 00-351	Alamance (98CVS2096)	Appeal dismissed
S&H TRAILERS, INC. v. CLAYTON No. 99-1100	Wake (93CVD7157)	Affirmed
STATE v. BARNES No. 99-1556	Davidson (98CRS17417)	Affirmed
STATE v. BROWN No. 99-1334	Alamance (98CRS19529) (98CRS22064)	Attempted first-degree murder: No Error. Attempted second-degree murder: Vacated
STATE v. CLARK No. 99-1531	Pitt (98CRS19932) (99CRS1717)	No Error
STATE v. DAVIS No. 00-288	Forsyth (97CRS39629) (97CRS39630) (98CRS42440)	No Error; motion for appropriate relief denied
STATE v. LEMAY No. 99-1050	New Hanover (98CRS2739)	No Error
STATE v. McCLENDON No. 00-296	Union (98CRS015383) (99CRS002937)	No Error
STATE v. McFADDEN No. 00-65	Forsyth (97CRS26675)	No Error

STATE v. MORRIS No. 99-1083	Durham (98CRS13684) (98CRS13685) (98CRS30681)	No Error
STATE v. MOSLEY No. 99-1567	Rutherford (98CRS8863)	No Error
STATE v. PEGUES No. 00-392	Mecklenburg (98CRS132137) (98CRS132138) (98CRS132139) (98CRS132140)	No Error
STATE v. SWINSON No. 00-183	Lincoln (97CRS6703)	No Error
STRATAS & WEATHERS v. ANDERSON No. 99-621 No. 99-938	Wake (98CVS05507)	Affirmed
SUTTON v. LANGFORD No. 00-394	Haywood (99CVD875)	Affirmed

FILED 21 NOVEMBER 2000

HARRIS v. DECLERCK No. 99-1255	Lenoir (98CVS1510)	Affirmed
KLOEPPING v. JACOCKS CORP. No. 99-1180	Mecklenburg (96CVS61)	Reversed and remanded
MAGIC MARKETING, INC. v. SNYDER No. 99-1472	Hyde (97CVD39)	Vacated and remanded
PALMER v. ROBERSON No. 99-1348	Hertford (99CVD67)	Affirmed
SOMERS v. DURHAM No. 99-1331	Alamance (97CVD1068)	Affirmed
STATE v. AGUILLAR No. 99-1329	Stanly (97CRS6370)	Reversed and remanded with instructions
STATE v. MASSEY No. 99-1326	Durham (88CRS12541) (88CRS12542) (88CRS12543)	Vacated and remanded

ROSALYN GLENN-ROBINSON, PLAINTIFF v. ROBERT CHARLES ACKER; CITY OF DURHAM, NORTH CAROLINA, DEFENDANTS

Nos. COA99-894, COA99-1116

(Filed 5 December 2000)

1. Civil Rights— section 1983 claim—off-duty officer—false arrest—freedom to leave—issue of fact

Summary judgment should not have been granted for defendant Acker on a 42 U.S.C. § 1983 claim for false arrest where Acker was an off-duty police officer who became involved in a confrontation with a school bus driver and the driver brought an action including a section 1983 claim and state claims for assault and battery, false imprisonment, and violation of state constitutional rights. There were genuine issues of fact as to whether a reasonable person would have felt free to leave and whether plaintiff was arrested rather than merely seized.

2. Civil Rights— section 1983 claim—off-duty officer—false arrest—probable cause—issue of fact

Summary judgment should not have been granted for defendant Acker on a 42 U.S.C. § 1983 claim for false arrest where Acker was an off-duty police officer who became involved in a confrontation with a school bus driver. The existence of probable cause was an issue of fact because Acker originally stated that plaintiff was under arrest for violation of a city ordinance prohibiting stopping in a street so as to impede traffic, but officers are not empowered to arrest for infractions. Acker later contended that he had probable cause to arrest for the misdemeanor violation of willfully failing to comply with a lawful order by a law enforcement officer, but the trier of fact could reasonably infer that plaintiff did not know that Acker was an officer; an officer may not assume that others will know he is a police officer where he simply states as much and flashes "something," while wearing civilian clothing, working off-duty, and acting "out of control."

3. Civil Rights— section 1983 claim—off-duty officer—false arrest—qualified immunity

Summary judgment should not have been granted for defendant Acker on the basis of qualified immunity on a 42 U.S.C. § 1983 claim for false arrest where Acker was an off-duty police officer who became involved in a confrontation with a school bus driver,

and plaintiff's right to be free from an unconstitutional arrest was clearly established under plaintiff's version of the facts, but whether the incident occurred in the manner described by plaintiff was in dispute.

4. Civil Rights— section 1983 claim—off-duty officer—excessive force

Summary judgment should not have been granted for defendant Acker on a 42 U.S.C. § 1983 claim for excessive force where Acker was an off-duty police officer who became involved in a confrontation with a school bus driver and there were genuine issues of material fact as to whether the incident occurred in the manner described by plaintiff and regarding the existence of probable cause. If no probable cause existed for the arrest, then any use of force was unlawful.

5. Assault and Battery; False Imprisonment— off-duty officer—probable cause—issue of fact

Summary judgment should not have been granted for defendant Acker on state claims for assault and battery and false imprisonment where Acker was an off-duty police officer who became involved in a confrontation with a school bus driver. The trier of fact should decide the reasonableness of Acker's belief that defendant had committed a criminal offense and whether he was entitled to use any force against plaintiff. Without probable cause, Acker loses the benefit of N.C.G.S. § 15A-401(d) and any use of force becomes at least a technical assault and battery.

6. Police Officers— off-duty—assault and false imprisonment—immunity

Defendant Acker, an off-duty police officer, was not protected by the doctrine of official immunity from state claims of assault and false imprisonment arising from a confrontation with a school bus driver where plaintiff forecast sufficient evidence of malice and actions outside the scope of Acker's official duties.

7. Civil Rights— section 1983 claim—off-duty officer—action against city—practice and custom

The trial court properly granted defendant-city's motion for summary judgment on 42 U.S.C. § 1983 claims arising from a confrontation between an off-duty police officer and a school bus driver where plaintiff provided competent evidence of only one

other incident in which no officers were disciplined for a false arrest or the use of excessive force against a citizen. A municipality cannot be held liable under section 1983 unless action pursuant to official municipal policy or custom caused a constitutional tort, and this single episode is insufficient to constitute the widespread and permanent practice necessary to establish municipal custom.

8. Constitutional Law— right to free speech—adequate state remedies

Summary judgment was properly granted for defendant-city on state constitutional claims arising from a confrontation between an off-duty police officer and a school bus driver where plaintiff brought a free speech claim, but nothing indicates that plaintiff's right to free speech was violated in any way, and adequate state remedies existed on the other claims.

9. Costs— attorney fees—section 1983 claim

An award of costs in an action arising from a confrontation between an off-duty police officer and a school bus driver did not include attorney fees where the trial court did not find that the action was frivolous, unreasonable, or brought without foundation, as required by 42 U.S.C. § 1983, and there was no indication that the City moved for an award of attorney fees.

10. Evidence— judicial notice—police department regulations

The trial court correctly denied plaintiff's motion for partial summary judgment where plaintiff asked the court to take judicial notice that officers had no authority to arrest for a motor vehicle infraction, that defendant, an off-duty officer, had no authority to arrest plaintiff for a motor vehicle infraction, and that Durham Police Department rules stated that off-duty officers in their private vehicles should not stop motorists for traffic violations. North Carolina courts may not take judicial notice of municipal ordinances, much less police department regulations, and the remaining "facts" are best characterized as legal conclusions, which are not a proper subject for judicial notice. N.C.G.S. § 8C-1, Rule 201.

Appeal by plaintiff from order filed 18 March 1999, order and judgment filed 19 April 1999, order filed 23 June 1999, and order and judgment filed 24 June 1999 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 10 May 2000.

Alexander Charns and Karen Bethea-Shields for plaintiff-appellant.

Newsom, Graham, Hedrick & Kennon, P.A., by Joel M. Craig and Thomas H. Lee, Jr., for defendant-appellee Robert Charles Acker.

Faison & Gillespie, by Reginald B. Gillespie, Jr. and Keith D. Burns, and Patrick W. Baker, for defendant-appellee City of Durham.

SMITH, Judge.

Plaintiff Rosalyn Glenn-Robinson appeals the trial court's grant of summary judgment in favor of defendants Robert Charles Acker (Acker) and the City of Durham (the City). We affirm in part, reverse in part, and vacate in part the orders and judgments of the trial court.

This action arises out of a 7 May 1996 incident between plaintiff and Acker. At the time of the incident, Acker, a Durham city police officer, was working a second job as a truck driver for C.F. Corporation and had just made a delivery to Club Boulevard Elementary School (the school). Plaintiff, a school bus driver, was sitting in the driver's seat of her parked school bus in front of the school. According to plaintiff, Acker, dressed in street clothes, yelled at plaintiff, ordered her to move her school bus, and flashed "something" at her; when plaintiff did not move the bus, Acker "boarded the [p]laintiff's school bus, told her she was under arrest, grabbed her arm and unbuckled her seatbelt."

Plaintiff filed suit on 10 December 1997 pursuant to 42 U.S.C. § 1983 (1994), alleging that Acker's actions violated plaintiff's Fourth Amendment rights and that the City, "by way of its pattern, practice, custom or usage condoned or was deliberately indifferent to [its] officers' violations of the Fourth Amendment and Fourteenth Amendment to the United States Constitution." In her complaint, plaintiff detailed ten "example[s] of the pattern, practice, custom or usage" of the City that she alleges "foster and allow an atmosphere of repression and lawlessness by not punishing police officers who assault, batter, or violate the Fourth Amendment rights of Durham residents."

Plaintiff also alleged the City violated her rights guaranteed under Article I, §§ 14, 19, 20, 21, 35 and 36 of the North Carolina

Constitution and that Acker committed the torts of assault and battery and false imprisonment. Plaintiff sought compensatory and punitive damages and counsel fees. According to the original complaint, Acker was sued only in his individual capacity.

Acker filed an answer on 10 February 1998, admitting "that he demonstrated his police badge to [p]laintiff, unbuckled her seatbelt, touched her on the arm and told her she was under arrest," but denying that such actions violated plaintiff's constitutional rights and asserting the defenses of qualified immunity and governmental immunity as bars to plaintiff's claims. The City answered on 11 February 1998, generally denying plaintiff's allegations and asserting the defense of governmental immunity.

On 26 February 1999, plaintiff filed a "Motion for Partial Summary Judgment . . . and/or Request for the Court to Take Judicial Notice," which was denied on 18 March 1999. Plaintiff filed a motion *in limine* on 13 April 1999 requesting that Acker be judicially estopped "from claiming new, alternative grounds for his seizure and arrest of [p]laintiff." The record on appeal does not reflect that this motion was ruled on by the trial court.

On 24 March 1999, Acker moved for summary judgment, which was granted 19 April 1999. Plaintiff timely appealed the trial court's orders granting Acker's motion for summary judgment and denying her partial summary judgment motion.

The City moved to supplement its answer on 26 April 1999 to assert the defense of *res judicata*, in that the trial court's order granting summary judgment in favor of Acker "negate[d] essential elements of [p]laintiff's purported claims against the City"; it moved for summary judgment on 21 May 1999. The City's motions were granted on 21 and 24 June 1999, respectively. Plaintiff timely appealed both rulings.

This Court, *ex mero motu*, consolidated plaintiff's appeals for argument and decision. *See* N.C. R. App. P. 40 ("actions which involve common questions of law may be consolidated for hearing . . . upon the initiative of th[e] court").

I. *Plaintiff's claims against Acker*

Plaintiff first argues the trial court erred in granting Acker's motion for summary judgment because "there were genuine material

issues of fact in dispute." A motion for summary judgment is properly granted when

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

N.C.G.S. § 1A-1, Rule 56(c) (1999). A defendant moving for summary judgment bears the burden of showing either that (1) an essential element of the plaintiff's claim is nonexistent; (2) the plaintiff is unable to produce evidence that supports an essential element of her claim; or, (3) the plaintiff cannot overcome affirmative defenses raised in contravention of her claims. *See Lyles v. City of Charlotte*, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996). In ruling on such motion, the trial court must view all evidence in the light most favorable to the non-movant, taking the non-movant's asserted facts as true, and drawing all reasonable inferences in her favor. *See Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994).

The trial court's order granting summary judgment in favor of Acker read in pertinent part:

> [T]he Court finds and concludes that the forecast of evidence demonstrates:
>
> 1. That [Acker] did not violate Plaintiff's rights under the United States or North Carolina Constitutions, for the reasons, *inter alia*, that
>
> a. [Acker] did not arrest or seize Plaintiff . . . , and/or
>
> b. Even if any such arrest or seizure occurred, such arrest or seizure was reasonable and supported by probable cause, and
>
> c. [Acker] did not use excessive force against Plaintiff;
>
> 2. That [Acker] did not commit . . . false imprisonment, assault and/or battery against the Plaintiff; and
>
> 3. In the alternative, that [Acker] is entitled to judgment on all claims herein asserted under the doctrines of qualified immunity under federal law and governmental officer immunity under North Carolina law.

Preliminarily, we agree with plaintiff that her "amended complaint alleged no North Carolina [c]onstitutional claims against . . . Acker in his individual capacity." Plaintiff's amended complaint alleged only that the City, "through . . . Acker *in his official capacity*, violated the rights guaranteed to the plaintiff under" various sections of the North Carolina Constitution. It was thus improper for the trial court to include a reference to plaintiff's state constitutional claims in its order granting summary judgment in favor of Acker.

A. *Section 1983 claim—False arrest*

[1] We next address *seriatim* plaintiff's federal claims of false arrest and excessive force brought against Acker in his individual capacity. Plaintiff alleged in her complaint that Acker "subjected [her] to excessive force, [and] arrested [her] and threatened [her] in violation of the Fourth Amendment to the United States Constitution," thus establishing a cause of action under section 1983. Before proceeding, we note that although plaintiff has filed suit pursuant to a federal statute in state court, "plaintiff's relief, if any, will be the same that she might have in a federal court under" section 1983. *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 197, 371 S.E.2d 503, 510 (1988), *overruled on other grounds by Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992).

Section 1983 provides:

> Every person who, under color of any statute,[1] ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Fourth Amendment protects individuals against "unreasonable searches and seizures." U.S. Const. amend. IV. Two categories of police-citizen encounters implicate Fourth Amendment protection:

> investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity, and [] arrests, the most

1. Neither Acker nor the City has argued to this Court that Acker was not acting under color of law at the time of the incident, as required to impose liability pursuant to section 1983. Thus, we do not address the issue.

> intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause.

United States v. Bloom, 975 F.2d 1447, 1450-51 (10th Cir. 1992) (citations omitted), *overruled in part on other grounds by United States v. Little*, 18 F.3d 1499 (10th Cir. 1994).

1. *Was plaintiff seized?*

Acker argues summary judgment was proper on plaintiff's false arrest claim because "no arrest or seizure actually occurred." "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980).

In her deposition, plaintiff described the events surrounding the incident as follows: Plaintiff drove her bus to the school to wait for the children to be dismissed. A tractor-trailer was double-parked, requiring plaintiff to maneuver around it before parking her bus. Cars also were parked along the curb where plaintiff usually parked, causing plaintiff to stop the bus in the travel lane of the roadway. Plaintiff testified that as she was waiting for the children, Acker

> tapped on the window, and I slid it back. And he said, "You need to move this bus." I said, "Well, as soon as these other cars move, I'll move."
>
> . . . .
>
> . . . Acker said, "You need to move this bus now."
>
> And I replied again, "As soon as these cars move." So he was getting a little out of sorts. So I shut the window.
>
> . . . .
>
> . . . [Next, Acker came a]round the front of the bus and banged on the door. And I opened the door, and he said, "I'm a police officer. You need to move this bus now." And he flashed a badge.
>
> Q When you say "flashed," tell me what you mean.
>
> A He just got—he pulled something out and flipped it over.
>
> Q Were you able to tell it was a badge of some kind?

> A No. . . . [After] that point, he just got out and just lost it.
>
> . . . .
>
> . . . He went to screaming and hollering, "You need to move this bus. I've got freight to unload. I'm a police officer. I can arrest you for obstructing traffic." And at that time he boarded the bus.

Plaintiff testified that until this point, Acker had been standing "down at the bottom of the steps." Next, Acker

> boarded the bus, and he said, "I can arrest you for obstructing traffic." He said, "You are under arrest." He reached over, put his hand on my arm and reached over and unbuckled the seat belt.

Acker then asked plaintiff to "get up," but she refused. According to plaintiff, Acker was "no more than a f[oo]t, f[oo]t and a half" away from her at this time, and she "was trapped in [her seat]. He was between [her] and the entrance to the bus."

Plaintiff testified that Acker's touching of her arm did not hurt, did not leave any marks, and lasted just "[l]ong enough to unbuckle the seat belt." When plaintiff asked him to remove his hand, he complied and "backed off," ending the incident. When asked if she tried to leave the bus during the incident, plaintiff answered that she "didn't move. [She] didn't even try." In a later affidavit, plaintiff testified she "was trapped behind the wheel [and] couldn't move because [Acker] was right next to [her]."

Taking the facts in the light most favorable to plaintiff, *See Kennedy*, 115 N.C. App. at 583, 448 S.E.2d at 281, we find plaintiff's evidence sufficient for the trier of fact to find that "a reasonable person would have believed that he was not free to leave," *Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509, thus establishing a seizure under the Fourth Amendment, *see id.* It was thus improper for the trial court to grant Acker's motion for summary judgment on the basis that a seizure did not occur.

There is also a genuine issue of material fact as to whether plaintiff was not merely seized, but was in fact arrested. "A seizure becomes an arrest when 'a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with

formal arrest.' " *United States v. Ienco*, 182 F.3d 517, 523 (7th Cir. 1999) (quoting *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988)). Although our Supreme Court has held, "One is not arrested until law enforcement officers significantly restrict his freedom of action," *State v. Simpson*, 303 N.C. 439, 445, 279 S.E.2d 542, 546 (1981), the United States Supreme Court has held, "[T]he mere grasping or application of physical force with lawful authority, whether or not it succeed[s] in subduing the arrestee, [i]s sufficient" to constitute an arrest, *California v. Hodari D.*, 499 U.S. 621, 624, 113 L. Ed. 2d 690, 696 (1991).

Acker admitted in his answer "that he demonstrated his police badge to [p]laintiff, unbuckled her seatbelt, touched her on the arm and told her she was under arrest," and testified in his deposition that after the incident, he told plaintiff's supervisor he had placed plaintiff under arrest. Although Acker exited plaintiff's bus and did not take her into custody, his "application of physical force," *id.*, coupled with his proclamation that plaintiff was under arrest and plaintiff's allegations that her exit was blocked, raise at least a genuine issue of material fact as to whether plaintiff was "arrested" for purposes of the Fourth Amendment.

2. *Did Acker have probable cause to arrest plaintiff?*

[2] "The Fourth Amendment prohibits a police officer from arresting a citizen except upon probable cause." *Rogers v. Powell*, 120 F.3d 446, 452 (3rd Cir. 1997). Thus, if probable cause to arrest plaintiff was not present in the case at bar, "the arrest was unlawful and violated [plaintiff's] Fourth Amendment right to be free from unlawful seizures." *Id.* at 454; *see also Burton v. City of Durham*, 118 N.C. App. 676, 682, 457 S.E.2d 329, 333 (1995) ("[E]xistence of probable cause is an absolute bar to a civil rights claim for false arrest."). According to plaintiff, Acker informed her he was placing her under arrest for impeding or obstructing traffic.

Section 20-90(11) of the Durham City Code provides that "[n]o person shall stop, stand or park a vehicle . . . [u]pon the travel portion of the roadway or street such that said vehicle obstructs or impedes the flow of vehicular traffic." Durham, N.C., Code § 20-90(11) (1985). A violation of a city ordinance "regulating the operation or parking of vehicles" is an "infraction." N.C.G.S. § 14-4(b) (1999).

"Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Michigan v. DeFillippo*,

443 U.S. 31, 36, 61 L. Ed. 2d 343, 348-49 (1979). A police officer may only arrest a person without a warrant in this state if that officer "has probable cause to believe [that person] has committed a *criminal offense* in the officer's presence." N.C.G.S. § 15A-401(b)(1) (1999) (emphasis added). An infraction, however, is a "noncriminal violation of law," N.C.G.S. § 14-3.1 (1999), such that officers are not empowered to arrest for its violation. *See* Robert L. Farb, *Arrest, Search and Investigation in North Carolina* 56 (2d ed. 1992); *see also United States v. Watson*, 423 U.S. 411, 418, 46 L. Ed. 2d 598, 606 (1976) ("[C]ases construing the Fourth Amendment . . . reflect the ancient common-law rule that a peace officer [i]s permitted to arrest without a warrant for a *misdemeanor or felony* committed in his presence . . . if there [i]s reasonable ground for making the arrest."). Thus, assuming *arguendo* plaintiff did violate section 20-90, Acker could not arrest her for such an infraction.

Acker contends summary judgment was proper in that he had probable cause to arrest plaintiff pursuant to N.C.G.S. § 20-114.1(a) (1999), which provides "[n]o person shall willfully fail or refuse to comply with any lawful order or direction of any law-enforcement officer . . . which order or direction [is] related to the control of traffic." Violation of section 20-114.1(a) is a misdemeanor, *see* N.C.G.S. § 20-176(a) (1999), such that an officer may make a warrantless arrest if the officer has probable cause to believe the violation was committed in his presence, *see* G.S. § 15A-401(b)(1); *see also State v. Brooks*, 337 N.C. 132, 145, 446 S.E.2d 579, 588 (1994) (holding that officer may make warrantless arrest for misdemeanor committed in his presence).

Our courts have never addressed the issue herein presented—whether a police officer who states that a person is under arrest for one violation may later justify that arrest by reference to another violation. However, we agree with the approach taken by the Fifth Circuit in similar circumstances. In *Trejo v. Perez*, 693 F.2d 482, 484 (5th Cir. 1982), the defendant-officer, Perez, arrested the plaintiff, Trejo, for disorderly conduct, but later asserted Trejo had violated the Texas "Stop and Identify" statute, Tex. Penal Code Ann. § 38.02. Trejo filed suit for false arrest under section 1983. The jury found that Perez had no probable cause to believe Trejo had committed the offense of disorderly conduct; Perez sought to avoid liability by claiming he had probable cause to arrest Trejo for violation of section 38.02. *Id.*

The *Trejo* court held that the question to be resolved was

> whether the conduct that served as the basis for the charge for which there was no probable cause could, in the eyes of a similarly situated reasonable officer, also have served as the basis for a charge for which there was probable cause.

Id. at 486; *see also Graham v. Connor*, 490 U.S. 386, 397, 104 L. Ed. 2d 443, 456 (1989) ("[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."). The court found that Trejo's use of vulgar language in a public place gave rise to the disorderly conduct charge and that Trejo's use of vulgar language in response to Perez' request for identification may have permitted Trejo's arrest under section 38.02; thus, the court concluded, the two offenses "were sufficiently related that an objective police officer might have charged the offense of failure to identify." *Trejo*, 693 F.2d at 486.

In the case *sub judice*, plaintiff could not have been legally arrested for violation of section 20-90. Acker attempted to arrest plaintiff for that infraction based on plaintiff's parking of the bus in the travel lane of the road. The offense for which Acker argues he had probable cause to arrest plaintiff—disobeying a traffic order of a law enforcement officer, *see* G.S. § 20-114.1(a)—was based on plaintiff's refusal to move her bus from the travel lane. Thus, as in *Trejo*, the offenses are sufficiently related so that Acker may seek to justify his arrest of plaintiff under G.S. § 20-114.1(a).[2] *See Foster v. Metropolitan Airports Com'n*, 914 F.2d 1076, 1079 (8th Cir. 1990) (holding that officer's "subjective reason for making the arrest is irrelevant to a fourth amendment challenge to the arrest").

Acker argues that because plaintiff refused to move her bus when he ordered her to do so, he had probable cause to arrest her for violation of G.S. § 20-114.1(a).

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2. Plaintiff filed a motion *in limine* with the trial court requesting that Acker be judicially estopped "from claiming [G.S. § 20-114.1(a) as a] new, alternative ground for his seizure and arrest of [p]laintiff." Plaintiff alleges that Acker did not seek to justify his conduct pursuant to G.S. § 20-114.1(a) until 1999, approximately three years after the incident in question. *See* G.S. § 15A-401(c)(2) (an officer, "[u]pon making an arrest, . . . must . . . [a]s promptly as is reasonable under the circumstances, inform the arrested person of the cause of the arrest"). However, the record on appeal indicates this motion was not ruled on by the trial court, and we therefore may not review the merits of the motion. *See* N.C. R. App. P. 10(b)(1) (to preserve question for appellate review, party must "obtain a ruling upon [its] . . . motion").

> Probable cause is defined as "those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent [person] in believing that the suspect had committed or was committing an offense."
>
> In examining the facts and circumstances known to the officer[] at the time of the arrest to determine whether summary judgment was proper[] . . . , we must view the evidence in the light most favorable to plaintiff.

Davis v. Town of Southern Pines, 116 N.C. App. 663, 671-72, 449 S.E.2d 240, 245 (1994) (citation omitted).

Plaintiff testified by way of affidavit that

> [o]n May 7, 1996, . . . Acker was dressed in short pants and a t-shirt. At times he claimed he was driving a truck and had freight to unload. Other times he claimed he was a police officer and flashed something quickly. He did not act like a police officer. He was completely out of control, and very angry. I believed at the time he was high on drugs. He was yelling and waving his arms.

In his deposition, Acker testified he was wearing shorts, a plain t-shirt, and boots on the date of the incident, and when he was speaking with plaintiff at the window of her bus, he "produced [his] police ID and . . . tried to get [plaintiff's] attention that [he] was a police officer. And [plaintiff] totally ignored [him]." Acker further testified that plaintiff continued to "ignore[]" him after he boarded her bus.

Viewed in the light most favorable to plaintiff, *see Kennedy*, 115 N.C. App. at 583, 448 S.E.2d at 281, the facts tend to show that plaintiff was approached by an "angry," "out of control" man wearing shorts, a plain t-shirt, and boots. The man "flashed something" at her "quickly"; asserted he was both a truck driver and a police officer; boarded her bus; ordered her to move her bus; grabbed her arm, unfastened her seatbelt, and told her she was under arrest; then exited her bus without writing her a citation or formally taking her into custody. At no point did plaintiff acknowledge Acker's status as a police officer, and, according to Acker's own testimony, plaintiff was not looking in his direction when he attempted to show her his badge at the window of the bus.

Under these circumstances, we believe the trier of fact could reasonably infer plaintiff did not know Acker was a "law-enforcement officer," G.S. § 20-114.1(a), and in fact may have believed he was a civilian masquerading as an officer in an attempt to get her to move the bus. To violate G.S. § 20-114.1(a), plaintiff must have "willfully" disobeyed a "lawful order"[3] of a "law-enforcement officer." The word "willfully" means "something more than an intention to commit the offense." *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940). "It implies committing the offense purposely and designedly in violation of law." *Id.* Thus, to *willfully* disobey an order under G.S. § 20-114.1(a), plaintiff must have known or had reasonable grounds to know Acker was a law enforcement officer. *See State v. Avery*, 315 N.C. 1, 30, 337 S.E.2d 786, 803 (1985) (stating that in prosecution for "assault with a firearm on a law enforcement officer," State must prove defendant "knew or had reasonable grounds to know" victim was a law enforcement officer); *State v. Rowland*, 54 N.C. App. 458, 462, 283 S.E.2d 543, 546 (1981) (holding that in prosecution for assault on a law enforcement officer, State must prove defendant knew victim was a law enforcement officer).

Although an officer giving an order knows that he is in fact an officer, to find probable cause to arrest a suspect for violation of G.S. § 20-114.1(a), the officer must evaluate whether the *suspect* knows the person giving the order is a law enforcement officer. Probable cause exists only if a reasonable officer could believe plaintiff knew the officer's status as such. *See Davis*, 116 N.C. App. at 671, 449 S.E.2d at 245. We are not prepared to hold that an officer in these circumstances—wearing civilian clothing, working off-duty at a second job, and acting "out of control"—may assume that others will know he is a police officer simply if he states such and flashes "something" at someone who is admittedly "ignor[ing]" him. We also emphasize that plaintiff never acknowledged Acker's status as a police officer by way of words or action.

> The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established, it is a question of law for the court. Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury.

Pitts v. Pizza, Inc., 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978) (citations omitted). As there are material facts in dispute *sub judice*, such

3. We assume without deciding that Acker's order was "lawful."

as whether plaintiff ever saw Acker's badge and whether Acker's demeanor at the time of the incident was "out of control" and not indicative of an officer, as plaintiff testified, or "professional," as Acker testified in his deposition, we hold the existence of probable cause is an issue for the trier of fact. The trial court's grant of summary judgment on this basis was thus improper.

3. *Is Acker entitled to the defense of qualified immunity?*

[3] Acker also was not entitled to summary judgment on plaintiff's federal false arrest claim on the grounds of qualified immunity.

> "The test of qualified immunity for police officers sued under [section 1983] is whether [the officers' conduct violated] clearly established statutory or constitutional rights of which a reasonable person would have known." In ruling on the defense of qualified immunity we must: (1) identify the specific right allegedly violated; (2) determine whether the right allegedly violated was clearly established at the time of the violation; and (3) if the right was clearly established, determine whether a reasonable person in the officer's position would have known that his actions violated that right. The first two determinations are questions of law for the court and should always be decided at the summary judgment stage. However, "the third [determination] . . . require[s] [the factfinder to make] factual determinations [concerning] disputed aspects of the officer[s'] conduct."

Davis, 116 N.C. App. at 670, 449 S.E.2d at 244. The right allegedly violated herein was plaintiff's Fourth Amendment "right not to be arrested without probable cause," *Roberts v. Swain*, 126 N.C. App. 712, 719, 487 S.E.2d 760, 765 (1997), for violation of G.S. § 20-114.1(a). The right to be free from false arrest is "clearly established" for purposes of this analysis "if probable cause is lacking." *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992).

Before proceeding, we must distinguish our analysis on this element of the qualified immunity test from our analysis of the propriety of summary judgment based on the trial court's finding that Acker had probable cause to arrest plaintiff. We first note that if probable cause to arrest plaintiff was present as a matter of law, summary judgment should have been entered in favor of Acker, and the issue of whether Acker is entitled to qualified immunity would not arise. *See Burton*, 118 N.C. App. at 682, 457 S.E.2d at 333. However, summary judgment is improper if genuine issues of material fact are

present. As we discussed above, plaintiff and Acker present such different versions of the facts that summary judgment is inappropriate on the issue of whether probable cause to arrest plaintiff existed. The trier of fact must determine exactly what transpired and, based on those facts, determine if probable cause existed.

However, when determining whether a right is "clearly established" for purposes of qualified immunity, the trial court essentially assumes the facts are as the plaintiff alleges, thus removing any fact issue from the analysis. *See Davis*, 116 N.C. App. at 670-72, 449 S.E.2d at 244-45 (In determining whether probable cause existed for purposes of qualified immunity analysis, "we must view the evidence in the light most favorable to plaintiff;" determination is question of law for the trial court.); *see also Kennedy*, 115 N.C. App. at 583, 448 S.E.2d at 281 (holding that on summary judgment, must take nonmovant's asserted facts as true). On plaintiff's view of the facts, Acker did not have probable cause to believe plaintiff knew he was a law enforcement officer, *see Avery*, 315 N.C. at 30, 337 S.E.2d at 803; thus, Acker did not have probable cause to arrest plaintiff for violation of G.S. § 20-114.1(a), and plaintiff's right to be free from arrest under these facts was clearly established, *see Pritchett*, 973 F.2d at 314.

To summarize, we hold as a matter of law that plaintiff's right to be free from an unconstitutional arrest was clearly established under plaintiff's version of the facts. *See Davis*, 116 N.C. App. at 670, 449 S.E.2d at 244 (first two prongs of qualified immunity test are "questions of law for the court"). Thus, we must next examine the third prong of the qualified immunity test to determine whether Acker is entitled to qualified immunity. *See id.*

When reviewing this third prong, we must ask "whether the conduct at issue actually occurred and if so, whether a reasonable officer would have known that his conduct would violate that right." *Id.* at 672-73, 449 S.E.2d at 246. However, "[i]f there are genuine issues of historical fact respecting the officer's conduct or its reasonableness under the circumstances, summary judgment is not appropriate" on this prong of the test. *Pritchett*, 973 F.2d at 313. Again, as discussed above, certain facts *sub judice* are in dispute, such as whether plaintiff was given sufficient opportunity to view Acker's badge and whether Acker's conduct towards plaintiff was "out of control" or "professional." The "third inquiry [therefore] cannot be answered on summary judgment" in the case at bar. *Davis*, 116 N.C. App. at 673,

449 S.E.2d at 246. Summary judgment was thus inappropriate on the basis that Acker was entitled to qualified immunity.

B. *Section 1983 claim—Excessive force*

[4] We now turn to plaintiff's federal claim of excessive force. Acker contends, as the trial court found in its order, that he "did not use excessive force against [p]laintiff," or, in the alternative, that the doctrine of qualified immunity bars plaintiff's claim.

> [C]laims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard . . . .
>
> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' " against the countervailing governmental interests at stake.

Graham, 490 U.S. at 395-96, 104 L. Ed. 2d at 454-55 (citation omitted) (footnote omitted). Proper application of this "reasonableness" test

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. at 396, 104 L. Ed. 2d at 455. Finally, the issue to be determined

> is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force . . . .

Id. at 397, 104 L. Ed. 2d at 456 (citations omitted).

In the instant case, plaintiff alleges Acker touched her on the arm, but testified in her deposition that such touching did not hurt, did not leave any marks, and lasted just "[l]ong enough to unbuckle the seat belt," and that Acker removed his hand when plaintiff asked him to do so. However, plaintiff alleges in her complaint that "Acker's behavior has led [her] to have nightmares and other anxiety."

Plaintiff asserts that she "pose[d] no threat to anyone and [wa]s not trying to flee," such that Acker should have been "prohibited from using any force, because no force [wa]s reasonable under the totality of the circumstances." According to plaintiff, "[w]hen no use of force by an officer is required, no use of force is permissible." Acker counters that any use of force was so minimal as to "not amount to a constitutional violation."

In the course of a lawful arrest, "the application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment." *Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir. 2000); *see also Carter v. Morris*, 164 F.3d 215, 219 n.3 (4th Cir. 1999) (holding that arrestee's claims "that her handcuffs were too tight and that an officer pushed her legs as she got into the police car" are "so insubstantial that [they] cannot as a matter of law support her claim" for use of excessive force). However, if an officer attempts an arrest "without probable cause[,] . . . *any* use of force [i]s inappropriate." *Nolin*, 207 F.3d at 1258 (emphasis added); *see also Graham*, 490 U.S. at 396, 104 L. Ed. 2d at 455 ("Our Fourth Amendment jurisprudence has long recognized that *the right to make an arrest* or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."); *State v. Simmons*, 192 N.C. 692, 695, 135 S.E. 866, 867 (1926) ("[A]n officer who in attempting to make an unlawful arrest . . . commits an assault . . . must be held responsible."); *cf. Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 909 (1968) (Officer may conduct "reasonable search for weapons . . . where he has reason to believe that he is dealing with an armed and dangerous individual" but has no probable cause to arrest.).

Thus, the issue central to plaintiff's false arrest claim also is determinative of her excessive force claim: if no probable cause existed to arrest plaintiff, any use of force by Acker was unlawful, *see Nolin*, 207 F.3d at 1257; however, if probable cause did exist, Acker was authorized to use a "reasonable" amount of force to effect plaintiff's arrest, *see Graham*, 490 U.S. at 396, 104 L. Ed. 2d at 455. As there are genuine issues of material fact that must be resolved by the trier of fact regarding the existence or non-existence of probable cause, summary judgment was inappropriate on plaintiff's excessive force claim as well.

Acker contends he is entitled to qualified immunity as to this claim. Although the United States Supreme Court "has declined to reach the issue of whether qualified immunity is available as a

defense to excessive force claims," *Baker v. Chaplin*, 517 N.W.2d 911, 914 n.5 (Minn. 1994), this Court has analyzed section 1983 cases as if qualified immunity were available to defendants, *see Roberts*, 126 N.C. App. at 727, 487 S.E.2d at 770. We thus address Acker's argument.

Viewing the facts in the light most favorable to plaintiff, *see Davis*, 116 N.C. App. at 671-72, 449 S.E.2d at 245, Acker did not have probable cause to arrest plaintiff. If Acker was without probable cause to arrest plaintiff, he was not entitled to use any force against her. *See Nolin*, 207 F.3d at 1257-58. Thus, "plaintiff had a clearly established right, under the facts and circumstances shown, not to be subjected to use of excessive force." *Roberts*, 126 N.C. App. at 727, 487 S.E.2d at 770.

We must next "determine whether a reasonable person in the officer's position would have known that his actions violated" plaintiff's right to be free from use of excessive force. *Davis*, 116 N.C. App. at 670, 449 S.E.2d at 244. This determination turns on whether the incident actually occurred in the manner described by plaintiff and must be decided by the trier of fact as material issues of fact are in dispute. *See id.* at 672-73, 449 S.E.2d at 246. Summary judgment was thus inappropriate. *See id.* at 673, 449 S.E.2d at 246.

C. *State tort claims*

[5] We next address plaintiff's state tort claims, which were brought against Acker in his individual capacity. Plaintiff has not brought suit against the City for these claims. The evidence before the trial court on Acker's motion for summary judgment established a *prima facie* claim of both assault and battery and false imprisonment. As previously discussed, plaintiff presented evidence Acker arrested her without probable cause, thus committing a false arrest. "A false arrest is an arrest without legal authority and is one means of committing a false imprisonment." *Marlowe v. Piner*, 119 N.C. App. 125, 129, 458 S.E.2d 220, 223 (1995). As "the existence or nonexistence of probable cause is for the jury to determine[,] . . . [Acker] was not entitled to summary judgment." *Id.*

"An assault is an offer to show violence to another without striking him, and a battery is the carrying of the threat into effect by the infliction of a blow." *Dickens v. Puryear*, 302 N.C. 437, 444, 276 S.E.2d 325, 330 (1981). "A battery is made out when the . . . plaintiff is offensively touched against h[er] will." *Ormond v. Crampton*, 16

N.C. App. 88, 94, 191 S.E.2d 405, 410 (1972). Acker admitted in his answer that he "touched" plaintiff's arm, and plaintiff has presented evidence such contact was against her will.

However,

> [p]ursuant to the common law of North Carolina, an assault [and battery] by a law enforcement officer upon a citizen can provide the basis for a civil action for damages against the officer only if a plaintiff can show that the officer used force against plaintiff which was excessive under the given circumstances.

Fowler v. Valencourt, 108 N.C. App. 106, 114, 423 S.E.2d 785, 790 (1992), *rev'd in part on other grounds*, 334 N.C. 345, 435 S.E.2d 530 (1993). G.S. § 15A-401(d) governs the use of force by law enforcement officers and provides in pertinent part:

> a law-enforcement officer is justified in using force upon another person when and to the extent that he reasonably believes it necessary:
>
> a. To prevent the escape from custody or to effect an arrest of a person *who he reasonably believes has committed a criminal offense*, unless he knows that the arrest is unauthorized . . . .

(Emphasis added.) The statute in effect proscribes the use of force by a law-enforcement officer if the officer either "knows that the arrest is unauthorized" or does not have a reasonable belief that the suspect "has committed a criminal offense." *Id.*; *see also Simmons*, 192 N.C. at 695, 135 S.E. at 867 ("[A]n officer who in attempting to make an unlawful arrest . . . commits an assault . . . must be held responsible."); Farb, *Arrest, Search and Investigation* at 45 ("If officers are making an unlawful arrest, their use of force . . . is also unlawful and may constitute an assault.").

Again, given that the trier of fact must determine the reasonableness of Acker's belief that plaintiff had committed a criminal offense, we hold that the trier of fact should decide whether Acker was entitled to use any force at all against plaintiff. If Acker did not have probable cause to arrest plaintiff, Acker loses the benefit of G.S. § 15A-401(d), and any use of force becomes at least a technical assault and battery against plaintiff.

[6] In sum, the trial court improperly granted Acker's motion for summary judgment on the grounds that Acker "did not commit the

common law torts of false imprisonment, assault and/or battery." However, Acker asserts he is protected by the doctrine of official immunity and that summary judgment was appropriate on that ground.

> To maintain a suit against a public official in his/her individual capacity, the plaintiff must make a *prima facie* showing that the official's actions (under color of authority) are sufficient to pierce the cloak of official immunity. Actions that are malicious, corrupt or outside of the scope of official duties will pierce the cloak of official immunity, thus holding the official liable for his acts like any private individual.

Moore v. Evans, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citation omitted).

In her complaint, plaintiff alleged Acker committed the tort of assault and battery by "deliberately, willfully, maliciously and in bad faith grabb[ing] plaintiff without her consent," and committed the tort of false imprisonment by "deliberately, willfully, maliciously and in bad faith" restraining plaintiff against her will. Based on our previous discussion of the facts, plaintiff has forecast sufficient evidence that Acker acted maliciously, thus requiring reversal of the trial court's grant of summary judgment in Acker's favor on these claims. *See Roberts*, 126 N.C. App. at 718, 487 S.E.2d at 764.

Plaintiff also has forecast evidence from which it could be found that Acker acted outside the scope of his official duties. All parties agree Acker was off-duty and working a second job as a truck driver at the time of the incident. Further, plaintiff presented evidence that the "Rules & Regulations of the Durham Police Department" provide in section 2.25 that "[o]ff-duty officers in their personal vehicles shall not stop or attempt to stop motorists for traffic violations or other minor offenses." Acker was off-duty and driving a tractor-trailer at the time of the incident at issue, and his order to move the bus appears to have been given so that he could more easily move his tractor-trailer, not to further a purpose of the police department. Thus, plaintiff presented evidence from which it could be found that Acker was acting outside the scope of his duties with the police department at the time of the incident.[4]

4. We feel compelled to note that if Acker was acting outside the scope of his authority, *i.e.*, acting not as a police officer but as a private citizen, he also *may not* have been acting "under color of law," as required to sustain a section 1983 claim. *See Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir. 1975) ("Acts of police officers in the ambit of their personal, private pursuits fall outside of" section 1983.); *see also Revene v.*

Finally, plaintiff states in her brief that "Acker's conduct may also support a claim for intentional infliction of emotional distress." However, plaintiff did not allege in either her original or amended complaint that Acker had committed such tort; she may therefore not pursue this claim.

D. *Award of Costs*

Finally, plaintiff assigns error to that portion of the trial court's 19 April 1999 order taxing costs to plaintiff. Given our disposition herein reinstating plaintiff's claims against Acker, the trial court's award of costs was premature and is therefore vacated.

II. *Plaintiff's claims against the City*

We now turn to plaintiff's claims against the City. In her complaint, plaintiff alleged the City "by way of its pattern, practice, custom or usage condoned or was deliberately indifferent to officers' violations of the Fourth Amendment and Fourteenth Amendment" and that the City "violated the rights guaranteed to the plaintiff under the N.C. Constitution, Art. I, [§§] 14, 19, 20, 21, 35 and 36." The trial court granted summary judgment in favor of the City on both claims. While the City's motion for summary judgment was based on the defense of *res judicata*, a defense rendered inapposite in light of our disposition with regard to plaintiff's claims against Acker, we note that "[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

A. *Section 1983 claims*

[7] Preliminarily, we note "a municipal entity has no claim to immunity in a section 1983 suit." *Moore v. City of Creedmoor*, 345 N.C. 356, 366, 481 S.E.2d 14, 21 (1997). Further, while a "municipality cannot be held liable under section 1983 unless action pursuant to official municipal policy [or custom] caused a constitutional tort," *Burton*, 118 N.C. App. at 685, 457 S.E.2d at 334, summary judgment was not proper for the City on the basis that no constitutional violation occurred as we have reinstated plaintiff's claims against Acker. Thus,

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Charles County Com'rs, 882 F.2d 870, 872 (4th Cir. 1989) ("[T]he lack of the outward •indicia suggestive of state authority—such as being on duty, wearing a uniform, or driving a patrol car—are not alone determinative of whether a police officer is acting under color of state law[; r]ather, the nature of the act performed is controlling."). As this issue was not raised by the parties, however, we decline to address it further.

> [a]ssuming *arguendo* [plaintiff] suffered a deprivation of her federal rights, it is by now well settled that a municipality is only liable under section 1983 if it causes such a deprivation through an official policy or custom. Municipal policy may be found in written ordinances and regulations, in certain affirmative decisions of individual policymaking officials, or in certain omissions on the part of policymaking officials that manifest deliberate indifference to the rights of citizens. Outside of such formal decisionmaking channels, a municipal custom may arise if a practice is so "persistent and widespread" and "so permanent and well settled as to constitute a 'custom or usage' with the force of law."

Carter, 164 F.3d at 218 (citations omitted). The municipality must have had, at the time of the incident, actual or constructive knowledge that the practice had become customary. *See Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir. 1987).

Where a plaintiff claims the municipality has caused an employee to inflict an injury, "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Board of Comm'rs of Bryan City v. Brown*, 520 U.S. 397, 405, 137 L. Ed. 2d 626, 640 (1997); *see also Spell*, 824 F.2d at 1388 (plaintiff must prove an "affirmative link" between the custom and the violation). Further, "a plaintiff cannot rely upon scattershot accusations of unrelated constitutional violations to prove either that a municipality was indifferent to the risk of her specific injury or that it was the moving force behind her deprivation." *Carter*, 164 F.3d at 218; *see also Canton v. Harris*, 489 U.S. 378, 391, 103 L. Ed. 2d 412, 428 (1989) ("[T]he identified deficiency . . . must be closely related to the ultimate injury.").

Plaintiff alleges,

> there is a well-known, well-tolerated pattern, practice, custom or usage of [the City] . . . to foster and allow an atmosphere of repression and lawlessness by not punishing police officers who assault, batter, or violate the Fourth Amendment rights of Durham residents, or use unlawful process against citizens, including but not limited to falsely charging citizens with a crime after an officer uses excessive force or is angered by a citizen's exercise of their rights.

In her complaint, plaintiff cited ten incidents that were "example[s] of the . . . custom." However, two of these incidents involved illegal

searches, not false arrests or uses of excessive force, and as such are insufficiently related to plaintiff's claims to be relevant. *See Carter*, 164 F.3d at 219 (refusing to consider past incidents of alleged excessive force when plaintiff's claims were for false arrest and unreasonable search and seizure). A third example alleges only that a "woman" was charged with resisting an officer "after the officer became angered" by the woman. While plaintiff states the charges against the woman were dismissed, plaintiff does not allege that the woman's right to be free from false arrest was violated. Thus, this incident is also irrelevant. *See id.*

Plaintiff's remaining examples are as follows: (1) in 1994, an officer fractured Kimberly Porter's finger, then falsely charged her with trespass "after the officer became angered by" her; the officer was not punished; (2) in a 1994 incident between Margaret Dukes (Dukes), Reta Scarlett (Scarlett), and an officer, the City admitted Dukes' Fourth Amendment rights had been violated by an unlawful arrest, "paid a very large monetary settlement" to Dukes, but stated in a press release it "was not admitting wrongdoing by anyone" and did not discipline anyone involved in the incident; (3) in 1993, a woman was falsely charged with resisting an officer after the officer became angered by the woman; (4) in 1993, excessive force was used against Glennis E. Jones II after an unlawful traffic stop by an officer; the officer was not disciplined; (5) in the mid-1980's, excessive force was used against a "suspect" who "pos[ed] no threat"; the officer "is now in the training division" of the police department; (6) in 1978, a man was falsely charged with various traffic and criminal offenses and was beaten by the arresting officer; this officer has been promoted; and (7) City records "indicate that there have been at least twenty (20) instances in which the Police Department has sustained complaints for assault and/or violations of" department regulations regarding the use of force, but no officers have been terminated or referred for criminal prosecution.

The City in its answer admitted that the confrontations noted in examples one through six occurred, but denied that any of the arrests were unlawful or that excessive force was used and specifically denied the existence of a "pattern, practice, custom or usage" of assault and use of excessive force by its officers.

Plaintiff submitted no further evidence to the trial court regarding examples one, three, four, five, and six. Further, although plaintiff's complaint was verified, plaintiff testified in a later deposition she had no personal knowledge "other than what [she] may have been

told by [her] attorneys" of the incidents. Even if we were to consider plaintiff's complaint to be an affidavit, it is the long-standing rule of this Court that affidavits must be "made on the affiant's personal knowledge." *Singleton v. Stewart*, 280 N.C. 460, 467, 186 S.E.2d 400, 405 (1972). Thus, any portion of plaintiff's affidavit not based on personal knowledge "could not have been properly considered by the trial judge" on summary judgment. *Id.*

In the instant case, plaintiff "may not rest upon the mere allegations . . . of [her] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." G.S. § 1A-1, Rule 56(e). As plaintiff has provided no evidence beyond "mere allegations," *id.*, indicating the circumstances surrounding the incidents, we are unable even to infer that a false arrest or use of excessive force occurred therein. We thus decline to consider these incidents in our review of the propriety of the trial court's summary judgment order. *See Briley v. Farabow*, 348 N.C. 537, 544, 501 S.E.2d 649, 654 (1998) (holding that "unsupported, conclusory allegations are simply insufficient to create the existence of a genuine issue of material fact where the moving party has offered a proper evidentiary showing").

We now turn to plaintiff's remaining examples. As to example seven, plaintiff submitted a document entitled "Sustained IA Cases With Disciplinary Action Taken." This document indicates that several complaints of assault and excessive force have been made against Durham police officers; however, the document also indicates that in each case, the officer involved was either given a written or verbal reprimand, suspended, or ordered to undergo counseling. Therefore, this evidence "does not support a conclusion that the City is deliberately indifferent to or condones improper behavior on the part of its officers. In fact, it shows just the opposite." *Carter*, 164 F.3d at 220 (holding that municipality did not condone conduct where officer accused of false arrest was suspended by department).

As to example two regarding Dukes and Scarlett, plaintiff submitted the City's answers to interrogatories, in which the City admitted (1) the stop and search of Dukes and Scarlett was unauthorized, (2) the force used therein was unauthorized and therefore excessive, and (3) no officer was disciplined for that incident. Plaintiff also submitted a 26 August 1997 letter from City Manager P. Lamont Ewell (Ewell) apologizing to Dukes for the unauthorized stop and search and use of excessive force.

Finally, plaintiff submitted an 18 July 1995 letter from former police chief Jackie W. McNeil (McNeil), not specifically related to any of plaintiff's ten examples, in which McNeil admitted he knew of citizen complaints that officers had "physical[ly] abus[ed] citizens." The letter provided no details of any of the incidents nor did it indicate how many incidents had occurred.

> Municipal fault for allowing . . . a developed "custom or usage" to continue requires (1) actual or constructive knowledge of its existence by responsible policymakers, and (2) their failure, as a matter of specific intent or deliberate indifference, thereafter to correct or stop the practices.

Spell, 824 F.2d at 1391. Assuming *arguendo* the letters from McNeil and Ewell indicate active or constructive knowledge of a custom of false arrests or use of excessive force by Durham police officers, plaintiff presented insufficient evidence that the City failed to correct or stop the practices due to its deliberate indifference to citizens' rights. *See id.*

Plaintiff has provided competent evidence of only one incident (the Dukes/Scarlett incident), other than the one between herself and Acker, in which no officers were disciplined for a false arrest or use of excessive force against a citizen. This single episode is insufficient to constitute "the 'widespread and permanent' practice necessary to establish municipal custom." *Carter*, 164 F.3d at 220 (quoting *Greensboro Prof. Fire Fighters Ass'n v. Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995)). The trial court therefore properly granted the City's motion for summary judgment as to plaintiff's section 1983 claims.

B. *State constitutional claims*

[8] We also affirm the trial court's grant of summary judgment as to plaintiff's North Carolina constitutional claims. First, plaintiff alleges in her brief that she has "raised a free speech claim against" the City. However, nothing in the record indicates that plaintiff's right to free speech was violated in any way, and plaintiff does not allege, either in her complaint or in her brief to this Court, that any action by Acker or the City has restricted her speech or deterred her from speaking on any subject. The court was correct to dismiss this claim.

As to plaintiff's remaining state constitutional claims, we are guided by the principle that "a direct cause of action under the State Constitution is permitted only 'in the absence of an adequate state

remedy.' " *Davis*, 116 N.C. App. at 675, 449 S.E.2d at 247 (quoting *Corum*, 330 N.C. at 782, 413 S.E.2d at 289). The judiciary "must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power." *Corum*, 330 N.C. at 784, 413 S.E.2d at 291.

As we have reversed the trial court's grant of summary judgment on plaintiff's state tort law claims against Acker, there is an adequate state remedy for plaintiff's alleged injury resulting from Acker's conduct. *See Davis*, 116 N.C. App. at 675, 449 S.E.2d at 248 (holding that common law false imprisonment claim adequately protects "constitutional right not to be unlawfully imprisoned" and deprived of liberty). Plaintiff concedes as much in her brief, noting that only if this Court should find plaintiff "has no common law cause of action against . . . Acker in his individual capacity" should her claims arising under Article I, §§ 19-21, 35, and 36, stand. The trial court thus properly entered summary judgment in favor of the City on each of plaintiff's state constitutional claims.

C. *Award of costs*

[9] Plaintiff also assigns error to the trial court's award of costs to the City. The court's order granting summary judgment simply states "[t]he costs of this action shall be taxed against [p]laintiff." Plaintiff does not argue it was error to tax costs to her, but rather argues it was error for the trial court not to include language in the order "making it clear that costs did not include attorney's fees."

The award of attorney's fees in a section 1983 action is governed by 42 U.S.C. § 1988 (1994), which states "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee *as part of the costs*." (emphasis added). Plaintiff apparently is concerned attorney's fees will be assessed herein as part of the costs awarded by the court.

Plaintiff correctly notes that attorney's fees may be awarded under section 1988 to a prevailing defendant only "upon a *finding* that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 54 L. Ed. 2d 648, 657 (1978) (emphasis added). As the trial court made no such finding, no attorney's fees may be awarded to the City on the basis of this order. *See Hughes v. Rowe*, 449 U.S. 5, 15, 66 L. Ed. 2d 163, 173 (1980).

In addition, the record shows no indication that the City has moved for an award of attorney's fees. In fact, in its brief, the City states it "has no objection to modifying the order and judgment to make plain that as used therein the word 'costs' does not include attorneys' fees," so long as such alteration does not foreclose its ability to later seek an award of attorney's fees. Thus, we hold that the order at issue awards only costs, not attorney's fees, to the City.

III. *Plaintiff's motion for partial summary judgment*

[10] Finally, plaintiff assigns error to the trial court's denial of her motion for partial summary judgment and/or request for the trial court to take judicial notice. Plaintiff moved for partial summary judgment on the issue of whether plaintiff was seized by Acker. However, as we have discussed previously, summary judgment was not appropriate on this issue as there are genuine issues of material fact to be resolved, *i.e.*, whether a reasonable person could believe she was not free to leave the school bus during the incident between Acker and plaintiff. *See Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509.

Plaintiff asked the trial court to take judicial notice of the following:

> 2. That on or about May 7, 1996, Durham Police officers had no authority under state law to arrest a person for a motor vehicle infraction.
>
> 3. That . . . Acker, an off-duty Durham Police Corporal, had no authority to arrest [p]laintiff . . . for a motor vehicle infraction.
>
> 4. Since approximately 1986, law enforcement officers in North Carolina have had no authority to arrest a person for a motor vehicle infraction.
>
> 5. Durham Police Department rules and regulations in effect during 1996 state:
>
> 2.25 Traffic Stops in Personal Vehicles
>
> Off-duty officers in their personal vehicles shall not stop or attempt to stop motorists for traffic violations or other minor offenses.

Judicial notice of adjudicative facts is governed by N.C.G.S. § 8C-1, Rule 201 (1999). Adjudicative facts are "the facts of the particular case," including "who did what, where, when, how, and with

what motive or intent," and must be distinguished from legislative facts, defined as "those which have relevance to legal reasoning." *Id.*, commentary.

"Facts" two through four are not adjudicative facts, but are more akin to legislative facts. While our courts do take judicial notice of state laws, *see, e.g., Wikel v. Commissioners*, 120 N.C. 451, 452, 27 S.E. 117, 117 (1897) ("court takes judicial notice . . . of . . . a public act"), plaintiff did not ask the court to take judicial notice of any specific general statute. *Cf.* G.S. § 8C-1, Rule 201(d) (Court "shall take judicial notice" of adjudicative fact only if supplied with "necessary information."). Rather, "facts" two through four are best characterized as legal conclusions, which are not a proper subject for judicial notice.

"Fact" five simply recites a purported regulation of the Durham Police Department. However, our courts may not take judicial notice of municipal ordinances, see *Fulghum v. Selma*, 238 N.C. 100, 105, 76 S.E.2d 368, 371 (1953), much less police department regulations. The court thus properly denied plaintiff's motion.

To summarize, the court's order granting summary judgment in favor of Acker is reversed, and the court's orders denying plaintiff's motion for partial summary judgment and granting summary judgment in favor of the City are affirmed. We vacate the award of costs to Acker as premature and hold that the award of costs to the City does not include an award of attorney's fees.

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

Judges WYNN and MARTIN concur.

STATE OF NORTH CAROLINA v. TRAVIS K. McCORD AKA SHAWN LATTIMORE

No. COA99-1349

(Filed 5 December 2000)

1. Jury— peremptory challenge—*Batson* claim—race-neutral reasons

The trial court did not err in a prosecution for first-degree murder, first-degree rape, first-degree kidnapping, robbery with a

firearm, and first-degree burglary by concluding the State properly exercised its peremptory challenges without relation to race to exclude two prospective black jurors because: (1) the State offered race-neutral reasons for excusing one prospective juror that he did not own his own home, he had not lived at his residence for more than five years, and he knew a codefendant; (2) the State offered race-neutral reasons for excusing the other prospective juror that she knew the codefendant and she had previously been charged with aiding and abetting a murder; (3) the record contains no evidence the State made any racially motivated statements or asked any racially motivated questions during voir dire, and the record shows one black juror served on the panel; and (4) defendant did not offer any evidence tending to show racial discrimination by the State in the use of its peremptory challenges.

2. Jury— peremptory challenge—*Batson* claim—prima facie showing of intentional discrimination

The trial court's finding that defendant did not make a prima facie showing of intentional discrimination in a prosecution for first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary is clearly erroneous and the case is remanded to the trial court to provide the State the opportunity to give a race-neutral reason for striking two black potential jurors, because: (1) the record shows the victim was white and defendant is black; (2) the State used its peremptory challenges to excuse four of the six black jurors in the jury pool; and (3) the composition of the jury panel was eleven white jurors and one black juror.

3. Search and Seizure— warrant—sworn application

The trial court did not err by denying defendant's motion to suppress evidence obtained as a result of a search warrant even though the application for the search warrant itself did not state on its face that it was sworn, because: (1) the trial court found that the detective was sworn by the judge and made the application for the search warrant with attachments under oath as required by N.C.G.S. § 15A-244; and (2) this finding of fact is supported by the detective's testimony during voir dire that she signed the application in the judge's presence after being sworn by the judge.

4. Evidence— hearsay—not truth of matter asserted—limiting instruction—not substantially outweighed by danger of unfair prejudice

The trial court did not err in a prosecution for first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary by concluding that an accomplice's testimony regarding statements made by the victim to one of the other accomplices, that the victim's boyfriend was in motel room 109 and he had drugs and a lot of money, was not inadmissible hearsay or inadmissible under N.C.G.S. § 8C-1, Rule 403, because: (1) the State did not offer testimony of the victim's statement for the truth of the statement, but offered the testimony to show what the accomplice did based on the victim's statement; (2) the trial court gave the jury a limiting instruction that the evidence of the victim's statement was offered for that limited purpose; and (3) defendant does not argue in his brief how the probative value of this testimony would be substantially outweighed by the danger of unfair prejudice, and the record reveals no danger of unfair prejudice under Rule 403.

5. Evidence— prior statement—corroboration of trial testimony

The trial court did not err in a prosecution for first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary by admitting into evidence an accomplice's prior statement to an officer to corroborate her trial testimony, because; (1) the variations in the accomplice's testimony at trial do not directly contradict her statement given to the officer; and (2) the information in the statement was substantially similar to and tended to strengthen and confirm her testimony at trial regarding the events leading up to the victim's shooting.

6. Criminal Law— State's method of questioning—trial court's discretion

The trial court did not err in a prosecution for first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary by allowing the State to read lines of an accomplice's statement and then ask her whether the line was correct, because: (1) the method of questioning allowed at trial was within the discretion of the trial court; and (2) there was no showing of a manifest abuse of discretion.

7. Evidence— accomplice's plea agreement and plea transcript—agreement to testify against defendant—relevant to credibility

The trial court did not err in a prosecution for first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary by admitting evidence of an accomplice's plea agreement and plea transcript under N.C.G.S. § 8C-1, Rule 401, because the fact that the accomplice entered into a plea agreement with the State in which she agreed to testify against defendant was relevant to the accomplice's credibility.

8. Evidence— expert testimony—reliability of scientific methods—hair comparisons—shell casings

The trial court did not err in a prosecution for first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary by admitting testimony of an expert in the field of hair and fiber analysis regarding hair comparisons and testimony of an expert in firearms and tool mark examination regarding shell casings even though defendant contends there was no proper foundation to show the reliability of the scientific methods, because: (1) although the trial court did not specifically find the comparison of hair samples is reliable scientific methodology, this finding was implicit in the trial court's overruling of defendant's objection to this testimony, and the comparison of hair samples has been accepted as reliable scientific methodology in this State; and (2) although the trial court did not specifically find the comparison of shell casings is reliable scientific methodology, this finding was implicit in the trial court's overruling of defendant's objection to this testimony, and the comparison of bullets and weapons has been accepted as reliable scientific methodology in this State.

9. Evidence— expert testimony—procedure used by SBI to conduct DNA tests—testing performed by another individual—information inherently reliable

The trial court did not err in a prosecution for first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary by allowing an expert in DNA testing to testify regarding a report he did not prepare showing the procedure used by the SBI to conduct DNA tests even though the testing was performed by another individual, because the

information contained in the file was inherently reliable based on the fact that the expert worked with the individual at the SBI and reviewed the file in this case by specifically doing a technical review of the individual's work on the file.

10. Evidence— expert opinion—validity of DNA testing report—no expression of opinion by trial court

The trial court did not improperly express its opinion as to the validity of a DNA testing report in a prosecution for first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary when it asked an expert in DNA testing who did not perform the pertinent test whether his testimony was his opinion as to the results of the testing, because the trial court merely asked whether the expert was stating an opinion based on the report instead of expressing an opinion on whether the report was valid or credible.

11. Witnesses— expert—qualifications—DNA analysis

The trial court did not commit prejudicial error in a prosecution for first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary by instructing the jury that a witness would be allowed to testify as an expert in the field of DNA analysis if the jury finds her to be so qualified, because: (1) the record shows the witness was qualified as an expert in the field of DNA analysis and the trial court permitted the witness to give expert testimony in this field; and (2) even if the statement was error, it was harmless in light of the witness's qualifications, the trial court's conviction that the witness was an expert, and the fact the witness's opinion testimony fit within the definition of expert testimony.

12. Evidence— flight—disclosure of separate crime admissible—evidence of guilt or consciousness of guilt

The trial court did not err in a prosecution for first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary by allowing evidence under N.C.G.S. § 8C-1, Rule 404(b) of defendant's flight from an officer, including evidence that defendant fired a weapon at officers and defendant was hit with a bullet fired by one of the officers, because: (1) evidence of a defendant's flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt; (2) evidence of flight is admissible even though it may disclose the commission of a sep-

arate crime by defendant; and (3) the trial court's determination that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to defendant under N.C.G.S. § 8C-1, Rule 403 was not an abuse of discretion.

Appeal by defendant from judgments dated 7 April 1999 by Judge Steve A. Balog in Cleveland County Superior Court. Heard in the Court of Appeals 11 October 2000.

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

Julian B. Wray for defendant-appellant.

GREENE, Judge.

Travis K. McCord AKA Shawn Lattimore (Defendant) appeals judgments finding him guilty of first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary.

Jury selection

The record shows Defendant is black and the victim was white. The initial prospective panel of jurors to be questioned during *voir dire* consisted of ten white jurors and two black jurors. The two black jurors on the panel were Loretta Clemmons (Clemmons) and Vernon Pressley (Pressley). Subsequent to its questioning of the panel, the State excused Clemmons and Pressley. Defendant objected to the State excusing these two jurors on the ground "[t]here is no legitimate reason for dismissal by the State of the two blacks on the jury except to try to get all white jurors to sit and hear this matter." Prior to determining whether Defendant had stated a *prima facie* case of intentional discrimination under *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), the trial court allowed the State to argue legitimate non-discriminatory reasons existed for excusing these jurors. The State argued it excused Pressley because he did not own his own home, he had not lived in his residence for more than five years, and he knew a co-defendant. Also, the State argued it excused Clemmons because she knew a co-defendant and she previously had been charged with aiding and abetting a murder. The trial court then found:

[T]here is not a sufficient pattern shown at this time to indicate that [Pressley and Clemmons] were excluded and excused for

> any improper purposes, and that therefore, although the State is not required at this point to state reasons why the peremptory challenge was exercised as to each, I do find that the stated reasons by the [State] were . . . legitimate grounds to exercise peremptory challenge not related to race.

The trial court subsequently denied Defendant's *Batson* motion and the parties continued to question additional prospective jurors.

Later during *voir dire*, the State excused two black jurors, Itaska White (White) and Patricia Hartgrove (Hartgrove). Defendant objected to the State excusing these jurors, and the trial court noted the objection and indicated it would allow Defendant to make an argument regarding the objection at a later point in the proceedings. The parties, therefore, continued with *voir dire*. When the *voir dire* proceedings were complete, the trial court allowed Defendant to raise his objection to the State excusing White and Hartgrove. Defendant argued these jurors were excused "for no apparent reason, other than . . . that they were black." Defendant argued the State had exhibited "a pattern [of] taking all . . . blacks off of the jury." The trial court overruled Defendant's objection, finding there had not been "any pattern of ra[cial] discrimination in the exercise of peremptory challenge by the [State]." The trial court noted, regarding the racial composition of the jury, that the jury had eleven white members and one black member. The trial court also noted that one other black juror had been in the jury pool, but that juror was excused for cause. Subsequent to the trial court's ruling, Defendant asked the trial court to "make inquiry as required by *Batson*" regarding the State's use of its peremptory challenges. In response to Defendant's request, the trial court stated: "I do not find that there has been any . . . prima facie showing of any pattern of racial discrimination" by the State.

Trial

The State presented evidence at trial that on 8 February 1997, Katina Lankford (Lankford) and Amy Sigmon (Sigmon) rented a room at the Governors Inn, a motel located near Shelby, North Carolina. Lankford testified that she and Sigmon were joined at the motel by Marquette Ruff (Ruff) and a man named "Zeek." The four parties got "high" on marijuana and Xanax and spent the night in the motel room. On the following day, Lankford and Sigmon took Ruff and Zeek to another location, and Lankford and Sigmon returned to the Governors Inn and rented room 108 for the evening. After smoking marijuana and "rid[ing] around," Lankford and Sigmon returned to

room 108 and were joined by Lamont Haynes (Haynes) and a man Lankford knew as "Lamar." The parties remained in the room for approximately one hour and smoked marijuana, and then Haynes left the room to go to room 109 of the motel. Lankford testified Haynes went to room 109 because he had seen a woman he knew named Krista Byers (Byers) go into the room. Sometime later, Haynes returned to room 108 accompanied by Byers. Byers was staying "with a drug dealer in room 109 that [Haynes] knew" named Frankie Roseboro (Roseboro). Haynes wanted to go to room 109 to purchase cocaine from Roseboro; however, Byers told Haynes that he could not go to room 109 at that time.

Defendant objected at trial to the admission into evidence of statements made by Byers to Haynes on the ground the evidence was hearsay. The trial court held a *voir dire*, and the State argued it was not offering the testimony to prove the truth of what Byers said to Haynes; rather, the evidence was offered "to show what Lankford did" after hearing Byers' statement. Lankford testified on *voir dire* that Byers told Haynes "the weight of the drugs and the money that . . . Roseboro had in room 109." Lankford then relayed this information to Sigmon, who was talking on the telephone with Ruff at that time. The State argued it intended to offer this evidence to show that Lankford told Sigmon that Byers said room 109 contained drugs and money. The trial court ruled the testimony was not hearsay and was, therefore, admissible. Defendant then objected to the evidence on the ground "its probative value does not outweigh the undue prejudice to [Defendant]," pursuant to Rule 403 of the North Carolina Rules of Evidence. In response, the trial court found the evidence was relevant and "that its probative value is not outweighed by any undue prejudice to . . . [D]efendant, and it is therefore admissible."

Subsequent to its ruling, the trial court gave the following limiting instruction: "[Lankford's] testimony about statements by . . . Byers, [is] not offered for the truth of the content of . . . Byers' statements, but [is] offered as—to the fact that the statement was made and the content of the statement itself. And its use is limited for that purpose." Lankford then continued to testify regarding the events that took place at the Governors Inn on 9 February 1997. She testified that Sigmon was talking on the telephone with Ruff. While Sigmon was still on the telephone, Byers told Haynes that "Roseboro was in 109, and he had [drugs] and a lot of money." Lankford then told Sigmon to tell Ruff that "in room 109 there was money and drugs." Haynes, Lamar, and Byers subsequently left the motel room, and

Lankford and Sigmon discussed robbing Roseboro. Lankford and Sigmon then also left the motel room and went in Sigmon's vehicle to pick up Ruff.

After Lankford and Sigmon picked up Ruff, they had a discussion about their intended robbery and decided to pick up Defendant. After Defendant got into the vehicle, Lankford, Sigmon, and Ruff continued to discuss robbing Roseboro. The parties returned to room 108 at the Governors Inn and made plans to enter room 109; however, before they went to room 109, Roseboro and Byers left the Governors Inn in a vehicle. Defendant, Lankford, Sigmon, and Ruff then left in a vehicle and drove in the direction of Roseboro's house. As they were driving, however, they saw Byers returning to the motel so they decided they would also return to the motel.

Approximately twenty minutes later, after the parties saw Byers return to room 109 by herself, Defendant, Ruff, and Lankford left room 108 and stood outside of room 109. Lankford knocked on the door to room 109 and, after Byers opened the door, Defendant and Ruff "pushed" Lankford into the room and entered the room behind her. Defendant and Ruff both had guns, and they "told [Byers] to l[ie] down [on] the bed with her head in the pillow." Byers complied, and the parties searched the room. After they searched the room, Defendant told Lankford to instruct Byers to remove her clothing. Lankford did so, and Byers removed her clothing. Lankford then left the room and returned to room 108, where she told Sigmon what had occurred. Approximately ten minutes later, Ruff returned to room 108 and told Lankford that Defendant was " 'in room 109 having sex with [Byers].' "

A few minutes later, Lankford and Sigmon left the motel in Sigmon's vehicle. They followed a vehicle driven by Ruff, in which Defendant and Byers were passengers. The parties drove to a dirt road, and Defendant and Byers got out of the vehicle. Defendant then walked over to the vehicle in which Lankford was riding and told Lankford to get out of the vehicle because they "were going to kill [Byers]." Lankford got out of the vehicle and stood beside Defendant, and Defendant shot Byers. Byers, whose hands were tied behind her back, "[f]ell on the ground." Defendant then handed a gun to Lankford and told her that "if [she] didn't shoot [Byers] too that he would shoot [Sigmon and Lankford]." Lankford shot in the direction of Byers, and then, at Defendant's request, Lankford gave the gun to Sigmon. After Lankford gave the gun to Sigmon, Lankford ran in the direction of the vehicles. As she was running she heard a gunshot.

Lankford got into one of the vehicles and, as she looked in the direction of Byers, she saw Byers sit up. Defendant then shot Byers two additional times.

During Lankford's testimony, the State handed Lankford a document that Lankford identified as the written statement she gave to Billy Benton (Benton), a lieutenant with the Cleveland County Sheriff's Department, subsequent to the shooting. The State identified the statement as "Exhibit No. 23" and sought to introduce the statement into evidence. Defendant objected and the trial court overruled the objection. The trial court then instructed the jury that the statement was being "admitted for the limited purpose . . . for you to determine whether it is either consistent with or inconsistent with her testimony here at court, and you may consider it for that purpose only."

During cross-examination, Defendant asked Lankford about several statements in exhibit 23 that were inconsistent with her testimony at trial. Defendant asked Lankford whether she had testified during direct examination that she "shot in the general direction of [Byers]." Lankford responded, "Yes." Defendant then asked Lankford to read a portion of her statement, in which Lankford said that she " 'shot [Byers] in the head.' " Defendant also asked Lankford at what time she returned to the Governors Inn with Ruff and Zeek on 8 February, and she responded, "It was late. I don't know. . . . Maybe 10:00 or 11:00." Defendant then noted that Lankford's statement indicated the parties returned to the Governors Inn at 12:30 a.m. Additionally, Defendant asked Lankford about inconsistencies in her statement regarding actions she testified were taken by Haynes although her statement indicated these actions were taken by Lamar. Lankford testified that the law enforcement officers taking her statement must have confused Lamar with Lamont Haynes. Lankford also testified that Benton was "verbally abusing" her and "putting words in [her] mouth for [her]" while she was giving her statement.

On redirect examination of Lankford, the State used an overhead projector to project exhibit 23 onto a screen. Defendant noted his previous objection to the admission into evidence of exhibit 23 and also requested a limiting instruction. The trial court, therefore, gave the jury a second limiting instruction. The State then read lines from exhibit 23 to Lankford, and asked Lankford whether the information contained in each line was correct. Defendant objected to this method of questioning, in pertinent part, on the ground the evidence was not relevant and the evidence was not admissible under Rule 403

of the North Carolina Rules of Evidence. The trial court overruled Defendant's objection.

The State then continued to question Lankford regarding the statement, and the following information from the statement was read into evidence: the time and place that the statement was given; the times Lankford and Sigmon checked into the Governors Inn and where they went prior to checking into the motel and subsequent to checking into the motel; the location of Ruff's residence, which Lankford testified was incorrect; Sigmon's telephone call to Ruff from the motel; Lamar's statements regarding getting drugs from room 109, which Lankford testified was incorrect because Haynes actually made those statements; Lamar's and Byers' actions when they came to room 108, which Lankford testified was incorrect because Byers was actually with Haynes and not Lamar; a statement made by Lamar that Roseboro had been cooking cocaine in the bathroom in room 109, which Lankford testified was incorrect because Haynes actually made this statement; and Byers' statement to Lamar that it would not be much longer before Lamar could purchase cocaine from Roseboro, which Lankford testified was incorrect because Byers actually made this statement to Haynes.

Defendant again objected to this testimony on the ground it was not corroborative of anything testified to by Lankford during direct examination. The trial court ruled that there was no "substantial disagreement" between the portions of the statement that the State questioned Lankford about and the testimony elicited during Lankford's direct examination. The trial court also ruled that only the corroborative portions of exhibit 23 were admissible, and the trial court redacted the portions of exhibit 23 that it found were not corroborative. Additional portions of exhibit 23 were also redacted at the request of Defendant.

Subsequent to the redaction of exhibit 23, the State resumed questioning of Lankford regarding statements contained in exhibit 23. Lankford testified that her statement to Benton that room 109 probably contained a lot of " 'coke' " and money was correct; her statement that she and Sigmon went to pick up Ruff and Defendant was correct; her statement that she told Ruff that Roseboro " 'would probably have a gun' " was correct; her statement that when the parties returned to the Governors Inn, Byers' vehicle was still parked at the Governors Inn and Roseboro was in the room next to their room was correct; her statement that they heard Roseboro and Byers leave their motel room and Lankford devised a plan to rob them in the

parking lot was correct; her statement that the parties intended to follow Roseboro and Byers and that they saw Byers driving in the direction of the Governors Inn was correct; her statements regarding the details of how the parties carried out their plan to rob Roseboro and Byers were correct; her statements regarding how Byers was killed were correct; and her statement that she saw Byers " 'roll' " after Byers was shot was incorrect, as she actually saw Byers "sit up" rather than "roll."

Sigmon testified that on 9 February 1997, she was staying in a motel at the Governors Inn with Lankford. On that afternoon, Haynes and Lamar were in the motel room with Sigmon and Lankford when Byers came into the room. The State asked Sigmon what, if anything, Byers said when she came into the room. Defendant objected to this question on the ground the response would be hearsay. The trial court overruled the objection and instructed the jury that the testimony was "admitted for the limited purpose of establishing that it was said, and to explain the actions of others and not for the truth of the substance of what she said . . . and may be considered . . . for that purpose only." Sigmon then testified that when Byers entered the room, Haynes asked Byers "about some drugs." Byers responded: "Roseboro . . . has half a kilo of cocaine . . . . [Roseboro] was in the bathroom cooking it; for him to come back in an hour, and if there was any kind of drug over there[] that he would want for him to come back."

Sigmon also testified regarding a plea agreement that she entered into with the State as a result of the events that took place on 9 February 1997. The State handed Sigmon a document marked "State's Exhibit 24," and Sigmon identified this document as the plea agreement. Sigmon testified that her signature appeared on the plea agreement, and that exhibit 24 was a certified copy of the plea agreement. Sigmon also testified that exhibit 24 was "the full and complete plea agreement entered into between [her] and the State." The State then moved to introduce exhibit 24 into evidence and Defendant objected on the ground a proper foundation had not been laid. The trial court overruled the objection and admitted the exhibit into evidence. The State then handed Sigmon a second document identified as "State's Exhibit 25." The State asked Sigmon to identify the document, and she identified it as "the other half of the plea, where . . . they ask me questions." She testified her signature appeared on the document and the document was a certified copy. The State then moved to introduce exhibit 25 into evidence. Defendant objected on the grounds of

"relevance" and "improper foundation." The trial court overruled the objection and admitted exhibit 25 into evidence. Sigmon testified that as part of the plea agreement, she pleaded guilty to second-degree murder, first-degree burglary, first-degree kidnapping, and armed robbery. She also testified that the charge of conspiracy was dismissed as part of the plea agreement, and she agreed as part of the plea agreement to testify at Defendant's trial.

The State called Gary Reynolds (Reynolds), a physician's assistant, to testify at trial regarding physical evidence Reynolds obtained from Defendant while Defendant was incarcerated. Defendant objected to this testimony on the ground the evidence was obtained in reliance on an invalid search warrant. The trial court held a *voir dire*, and Deborah Arrowood (Arrowood) testified that she is employed as a detective with the Cleveland County Sheriff's Department and she was involved in the investigation of Byers' death. Arrowood stated that as part of the investigation, she prepared an application for a search warrant. Arrowood then took the application to Judge Jones, and Arrowood was sworn by Judge Jones in Judge Jones' office. Attached to the application was an affidavit signed by Arrowood. Judge Jones signed the portion of the affidavit labeled "Sworn and Subscribed before me." Arrowood also signed the application; however, Judge Jones did not sign the portion of the application labeled "SWORN AND SUBSCRIBED TO BEFORE ME." After reviewing the application, Judge Jones issued a search warrant and the search warrant was executed. Subsequent to *voir dire*, the trial court found as follows:

> [T]he requirement of 15A-244 regarding the contents of the application for a search warrant are met . . . . The back of the first page, the application for search warrant is signed by . . . Arrowood. She, likewise, signed the attachments to the search warrant that are the second and third pages of the exhibits. I further find that she was sworn by Judge Jones and made this application for [the] search warrant with attachments under oath as required by the statute, that the application and attachments contain the information required by 15A-244.

The trial court, therefore, denied Defendant's motion to suppress physical evidence obtained from Defendant.

Ronald Marrs (Marrs), an expert in firearms and toolmark examination, testified he is employed at the crime laboratory of the North Carolina State Bureau of Investigation (SBI). As part of his employ-

ment duties, Marrs received for examination several shell casings allegedly recovered as a result of the shooting of Byers. Marrs examined each shell casing to determine whether it was "a projectile or cartridge case, . . . the caliber, the manufacturer, whether there were any markings present to indicate it had been fired, extracted, [or] ejected from a firearm." The State asked Marrs whether he had done a comparison of shell casings marked for identification as State's exhibits 36, 37, 38, 39, and 41. Defendant objected to this question on the ground no proper foundation had been laid, and the trial court overruled the objection. Marrs testified he examined these exhibits "using an instrument known as a comparison microscope," and Marrs testified about the method for using a comparison microscope. Based on his comparisons, Marrs was able to determine that "four of [the shell casings] were worked through the action of the same gun." Further, "[t]he fifth [shell casing] had the same characteristics, but did not have enough of the individual characteristics needed for [him] to scientifically say that it had been worked through the same gun as the other four."

James A. Gregory (Gregory), an expert in the field of hair and fiber analysis, testified he is employed by the SBI "as a special agent assigned to the crime laboratory in Raleigh in the trace evidence section." Gregory testified he received approximately twenty-five items for analysis in connection with the investigation of Byers' death. These items included pubic hair samples known to be from particular individuals, including Byers, Defendant, Sigmon, Ruff, and Roseboro, as well as pubic hair samples which were found on Byers and were from unknown individuals. Gregory testified regarding the process that he used to determine whether each hair sample was "suitable for analysis." After determining which samples were suitable, he mounted the suitable samples onto microscope slides and used a "comparison microscope" to compare "known" samples to "unknown" samples. The State asked Gregory about the results of his comparisons, and Defendant objected on the ground a proper foundation had not been laid. The trial court overruled the objection. Gregory then testified that based on his comparisons, he determined that one of the "unknown" samples was "microscopically consistent" with a known sample of Defendant's hair. Gregory also concluded this "unknown" sample was not consistent with the "known" samples of hair from Ruff and Roseboro.

David Spittle (Spittle), an expert in DNA analysis testing, testified he is employed as a Special Agent with the molecular genetics section

of the SBI. Spittle testified regarding the methods of DNA analysis used by the SBI, and he stated he is "familiar with the procedures used by the [SBI] lab in the receiving and processing of items on which DNA testing [is] to be conducted." The State asked Spittle to identify State's exhibit 102, and Spittle identified the exhibit as a file containing laboratory reports and notes regarding Byers' case. Spittle testified the file was "maintained in the regular course of business conducted . . . at the SBI lab" and Spittle had reviewed the contents of the file including the results of tests conducted in connection with the case. The file indicated the DNA tests were performed by Jennifer Elwell (Elwell), a staff member of the SBI, who worked in the molecular genetics section. Spittle worked with Elwell, and Spittle "had reviewed this file at an earlier date specifically doing a technical review of the work of [Elwell]."

Spittle testified he was able to look at exhibit 102 and determine what tests were performed on the DNA samples. He described the DNA samples collected from Byers, which included "a liquid blood sample, two vaginal smears, four vaginal swabs, panties, two rectal smears, four rectal swabs, two oral smears, four oral swabs, two saliva swabs, known pubic hair combings, known pubic hair sample, known head hair sample and control swabs." The test results indicated that the examination of these items "revealed the presence of spermatozoa." The State asked Spittle whether, "as an expert, [he was] able to look at this file and look at the results and give [his] opinion as to the results of these tests." Spittle responded, "Yes." The State then asked Spittle what the results of the tests were, and Defendant objected pursuant to Rules 402, 403, 702, and 703 of the North Carolina Rules of Evidence, under the Sixth Amendment right to confront the witnesses against him, and on the ground no proper foundation had been laid. The trial court overruled the objection, and Spittle testified the DNA profile obtained from the oral swabs of Byers matched the DNA profile of the known blood sample taken from Defendant. Defendant objected on the ground Spittle was "simply reading a report as opposed to giving his opinion." The trial court then asked Spittle, "[I]s that your opinion as to the results of the testing." Spittle replied, "Yes," and the trial court overruled the objection. Subsequent to the ruling, Spittle gave the following testimony regarding the "statistical weight" of the DNA match:

> The probability of finding another unrelated individual having the same DNA profile which was obtained from the oral swabs is approximately one in 3,170 individuals from the North Carolina

white population, one in 1,220 individuals comprising the North Carolina black population, and one in 2,820 individuals in the North Carolina Lumbee Indian population.

Lucy Milks (Milks) testified she is employed in the molecular genetic section of the DNA unit of the SBI crime investigation laboratory. The State tendered Milks as an expert in DNA analysis, and the trial court instructed the jury that "Milk[s] will be allowed to testify as an expert in the field of DNA analysis if [the jury] find[s] her to be so qualified." Milks testified she received several DNA samples relating to this case, including dried blood stain samples from Byers, Defendant, Ruff, and Roseboro, a sample from Byers' "panties," and vaginal swabs of Byers. Milks conducted DNA tests on these samples and she went "through a series of steps to actually remove the DNA from the cells, cut them, [and] separate them into fragments of different sizes." After the DNA was removed from the cells, Milks "end[ed] up with a piece of film which has a DNA banding profile on it [and] [t]he band is like a bar code that you see on items." The State asked Milks whether, in this case, she was able to make conclusions based on the banding profiles. Defendant objected to this question on the ground no proper foundation had been laid, and the trial court overruled the objection. Milks then testified that she made the following conclusions based on the banding profiles: "the DNA banding pattern obtained from the male fraction from the cutting of the panties matched the DNA banding pattern obtained from the known blood stain from [Defendant] and did not match the banding pattern obtained from . . . Ruff or . . . Roseboro"; and, "the DNA banding pattern[] obtained from the male fraction of the vaginal swabs matched the DNA pattern of [Defendant] and does not match the banding pattern obtained from . . . Ruff or . . . Roseboro." The State then asked Milks: "What statistical weight can you give to the matches you obtained from your tests?" Defendant objected "as to the form of the question," and the trial court overruled the objection. Milks then testified regarding the statistical weight of the results she obtained.

The State called Benton to testify regarding Defendant's attempted flight from Benton on 12 February 1997. Prior to Benton's testimony, Defendant objected to any testimony regarding Defendant's flight on the ground "it is unfairly prejudicial and the probative value of this evidence regarding flight does not outweigh the unfairness as provided by Rule 403." Defendant also argued the evidence should be excluded under Rule 404 of the North Carolina Rules of Evidence as evidence of "other criminal conduct." The trial court

overruled Defendant's objection, finding "the evidence is relevant to prove flight and that its probative value is not substantially outweighed by the danger of unfair prejudice to . . . [D]efendant."

Subsequent to the trial court's ruling, Benton testified that on 12 February 1997, at approximately 11:30 a.m., he and two other law enforcement officers traveled to McIntire's Trailer Park to follow up on a lead in the investigation of Byers' death. The officers were traveling in an unmarked patrol car and were dressed in their law enforcement uniforms. After arriving at the trailer park, Benton saw a man fitting the description of Defendant walking across a street with three other individuals. Benton and another officer got out of Benton's vehicle and approached the four individuals. Benton "asked each individual for identification and [told them] that [they] were looking for a black male by the name of Shawn." Defendant told Benton he did not have any identification on him, and Benton approached Defendant to determine whether he was concealing any weapons under his coat. When Benton "got within arm's reach of [Defendant]," Defendant "started running." As Defendant was running, "he pulled a handgun from either the coat pocket or the waistband of his pants and fired several shots at [Benton] and [the other officer]." Benton returned fire at Defendant, and Defendant was struck by a bullet fired by Benton. Defendant was subsequently taken into custody.

Defendant did not present any evidence at trial. Subsequent to its deliberations, the jury returned verdicts finding Defendant guilty of first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary.

The issues are whether: (I) the trial court's finding that Defendant did not meet his burden of proving intentional discrimination in the State's use of its peremptory challenges to excuse Pressley and Clemmons from the jury is clearly erroneous, and whether the trial court's finding that Defendant did not meet his burden of establishing a *prima facie* case of intentional discrimination in the State's use of its peremptory challenges to excuse White and Hartgrove from the jury is clearly erroneous; (II) the application for a search warrant submitted to Judge Jones by Arrowood met the requirements of N.C. Gen. Stat. § 15A-244; (III) Lankford's testimony regarding statements made by Byers was inadmissible hearsay and, if not, whether the probative value of this evidence was "substantially outweighed by the danger of unfair prejudice" under Rule 403 of the North Carolina

Rules of Evidence; (IV) Lankford's statement to Benton corroborated Lankford's testimony at trial, and whether the trial court abused its discretion by allowing the State to question Lankford regarding individual lines in the statement; (V) evidence that Sigmon entered into a plea agreement with the State, in which she agreed to testify against Defendant, was relevant under Rule 401 of the North Carolina Rules of Evidence; (VI) Gregory's testimony regarding hair comparisons and Marrs' testimony regarding shell casings were based on reliable scientific methodology; (VII) the report relied upon by Spittle was inherently reliable, and whether the trial court expressed its opinion regarding the validity of the report in violation of N.C. Gen. Stat. § 15A-1222; (VIII) Milks was properly permitted to testify as an expert pursuant to Rule 702 of the North Carolina Rules of Evidence; and (IX) evidence of Defendant's flight from Benton was inadmissible under Rule 404(b) of the North Carolina Rules of Evidence.

I

Pressley and Clemmons

[1] Defendant objected at trial to the State's exercise of peremptory challenges to excuse Pressley and Clemmons on the ground the State's actions were intentionally discriminatory and, therefore, in violation of *Batson*.

"In *Batson*, the United States Supreme Court created a three-pronged test to determine whether a prosecutor impermissibly excused prospective jurors on the basis of their race." *State v. Bond*, 345 N.C. 1, 20, 478 S.E.2d 163, 172 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997).

> First, a criminal defendant must establish a *prima facie* case of intentional discrimination by the prosecutor. Finding a *prima facie* case shifts the burden to the State, which must give race-neutral explanations for peremptorily challenging a juror of a cognizable group. The reason does not have to be plausible. What is at issue in the second step is the " 'facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race[-]neutral.' " Once the State gives an explanation for its peremptory challenges, the trial court then determines "whether the defendant has carried his burden of proving purposeful discrimination."

Id. at 20-21, 478 S.E.2d at 172-73 (citations omitted). Whether the State intended to discriminate against the members of a race in its selection of the jury is a question of fact, *id.* at 22, 478 S.E.2d at 173, and the trial court's findings will be upheld on appeal "unless the appellate court is convinced that the trial court's decision is clearly erroneous," *State v. Crockett*, 138 N.C. App. 109, 115, 530 S.E.2d 359, 363, *disc. review denied*, 352 N.C. 593, — S.E.2d — (2000).

In this case, Defendant objected to the State's use of its peremptory challenges to excuse Pressley and Clemmons. Defendant argued during *voir dire* that "[t]here is no legitimate reason for dismissal by the State of the two blacks on the jury except to try to get all white jurors to sit and hear this matter." Prior to ruling on whether Defendant had established a *prima facie* case under *Batson*, the trial court allowed the State to present race-neutral reasons for excusing Pressley and Clemmons. Whether Defendant met his burden of establishing a *prima facie* case is, therefore, moot. *See State v. Hoffman*, 348 N.C. 548, 551-52, 500 S.E.2d 718, 721 (1998). Accordingly, we must determine whether the trial court's findings that "the stated reasons by the [State] were . . . legitimate grounds to exercise peremptory challenge not related to race" and that Defendant did not carry his burden of proving purposeful discrimination are clearly erroneous.[1]

The State offered as reasons for excusing Pressley that he did not own his own home, he had not lived at his residence for more than five years, and he knew a co-defendant. As these reasons are race-neutral on their face, the trial court properly determined these reasons were "not related to race." *See Bond*, 345 N.C. at 20, 478 S.E.2d at 172-73. Further, the record contains no evidence the State made any racially motivated statements or asked any racially motivated questions during *voir dire*, and the record shows one black juror served on the panel. *See State v. Sanders*, 95 N.C. App. 494, 502, 383 S.E.2d 409, 414 (1989). Moreover, Defendant did not offer any evidence tending to show racial discrimination by the State in the use of its peremptory challenges. *See id.* The trial court's denial of Defendant's *Batson* motion regarding Pressley was, therefore, not clearly erroneous.

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1. Although the trial court did not specifically state in its findings that Defendant failed to carry his burden of proving intentional discrimination, this finding is implicit in the trial court's denial of Defendant's *Batson* motion. *See Bond*, 345 N.C. at 21, 478 S.E.2d at 173.

The State offered as reasons for excusing Clemmons that she knew the co-defendant and she had previously been charged with aiding and abetting a murder. These reasons are racially neutral on their face. Further, as with Pressley, Defendant did not offer any evidence tending to show racial discrimination by the State in the use of its peremptory challenges, and the record does not contain any evidence suggesting Clemmons was dismissed from the jury for racially discriminatory reasons. The trial court's denial of Defendant's *Batson* motion regarding Clemmons was, therefore, not clearly erroneous.

White and Hartgrove

[2] Defendant also objected at trial to the State's use of its peremptory challenges to excuse White and Hartgrove from the jury on the ground the State's actions resulted in intentional discrimination, in violation of *Batson*. Because the trial court found Defendant had not made "any . . . prima facie showing of any pattern of racial discrimination" regarding White and Hartgrove, this Court's review is limited to whether this finding is clearly erroneous. *See Hoffman*, 348 N.C. at 552, 500 S.E.2d at 721.

A *prima facie* showing must raise an inference of intentional discrimination. *State v. Quick*, 341 N.C. 141, 144, 462 S.E.2d 186, 188 (1995). Factors to consider when making this determination include:

> the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

Id. at 145, 462 S.E.2d at 189.

In this case, the record shows Byers, the victim, was white and Defendant is black. Additionally, the State used its peremptory strikes to excuse four of the six black jurors in the jury pool, and the composition of the jury panel was eleven white jurors and one black juror. These factors are sufficient to raise a *prima facie* inference of intentional discrimination by the State in its use of its peremptory strikes. *See Hoffman*, 348 N.C. at 553-54, 500 S.E.2d at 722 (*prima facie* case of intentional discrimination established when record

shows defendant was black, victim was white, and State used peremptory challenges to strike three black jurors). The trial court's finding that Defendant did not make a *prima facie* showing of intentional discrimination is, therefore, clearly erroneous. This error, however, does not require a new trial. *State v. Hall*, 104 N.C. App. 375, 384, 410 S.E.2d 76, 81 (1991). Rather, because we find no other error in Defendant's trial, this case is remanded to the Cleveland County Superior Court. *See id.* On remand, a judge presiding over a criminal session shall hold a hearing and provide the State with an opportunity to give a race-neutral reason for striking White and Hartgrove. If the trial court finds the State's explanation is not race-neutral, Defendant is entitled to a new trial. If the trial court finds the State's explanation is race-neutral, Defendant shall be given the opportunity to demonstrate that the explanation was a mere pretext. If Defendant meets his ultimate burden of proving intentional discrimination, he is entitled to a new trial. If he does not meet this burden, the trial court will order commitment to issue in accordance with the judgment appealed from and dated 7 April 1999.

II

[3] Defendant argues the application for a search warrant submitted to Judge Jones by Arrowood was not sworn, and Defendant's motion to suppress evidence obtained as a result of the search warrant, therefore, should have been suppressed.[2] We disagree.

N.C. Gen. Stat. § 15A-244 provides that "[e]ach application for a search warrant must be made in writing upon oath or affirmation." N.C.G.S. § 15A-244 (1999). A judicial official, therefore, may base a finding of probable cause to issue a warrant "only on statements of fact confirmed by oath or affirmation of the party making the statement, or on information which the magistrate records or contemporaneously summarizes in the record." *State v. Heath*, 73 N.C. App. 391, 393, 326 S.E.2d 640, 642 (1985).

In this case, Arrowood submitted an application for a search warrant to Judge Jones, and Arrowood attached a sworn affidavit to her application. The application itself did not state on its face that it was

2. Defendant also argues in his brief to this Court that the search warrant should have been suppressed because it did not contain "the time of issuance" and was not directed to "a specific officer or . . . classification of officers." Because Defendant did not make these arguments before the trial court, these arguments are not properly before this Court. N.C.R. App. P. 10(b)(1). We, therefore, do not address these arguments.

sworn. The trial court found, however, that Arrowood "was sworn by Judge Jones and made this application for [the] search warrant with attachments under oath as required by the statute." This finding of fact is supported by Arrowood's testimony during *voir dire* that she signed the application in Judge Jones' presence after being sworn by Judge Jones. We are, therefore, bound by this finding of fact. *See id.* Accordingly, the trial court properly denied Defendant's motion to suppress evidence obtained as a result of the search warrant.

III

[4] Defendant argues Lankford's testimony regarding statements made by Byers was inadmissible hearsay or, in the alternative, was inadmissible under Rule 403 of the North Carolina Rules of Evidence. We disagree.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1999).

In this case, Lankford testified that Byers told Haynes, in Lankford's presence, that "Roseboro was in [room] 109, and he had [drugs] and a lot of money." Lankford then told Sigmon to tell Ruff that there were drugs and money in room 109. The State did not offer testimony of Byers' statement for the truth of the statement; rather, the testimony was offered "to show what Lankford did" based on Byers' statement. Because evidence of Byers' statement was offered for this limited purpose, the trial court gave the jury a limiting instruction regarding this evidence.[3] Accordingly, this evidence was properly admitted at trial.[4]

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3. Defendant argues in his brief to this Court that the language of the limiting instruction given to the jury was erroneous. Defendant contends the trial court's instruction that the evidence was "offered as—to the fact that the statement was made and the content of the statement itself" would lead the jury to believe it could consider Lankford's testimony for the truth of the matter asserted. While this language, standing alone, might cause confusion to a jury, the trial court's instruction, taken in its entirety, clearly instructed the jury that "[Lankford's] testimony about statements by . . . Byers, are not offered for the truth of the content of . . . Byers' statements." The limiting instruction given to the jury, therefore, was not erroneous.

4. In addition to testimony given by Lankford, Defendant assigns error to Sigmon's testimony that when Byers came into room 108 Byers said that Roseboro had drugs in room 109. As with Lankford's testimony regarding the statement made by Byers, Sigmon's testimony was not offered for the truth of the matter asserted and a limiting instruction was also given to the jury at the time the evidence was offered. Accordingly, the trial court did not err by admitting this evidence.

In the alternative, Defendant argues this evidence should have been excluded under Rule 403 of the North Carolina Rules of Evidence because "the probative value [of the evidence] was substantially outweighed by the danger of unfair prejudice."[5] Defendant does not argue in his brief to this Court how the probative value of Lankford's testimony regarding Byers' statements would be substantially outweighed by the danger of unfair prejudice, and the record reveals no danger of unfair prejudice under Rule 403. Accordingly, the trial court's finding that the "probative value [of this evidence] is not outweighed by any undue prejudice to . . . [D]efendant," which may be reversed on appeal only for an abuse of discretion, was not error. *See State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (whether to exclude evidence under Rule 403 is within sound discretion of trial court).

IV

[5] Defendant argues the trial court erred by admitting into evidence Lankford's prior statement to Benton because the statement did not corroborate Lankford's testimony at trial. We disagree.

A witness's prior consistent statements are admissible as corroborative evidence. *State v. Ramey*, 318 N.C. 457, 468, 349 S.E.2d 566, 573 (1986). In order to be admissible as corroborative, "the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." *Id.* at 469, 349 S.E.2d at 573. A witness's contradictory statements, however, "may not be admitted under the guise of corroborating his testimony." *Id.* at 469, 349 S.E.2d at 574.

In this case, Defendant elicited during cross-examination of Lankford several alleged inconsistencies between her testimony at trial and her statement to Benton. These include that Lankford testified at trial that she "shot in the general direction of [Byers]" and Lankford told Benton that she " 'shot [Byers] in the head' "; Lankford testified at trial that it was "late" when she returned to the motel and that it may have been "10:00 or 11:00," and Lankford told Benton that she returned to the motel at 12:30 a.m.; Lankford testified at trial that

5. Defendant also argues in his brief to this Court that this evidence was inadmissible under Rule 403 because the probative value of the evidence "was substantially outweighed by the danger of . . . confusion of the issue and would mislead the jury." Defendant, however, did not raise these arguments before the trial court and we, therefore, do not address them. N.C.R. App. P 10(b)(1).

certain actions were taken by Lamont Haynes and that the officers taking her statement had confused Lamar with Lamont Haynes; and Lankford testified at trial that after Byers was shot, Byers " 'roll[ed],' " and Lankford told Benton that after Byers was shot, she "s[a]t up." The variations in Lankford's testimony at trial do not directly contradict her statement given to Benton; rather, the information in the statement was "substantially similar to and tended to strengthen and confirm" Lankford's testimony at trial regarding the events leading up to the shooting of Byers. *See State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 341 (prior statement admissible to corroborate trial testimony when prior statement "contained slight variations and some additional information"), *cert. denied*, — U.S. —, 148 L. Ed. 2d 110 (2000); *State v. Frogge*, 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997) (prior statement not admissible to corroborate trial testimony when "prior statement contained information manifestly contradictory to [witness's] testimony at trial and did not corroborate the testimony"). Accordingly, the trial court properly allowed Lankford's statement into evidence as corroborative evidence.[6]

[6] Defendant also argues the method used by the State during redirect examination of Lankford was error. We disagree.

In this case, Lankford testified during cross-examination that when she gave her statement to Benton, Benton was "verbally abusing" her and "putting words in [her] mouth for [her]." The State, therefore, asked Lankford on redirect examination about whether many of the lines in the statement were "correct." The method used by the State was to read a line from the statement and then ask Lankford whether the line was correct. The method of questioning allowed at trial was within the discretion of the trial court, *State v. Harris*, 308 N.C. 159, 168, 301 S.E.2d 91, 97 (1983) ("manner of the presentation of evidence is largely in the discretion of the trial judge [and] [h]is control of the case will not be disturbed absent a manifest abuse of discretion"), and the trial court did not abuse its discretion by allowing the State to read portions of Lankford's statement,[7]

6. Defendant argues in his brief to this Court that by redacting portions of Lankford's statement, the trial court "assisted the State in obtaining the State's intended result, all in violation of the Rules of Evidence and the Trial Court's proper function." Defendant, however, cites no authority and makes no argument as to what rule of evidence was violated or how the trial court's actions were outside of its proper function. We, therefore, do not address this issue. *See* N.C.R. App. P. 28(b)(5).

7. As with the State's initial questions to Lankford regarding her statement, Defendant argues the portions of the statement brought out on redirect examination did not corroborate Lankford's testimony at trial. These statements, however, were

see State v. Burrus, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996) ("trial court may be reversed for an abuse of discretion only upon a showing that its ruling could not have been the result of a reasoned decision").

V

[7] Defendant argues the plea agreement entered into by Sigmon, as well as the plea transcript, were not relevant and, therefore, inadmissible.[8] We disagree.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999).

In this case, Sigmon testified for the State regarding Defendant's involvement in the death of Byers. The fact that Sigmon entered into a plea agreement with the State, in which she agreed to testify against Defendant, was relevant to Sigmon's credibility. Accordingly, the trial court properly admitted the plea agreement and plea transcript into evidence. *See Sherrod v. Nash General Hospital, Inc.*, 126 N.C. App. 755, 762, 487 S.E.2d 151, 155 (1997) (trial court's ruling regarding admissibility of evidence under Rule 401, although not discretionary, is given great deference on appeal), *aff'd in part and reversed in part on other grounds*, 348 N.C. 526, 500 S.E.2d 708 (1998).

VI

[8] Defendant argues Gregory's testimony regarding hair comparisons and Marrs' testimony regarding shell casings were inadmissible because no proper foundation was laid to show "the reliability of the scientific methods" used by these witnesses. We disagree.

"[An] expert's scientific technique on which he bases his opinion must be such that its 'accuracy and reliability has become estab-

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"substantially similar to and tended to strengthen and confirm" Lankford's testimony at trial. The statements were, therefore, admissible as corroborative evidence. *See Gell*, 351 N.C. at 204, 524 S.E.2d at 341.

8. In the alternative, Defendant argues that even if the plea agreement and plea transcript were relevant, the probative value of this evidence was "outweighed by the danger of unfair prejudice, confusion of the issue, and misleading the jury." Defendant did not raise this argument at trial and we, therefore, do not address it. N.C.R. App. P. 10(b)(1).

lished and recognized.' " *State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 282 (quoting *State v. Temple*, 302 N.C. 1, 12, 273 S.E.2d 273, 280 (1981)), *disc. review denied*, 327 N.C. 639, 399 S.E.2d 127 (1990). The emphasis of this consideration is "on the reliability of the scientific method and not its popularity within a scientific community." *State v. Bullard*, 312 N.C. 129, 149, 322 S.E.2d 370, 381-82 (1984).

In this case, Gregory testified about his use of a "comparison microscope" to compare "known" and "unknown" hair samples. Gregory concluded based on these comparisons that a pubic hair sample taken from Byers was "microscopically consistent" with a "known" sample of Defendant's pubic hair. Although the trial court did not specifically find that the comparison of hair samples is reliable scientific methodology, this finding was implicit in the trial court's overruling of Defendant's objection to Gregory's testimony. *See State v. Wise*, 326 N.C. 421, 430, 390 S.E.2d 142, 148 ("trial court's overruling of defense counsel's objection to the opinion testimony constituted an implicit finding that the witness was an expert"), *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990). Additionally, because the comparison of hair samples has been accepted as reliable scientific methodology in this State, the trial court properly allowed Gregory to testify regarding the results of his testing. *See, e.g., State v. Green*, 305 N.C. 463, 469-70, 290 S.E.2d 625, 629 (1982).

The State also presented expert testimony regarding shell casings allegedly recovered as a result of the shooting of Byers. Marrs testified that he examined these shell casings "using an instrument known as a comparison microscope." Based on his comparisons, Marrs concluded that "four of [the shell casings] were worked through the action of the same gun" and "[t]he fifth [shell casing] had the same characteristics, but did not have enough of the individual characteristics needed for [Marrs] to scientifically say that it had been worked through the same gun as the other four." Although the trial court did not specifically find that the comparison of shell casings is reliable scientific methodology, this finding was implicit in the trial court's overruling of Defendant's objection to Marrs' testimony. *See Wise*, 326 N.C. at 430, 390 S.E.2d at 148. Additionally, because the comparison of bullets and weapons has been accepted as reliable scientific methodology in this State, the trial court properly allowed Marrs to testify regarding the results of his testing. *See, e.g., State v. Alston*, 294 N.C. 577, 585, 243 S.E.2d 354, 360 (1978).

VII

[9] Defendant argues the trial court erred by allowing Spittle to testify regarding a report that he did not prepare because Spittle's testimony regarding the report was hearsay.[9] We disagree.

"Inherently reliable information is admissible to show the basis for an expert's opinion, even if the information would otherwise be inadmissible hearsay." *State v. Daughtry*, 340 N.C. 488, 511, 459 S.E.2d 747, 758 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996).

In this case, Spittle testified regarding the procedure used by the SBI to conduct DNA tests, and he stated the tests in this case were performed by Elwell. Spittle worked with Elwell at the SBI and he reviewed the file in this case "specifically doing a technical review of the work of [Elwell]" on the file. The information contained in the file was, therefore, inherently reliable. *See id.* at 511, 459 S.E.2d at 758-59 (DNA testing relied upon by expert inherently reliable when testing was performed by intern in DNA unit of SBI lab under supervision of expert). Accordingly, the trial court properly permitted Spittle to testify regarding the contents of the report and his opinion of the test results based on the report.[10]

[10] Defendant also argues the trial court "expressed [its] opinion as to the validity of the report" when it asked Spittle whether his testimony was "[his] opinion as to the results of the testing."

"The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1999). In this case, however, the trial court's statement did not express any opinion on whether the report was valid or credible; rather, the trial court merely asked whether Spittle was stating an opinion based on the report. The trial court's question, therefore, did not violate N.C. Gen. Stat. § 15A-1222.

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9. Defendant also states in his brief to this Court that "the probative value of such statistical data does not outweigh the unfair prejudice to . . . [D]efendant." Defendant, however, makes no argument and cites no authority in support of this contention. We, therefore, do not address it. *See* N.C.R. App. P. 28(b)(5).

10. Defendant states in his brief to this Court that his argument regarding "techniques" used by experts is "incorporated by reference" into the sections of his brief dealing with the testimony of Spittle and Milks. We, therefore, note that the North Carolina Supreme Court has held that "DNA evidence is admissible in North Carolina." *Daughtry*, 340 N.C. at 512, 459 S.E.2d at 759. Accordingly, Spittle and Milks were properly allowed to testify about the results of the DNA testing.

VIII

[11] Defendant argues the trial court erred by instructing the jury that "Milk[s] will be allowed to testify as an expert in the field of DNA analysis if [the jury] find[s] her to be so qualified" because the expertise of Milks should have been determined by the trial court.

In this case, the record shows Milks was qualified as an expert in the field of DNA analysis and the trial court permitted Milks to give expert testimony in this field. Accordingly, assuming the trial court's statement to the jury was error, this error was harmless. *See Wise*, 326 N.C. at 432, 390 S.E.2d at 149 (trial court's failure to formally qualify witness as an expert was harmless "in light of the evidence of her qualifications, the court's obvious conviction that the witness was an expert, and the fact that the witness'[s] opinion testimony fit within the definition of expert testimony").

IX

[12] Defendant argues evidence regarding his flight from Benton was evidence of "other crimes" and was, therefore, inadmissible under Rule 404(b) of the North Carolina Rules of Evidence. We disagree.

"Evidence of a defendant's flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt." *State v. King*, 343 N.C. 29, 38, 468 S.E.2d 232, 238 (1996). Evidence of flight is admissible "[e]ven though the evidence of flight may disclose the commission of a separate crime by defendant." *State v. Jones*, 292 N.C. 513, 526, 234 S.E.2d 555, 562 (1977).

In this case, Benton testified that Defendant fled when approached by law enforcement officers. Benton testified regarding the details of the flight, including that Defendant fired a weapon at officers and that Defendant was hit with a bullet fired by Benton. This evidence of flight was admissible to show Defendant's consciousness of guilt. Further, the trial court's determination that the probative value of the evidence "is not substantially outweighed by the danger of unfair prejudice to . . . [D]efendant" was not an abuse of discretion. *See Mason*, 315 N.C. at 731, 340 S.E.2d at 435 (trial court's ruling on admissibility of evidence under Rule 403 may be reversed on appeal only for an abuse of discretion).

Remanded for *Batson* hearing; otherwise, no error.

Judges MARTIN and EDMUNDS concur.

LENOX, INCORPORATED, PLAINTIFF v. MURIEL K. OFFERMAN, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. COA99-1267

(Filed 5 December 2000)

Taxation— nonbusiness income—functional test—partial liquidation—totality of circumstances

The trial court erred by classifying income received from the complete sale of one of plaintiff multi-state corporation's operating divisions as business income for purposes of taxation in North Carolina under N.C.G.S. § 105-130.4, and this case is remanded for entry of summary judgment in favor of plaintiff, even though a straightforward application of the functional test reveals that plaintiff's regular course of business was devoted to the sale and manufacture of consumer products whereas the pertinent operating division constituted the fine jewelry division of this business making it an integral part of plaintiff's trade or business, because: (1) when the taxable income results from something other than a liquidation of the asset, courts apply the functional test in a straightforward manner, focusing exclusively on whether the asset was integral to the corporation's regular business; (2) when the asset is sold pursuant to a complete or partial liquidation, courts focus on more than whether the asset is integral to the corporation's business and concentrate on the totality of circumstances including the nature of the transaction and how the proceeds are used; (3) the transaction in the instant case can be categorized as a partial liquidation, meaning the totality of circumstances is used to apply the functional test; and (4) the totality of circumstances reveals that the income generated from the liquidation constitutes nonbusiness income based on the facts that plaintiff's entire fine jewelry division was sold, the sale marked the cessation of plaintiff's involvement in that line of business, and the proceeds from the

sale were not reinvested in the company to pay off debts or meet other needs, but were immediately distributed to plaintiff's sole shareholder.

Judge HUNTER dissenting.

Appeal by plaintiff from order entered 9 June 1999 by Judge Henry W. Hight, Jr. in Granville County Superior Court. Heard in the Court of Appeals 12 September 2000.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Robert C. Bowers, for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General, Kay Linn Miller Hobart, for defendant-appellee.

LEWIS, Judge.

The narrow issue on appeal is whether income received from the complete sale of one of plaintiff's operating divisions should be classified as business or nonbusiness income for purposes of its corporate tax returns. Plaintiff Lenox, Inc. is a New Jersey-based corporation that does business in several states, including North Carolina. It is engaged in the business of manufacturing and selling various consumer products. Defendant is the North Carolina Secretary of Revenue. In 1970, Lenox formed "ArtCarved" as a separate and distinct operating division devoted exclusively to the manufacture and sale of fine jewelry. As a separate and distinct operating division, ArtCarved had its own president and chief financial officer. It also managed its accounts payable and accounts receivable independent of Lenox. In 1988, Lenox sold ArtCarved for $118,341,000. This marked the complete cessation of Lenox's involvement in the sale and manufacture of fine jewelry. The proceeds from the sale were not reinvested by Lenox but were distributed entirely to its one shareholder, Brown Forman Corporation. The sale created a taxable capital gain for Lenox in the amount of $46,700,194.

Lenox initially paid taxes only in New Jersey on this capital gain. After reviewing Lenox's tax returns, defendant concluded Lenox owed taxes in North Carolina for the sale and assessed Lenox with a capital gains tax of $71,908, which Lenox paid under protest. Lenox then filed this tax refund action to recover the $71,908 it claims it was erroneously taxed. The trial court upheld the tax, and Lenox now appeals.

North Carolina derives its statutory scheme for taxing multi-state corporations from the Uniform Division of Income for Tax Purposes Act ("UDITPA"). 7A U.L.A. 331 (1985). Specifically, we and other UDITPA states divide the income of a multi-state corporation into two classes: "business income" and "nonbusiness income." "Business income" is apportioned among all the states in which the corporation does business and is taxed by each state according to a particular statutory formula. N.C. Gen. Stat. § 105-130.4(I) (1999). "Nonbusiness income" is allocated to, and taxed by, only one state—the state with which the income-generating asset is most closely associated (in this case, New Jersey). N.C. Gen. Stat. § 105-130.4(h). Defendant argues the sale proceeds are "business income" for which Lenox must be taxed in North Carolina. Specifically, defendant contends ArtCarved was an integral part of Lenox's regular manufacturing business, thereby satisfying the statutory definition of "business income." Lenox counters that, because the sale and liquidation of ArtCarved marked the end of Lenox's involvement in the manufacture and sale of fine jewelry, the sale proceeds are more properly classified as "nonbusiness income."

Our statute defines business income as follows:

> "Business income" means income arising from transactions and activity in the regular course of the corporation's trade or business and includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business.

N.C. Gen. Stat. § 105-130.4(a)(1). Nonbusiness income is defined as "all income other than business income." N.C. Gen. Stat. § 105-130.4(a)(5). We conclude the sale of ArtCarved generated nonbusiness income and therefore reverse the trial court.

The seminal case in North Carolina with respect to the application of the business income-nonbusiness income dichotomy is *Polaroid Corp. v. Offerman*, 349 N.C. 290, 507 S.E.2d 284 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999). In that case, our Supreme Court undertook to clarify what is included within the statutory definition of business income. Joining the majority of other UDITPA states, our Court concluded the definition sets forth two separate tests. (A small minority of UDITPA states interpret the statute to provide for only one test. *Id.* at 295, 507 S.E.2d at 289.) According to *Polaroid*, the first part of the statutory definition, which focuses

on "income arising from transactions and activity in the regular course of the corporation's trade or business," sets forth the so-called "transactional test." *Id.* As its name connotes, the transactional test looks to the particular transaction generating the income to determine whether that transaction was done in the ordinary and regular course of business. *Id.* "[T]he frequency and regularity of similar transactions, the former practices of the business, and the taxpayer's subsequent use of the income" are all central to this inquiry. *Id.* The parties are in agreement that the sale of ArtCarved did not generate business income under the transactional test. This transaction was not an ordinary one but an extraordinary one by which Lenox divested an entire division.

The issue here is over the second half of the definition of business income. That half, which focuses on "income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business," sets forth the so-called "functional test." *Id.* Under this test, the extraordinary nature or infrequency of the transaction is irrelevant. *Id.* at 296, 507 S.E.2d at 289. Rather, the focus is on the asset or property that generated the income. *Id.* at 306, 507 S.E.2d at 296. If the asset or property was integral to the corporation's trade or business, income generated from the sale of that asset is business income, regardless of how that income is received. *Id.*

On the surface, this would appear to be a straightforward application of the functional test. Lenox's regular course of business was devoted to the sale and manufacture of consumer products. ArtCarved constituted the fine jewelry division of this business. Accordingly, ArtCarved was an asset that was integral to Lenox's trade or business, thereby seemingly satisfying the functional test.

However, application of the functional test in UDITPA states has not always been this straightforward. Although these courts uniformly hold, as our Supreme Court did, that the functional test simply focuses on whether the asset itself was integral to the corporation's regular trade or business, their analyses hinge on other factors as well, including the type of transaction that generated the income. A chronological survey of these cases will help illustrate this reality. Although this survey is quite extensive, we feel it necessary in order to fully understand how various courts have applied the functional test. We only look to cases that have explicitly applied

the functional test; cases either rejecting that test or failing to state upon which test they are relying (even if factually analogous) will not be discussed.

One of the first cases employing the functional test (or at least relying on the second part of the statutory definition) was *McVean & Barlow, Inc. v. New Mexico Bureau of Revenue*, 543 P.2d 489 (N.M. Ct. App. 1975). In that case, a corporation engaged in the business of laying pipelines liquidated part of its business. *Id.* at 490. Specifically, it sold off its "big-inch" pipeline business, continuing operation in only its "little-inch" business. *Id.* The court held the income from this partial liquidation was nonbusiness income. *Id.* at 492. Although the court relied on the second half of the definition in its analysis, it paid more attention to the nature of the transaction than to how the asset had been used in the business. The court reasoned:

> In the present case, taxpayer was not in the business of buying and selling pipeline equipment and, in fact, the transaction in question was a partial liquidation of taxpayer's business and a total liquidation of taxpayer's big inch business. The sale of equipment did not constitute an integral part of the regular trade or business operations of taxpayer. This sale contemplated a cessation of taxpayer's big inch business.

Id.

The D.C. Circuit was one of the next courts to apply the functional test. In *District of Columbia v. Pierce Associates, Inc.*, 462 A.2d 1129 (D.C. Cir. 1983), that court dealt with whether a corporation's receipt of insurance payments from one of its flooded manufacturing plants was business income. That court held the payments generated business income under the functional test. *Id.* at 1132. In so holding, the court engaged in a straightforward analysis of the functional test, focusing exclusively on whether the flooded manufacturing plant was an integral part of the corporation's regular trade or business. *Id.*

A few years later, Pennsylvania took its turn addressing the issue. In *Welded Tube Co. v. Commonwealth*, 515 A.2d 988 (Pa. Commw. Ct. 1986), a corporation had sold off one of its two manufacturing facilities pursuant to a corporate reorganization. *Id.* at 990. The Commonwealth Court concluded the sale generated income under both the transactional and functional tests. *Id.* at 994. However, in its analysis, the court focused on the nature of the transaction (noting

that it did not result in the cessation of corporate activities in that business) and how the sale proceeds were used (noting that all the proceeds were distributed within, either to satisfy debts or support its other facility). *Id.*

In *Pledger v. Getty Oil Exploration Co.*, 831 S.W.2d 121 (Ark. 1992), the Arkansas Supreme Court concluded that a corporate subsidiary's receipt of interest on a promissory note between it and its parent amounted to nonbusiness income. *Id.* at 125. In applying the functional test, the court engaged in a rather straightforward analysis, focusing on whether the promissory note was integral to the corporation's regular trade or business. *Id.*

A Pennsylvania court again considered the matter in *Laurel Pipe Line Co. v. Commonwealth*, 642 A.2d 472 (Pa. 1994). In that case, the company engaged in a partial liquidation, completely selling off one of its pipeline operations. *Id.* at 473. The Pennsylvania Supreme Court concluded the sale generated nonbusiness income. *Id.* at 477. In applying the functional test, that court once again focused on factors other than how the property was used by the corporation, relying instead on the "totality of the circumstances." *Id.* Specifically, the court reasoned:

> In our view, the pipeline was not disposed of as an integral part of Laurel's regular trade or business. Rather, the effect of the sale was that the company liquidated a portion of its assets. This is evidenced by the fact that the proceeds of the sale were not reinvested back into the operations of the business, but were distributed entirely to the stockholders of the corporation. Although Laurel continued to operate a second, independent pipeline, the sale of the Aliquippa-Cleveland pipeline constituted a liquidation of a separate and distinct aspect of its business.

Id. at 475.

Next, in *Dover Corp. v. Department of Revenue*, 648 N.E.2d 1089 (Ill. App. Ct. 1995), an Illinois court concluded that both royalties received from licenses and royalty income received from patent infringements constituted business income. *Id.* at 1097. In so doing, the court engaged in a straightforward analysis of the functional test, focusing on the fact that the royalties were used to further its business. *Id.* A year later, in *Ross-Araco Corp. v. Commonwealth*, 674 A.2d 691 (Pa. 1996), the Pennsylvania Supreme Court held that a construction company's sale of an undeveloped tract of land was non-

business income. *Id.* at 697. However, contrary to what it had done just two years prior in *Laurel Pipe Line*, that court undertook a straightforward application of the functional test, relying simply on the fact that the property sold was never used in the company's construction business. *Id.*

Proceeds from the sale of leasehold interests was at issue in *Kroger Co. v. Department of Revenue*, 673 N.E.2d 710 (Ill. App. Ct. 1996). The Illinois court concluded the sale generated business income under the functional test. *Id.* at 716. In so doing, the court focused exclusively on whether the leasehold interests themselves were integral parts of the company's regular trade or business. *Id.* Next, the Oregon Supreme Court considered whether monies received from the federal government's condemnation of a portion of a corporation's land was business income. *Simpson Timber Co. v. Department of Revenue*, 953 P.2d 366 (Or. 1998). Although the court never employed the term "functional test," it did rely upon the second half of the definition in concluding the monies constituted business income because the condemned land was integral to the company's business. *Id.* at 369-70.

The next case to apply the functional test was *Texaco-Cities Service Pipeline Co. v. McGaw*, 695 N.E.2d 481 (Ill. 1998). There, a company partially liquidated its assets, selling off a non-operational pipeline and the associated real estate. *Id.* at 483. The Illinois Supreme Court ultimately held the sale generated business income. *Id.* at 487. However, in applying the functional test, the court did not concentrate exclusively on how the property had been used; it relied on the totality of the circumstances. Specifically, it noted that the sale did not mark the cessation of the company's activity in that line of business. *Id.* at 486-87. The court also pointed out that the sale proceeds were reinvested in the company, as opposed to being distributed to its shareholders. *Id.* at 487.

Our own Supreme Court then entered the fray. In *Polaroid*, the Court concluded that damages received from certain patent infringements were business income. *Polaroid*, 349 N.C. at 315, 507 S.E.2d at 301. In so doing, the Court engaged in a straightforward analysis of the functional test, focusing on whether the income-generating asset (i.e., the patents) was integral to the corporation's regular trade or business. *Id.* at 306, 507 S.E.2d at 295-96. Thereafter, that Court concluded the reversion of a surplus from an employee pension plan constituted nonbusiness income. *Union Carbide Corp. v. Offerman*, 351 N.C. 310, 317, 526 S.E.2d 167, 171 (2000). In so holding, the Court sim-

ply considered whether the assets of the pension plan were used to generate income in the regular course of business; they were not. *Id.* at 315-17, 526 S.E.2d at 170-71. Finally, in *Hoechst Celanese Corp. v. Franchise Tax Board*, 90 Cal. Rptr. 2d 768 (Ct. App.), *petition for review granted*, 996 P.2d 1151 (2000), the California Court of Appeals similarly held that the reversion of a surplus from an employee pension plan constituted nonbusiness income. *Id.* at 779. That court also applied the functional test in a straightforward manner, focusing on the fact that the pension plan was not integral to the corporation's regular business. *Id.* at 778-79.

The foregoing survey can be synthesized as follows. When the taxable income results from something other than a liquidation of the asset, courts apply the functional test in a straightforward manner, focusing exclusively on whether the asset was integral to the corporation's regular business. But, as *McVean & Barlow*, *Welded Tube*, *Laurel Pipe Line*, and *Texaco-Cities* demonstrate, when the asset is sold pursuant to a complete or partial liquidation, courts focus on more than whether or not the asset is integral to the corporation's business. Instead, they concentrate on the totality of the circumstances, including the nature of the transaction and how the proceeds are used. In this regard, whether the liquidation results in a complete cessation of the company's involvement in that line of business is particularly relevant. Cessation ultimately justified treating the gains as nonbusiness income in *McVean & Barlow* and *Laurel Pipe Line*, whereas noncessation justified classification as business income in *Welded Tube* and *Texaco-Cities*.

Although neither the UDITPA nor the North Carolina statutes explicitly distinguish between liquidations and other situations, this distinction has not gone unnoticed by the courts. In *Polaroid*, our Supreme Court observed in a footnote:

> We do note, however, that cases involving liquidation are in a category by themselves. Indeed, true liquidation cases are inapplicable to these situations because the asset and transaction at issue are not in furtherance of the unitary business, but rather a means of cessation.

Polaroid, 349 N.C. at 306 n.6, 507 S.E.2d at 296 n.6. And the Alabama Supreme Court recently made a similar observation: "Moreover, even courts applying the functional test have excepted true liquidations from its application." *Uniroyal Tire Co. v. State Dep't of Revenue*, No. 1981928, 2000 WL 1074041, at *11 (Ala. 2000).

Defendant tries to distinguish the above cases on the ground that our statute is slightly different than the UDITPA and other states' version. Specifically, our statute defines business income as including "income from tangible and intangible property if the acquisition, management, *and/or* disposition of the property constitute integral parts of the corporation's regular trade or business." N.C. Gen. Stat. § 105-130.4(a)(1) (1999) (emphasis added). The UDITPA and other states' version only uses "and" instead of "and/or" in defining business income. 7A U.L.A. 331 (1985). Defendant thus argues that, in North Carolina, satisfaction of the functional test only requires that either the acquisition, management, *or* disposition of the asset be integral to the business, whereas in other states, all three—the acquisition, management, *and* disposition—must be integral. Although our statutory distinction perhaps evinces a slightly broader meaning of the functional test, the distinction was irrelevant for purposes of *Polaroid*, 349 N.C. at 294 n.3, 507 S.E.2d at 288 n.3, and we find the distinction to be irrelevant here.

With this framework in mind, we now proceed to the case at hand. First, the transaction here can be categorized as a partial liquidation. By selling off ArtCarved, Lenox divested its fine jewelry division. Accordingly, this case falls within the framework of *McVean & Barlow, Welded Tube, Laurel Pipe Line*, and *Texaco-Cities*, and we therefore look to the totality of the circumstances in applying the functional test. Here, Lenox's entire fine jewelry division was sold, and the sale marked the complete cessation of Lenox's involvement in that line of business. While Lenox continues to manufacture and sell other consumer products, it no longer manufactures and sells fine jewelry. The proceeds from the sale of ArtCarved were not reinvested in the company to pay off debts or meet other needs but were immediately distributed to Lenox's sole shareholder. This case is thus quite analogous to *McVean & Barlow* and *Laurel Pipe Line*, both of which classified the proceeds of sales as nonbusiness income. Given the totality of the circumstances here, we hold that the income generated from the liquidation of ArtCarved constitutes nonbusiness income. We therefore reverse the trial court and remand for entry of summary judgment in favor of plaintiff.

Reversed and remanded.

Judge WALKER concurs.

Judge HUNTER dissents.

Judge HUNTER dissenting.

My reading of *Polaroid Corp. v. Offerman*, 349 N.C. 290, 507 S.E.2d 284 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999) causes me to disagree with the majority opinion. Therefore, I respectfully dissent.

It is undisputed in the record before us that although Lenox argues that "[f]rom 1970 until 1988, . . . ArtCarved . . . remained a functionally and financially distinct entity from Lenox," Lenox never filed tax returns with either the Internal Revenue Service or with the State of North Carolina "separat[ing] the income or gross receipts associated with the ArtCarved division from the general business receipts of Lenox." Instead, Lenox's tax returns always showed the assets of ArtCarved as producing a "business income" for Lenox as opposed to "nonbusiness income." Furthermore:

> On all tax returns filed with North Carolina . . . Lenox . . . affirmatively treated ArtCarved as an integral part of its unitary business operations, part of which were conducted in this State.
>
> . . .
>
> At no time . . . did Lenox separate the expenses associated with the ArtCarved division, such as administrative expenses for overhead or salary associated with the personnel of the ArtCarved division, from the general administrative expenses of Lenox. At no time were the expenses associated with the assets of the ArtCarved division, such as depreciation, insurance, overhead, [or] taxes, separated from the general business expenses of Lenox. Rather, Lenox classified the expenses associated with the ArtCarved division, its personnel and assets as "business" expenses rather than "nonbusiness" expenses, which it deducted against its "business income" reducing the amount of business income subject to taxation in North Carolina.

Nevertheless, the majority believes that because Lenox is now ceasing to operate ArtCarved, its fine jewelry division, Lenox should be given the advantage of claiming that income derived from the sale of ArtCarved is "nonbusiness" income. I cannot agree.

Lenox admits that when it sold its line of melamine dinnerware in 1986, it reported the sale as a business income loss which resulted in reducing its taxable income. Lenox further admits that when it sold

its candle division in 1987, it reported the sale as a business income loss as well, again resulting in a reduction of Lenox's taxable income for the year. Thus, I do not believe it to be consistent with our tax laws that Lenox now be allowed to claim the sale of its fine jewelry division as nonbusiness income. I realize that Lenox attempts to distinguish the dinnerware and candle division sales from this present fine jewelry division sale by arguing that with the prior two it "did not sell its brand name and attendant goodwill," so that it continues to sell dinnerware and candles. However, I do not believe that matters. All three divisions were "integral parts" of Lenox's trade or business operations and thus, the sale of each produced business income as defined by N.C. Gen. Stat. § 105-130.4(a)(1) (1999). Thus, I believe the majority errs when it opines that

> [w]hen the taxable income results from something *other than* a liquidation of the asset, courts apply the functional test in a straightforward manner, focusing exclusively on whether the asset was integral to the corporation's regular business. But . . . when the asset is sold pursuant to a complete or partial liquidation, courts focus on more than whether or not the asset is integral to the corporation's business. Instead they concentrate on the totality of the circumstances, including the nature of the transaction and how the proceeds are used. In this regard, whether the liquidation results in a complete cessation of the company's involvement in that line of business is particularly relevant. . . .

(Emphasis added.)

I acknowledge, along with the majority, that Lenox's disposition of its ArtCarved division does not fall within the definition of business income as applied by the "transactional test." However, I do not agree that it does not comply with the definition of business income as applied by the "functional test." The majority correctly states that the functional test "focuses on income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business." The majority further acknowledges that "[u]nder this test, the extraordinary nature or infrequency of the transaction is irrelevant," instead, "[i]f the asset or property was integral to the corporation's trade or business, income generated from the sale of that asset is business income, regardless of how that income is received." (Citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 306, 507 S.E.2d 284,

296 (1998)). Nevertheless, the majority then goes on to analyze a great many cases determined throughout the nation, in an effort to prove that the "application of the functional test" is not as straightforward as its definition. Again, I cannot agree.

First of all, it must be noted that:

> North Carolina's definition of business income is slightly broader than the definition found under the Uniform Act. Specifically, North Carolina's definition reads "acquisition, management, *and/or* disposition of the property," as opposed to the definition in UDITPA, which uses the conjunction "and" rather than "and/or." Moreover, North Carolina's definition utilizes the term "corporation" instead of "taxpayer." *These distinctions are irrelevant to the case sub judice.*

Polaroid Corp. v. Offerman, 349 N.C. 290, 294, 507 S.E.2d 284, 288 n.3 (emphasis added). It must be noted that the *Polaroid* court found the distinctions irrelevant because the case had nothing to do with the disposition of corporate property. The majority seems to feel that because the court in *Polaroid* found the distinctions irrelevant, they are also irrelevant in the case at bar. However, because the present case is *only* about the disposition of corporate property, I believe it is this particular distinction in North Carolina's statute upon which this case turns.

"[T]he legislature is always presumed to act with full knowledge of prior and existing law and . . . where it chooses not to amend a statutory provision that has been interpreted in a specific way, we may assume that it is satisfied with that interpretation." *Id.* at 303, 507 S.E.2d at 294. Thus where, as here, the legislature chose to add "or" to the statute, we are compelled to presume that it intended to create the new distinction. Therefore, the fact that our state statute requires *only* that the "disposition of the property constitute integral parts of the corporation's regular trade or business operations," and not the "acquisition and management" as well, serves as notice that as long as the asset handled by the corporation produced income as an integral part of the corporation's regular trade or business operations, that income is business income. N.C. Gen. Stat. § 105-130.4(a)(1).

I am further convinced because " 'an interpretation by the Secretary of Revenue is *prima facie* correct. . . .' " *Polaroid*, 349 N.C. at 302, 507 S.E.2d at 293 (quoting *In re Petition of Vanderbilt Univ.*,

252 N.C. 743, 747, 114 S.E.2d 655, 658 (1960)). See also N.C. Gen. Stat. § 105-246 (Supp. 1994). Therefore, our Supreme Court held that the burden is on the taxpayer to rebut the presumption. *Polaroid*, 349 N.C. at 302, 507 S.E.2d at 293. North Carolina's Secretary of Revenue "has adopted the UDITPA approach of defining business income to include both the transactional test and the functional test." *Id.* Thus, in its Administrative Rule 17 NCAC 5C .0703(2) (June 2000), regarding business and nonbusiness income, business income is defined as "[a] gain or loss from the sale, exchange, or other disposition of real or personal property . . . if the property *while owned by the taxpayer* was used to produce business income. . . ." *Id.* (emphasis added). In the case at bar, I do not believe that Lenox has rebutted that presumption, and I would so hold.

It is undisputed that ArtCarved was an integral part of Lenox's business, used to produce income, *while it was owned by Lenox*. Yet, Lenox argues and the majority agrees that because selling ArtCarved was a "partial liquidation," the sale does not generate business income because it falls outside of the transactional or functional tests set out in *Polaroid*. However, although I agree with the majority that "the transaction here can be categorized as a partial liquidation[,] [and that] [b]y selling off ArtCarved, Lenox divested its fine jewelry division," I cannot agree that this partial liquidation status removes the income gained from *Polaroid*'s application and instead requires a "totality of the circumstances" application, as determined by the majority. I recognize that our Supreme Court opined *in a footnote* that a finding that the assets sold constitute integral parts of the corporation's regular trade or business is irrelevant in these cases. "[T]rue liquidation cases are inapplicable to these situations because the asset and transaction at issue are not in furtherance of the unitary business, but rather a means of cessation." *Polaroid*, 349 N.C. at 306, 507 S.E.2d at 296 n.6. Lenox thus argues that *Polaroid* set out a third test for liquidation cases, which I believe is incorrect. Nevertheless, I find that Lenox's divestment of ArtCarved is not a "true liquidation," and thus it *is* in furtherance of the unitary business.

According to Black's Law Dictionary, liquidation is "[t]he act or process of converting assets into cash, esp. to settle debts." Black's Law Dictionary 942 (7th ed. 1999). Furthermore, partial liquidation is defined as "[a] liquidation that does not completely dispose of a company's assets . . . and the corporation continues to operate in a restricted form." *Id.* Both the United States Supreme Court and our own Supreme Court discuss a "complete liquidation, [as one in

which] all of the assets of the corporation are distributed in complete liquidation" with the intent of ceasing the corporation's entire business operations, *Hillsboro National Bank v. Commissioner*, 460 U.S. 370, 399, 75 L. Ed. 2d 130, 156 n.36. (1983), and "thereby terminating the existence of the [corporation] . . . ." *Shuford v. Building & Loan Asso.*, 210 N.C. 237, 239, 186 S.E. 352, 353 (1936). Thus, although the *Polaroid* court did not define "true liquidation," I believe we are safe in assuming that a "true liquidation" (as mentioned by *Polaroid*) is the same as a complete liquidation—and as such, because Lenox admits its divestment of ArtCarved was only a "partial liquidation" and not a complete liquidation, Lenox's corporate restructuring does not qualify. Therefore, I disagree with Lenox and the majority in their rationalization that as a partial liquidation, Lenox's restructuring should not come under the functional test.

Instead, I agree with the State's argument that Lenox's restructuring was a directed effort to boost its unitary business of manufacturing and selling consumer durable goods in the retail market. And although the company's intent was to cease the manufacturing and selling of fine jewelry, the sale of that division was intended to enable the company to better focus on selling more of its other manufactured goods. Therefore, the sale of ArtCarved also was to benefit Lenox's unitary business.

Furthermore, our Supreme Court has acknowledged that "the uniform definition of business income, as set forth in UDITPA, finds its origins in early California jurisprudence"; thus, the Court found California cases on point to be quite persuasive. *Polaroid*, 349 N.C. at 304, 507 S.E.2d at 294. Accordingly, I find *In re Appeal of Triangle Publ'n., Inc.*, 1984 WL 16175, 1984 Cal. Tax Lexis 86 (Cal. St. Bd. of Equal. June 27, 1984) (per curiam) directly on point. In that case, California's State Board of Equalization ("Board") had to determine whether income gained by Triangle Publications' ("Triangle") sale of its media divisions, by installment contracts and afterward transferred to TFI (its wholly-owned subsidiary), was business income to the parent company, Triangle. Because California's version of UDIPTA's definition of business income requires that "acquisition, management, *and* disposition of the property constitute integral parts of the taxpayer's regular trade or business," *In re Appeal of Triangle Publ'n., Inc.*, 1984 WL 16175, at *2, 1984 Cal. Tax Lexis 86, at *4 (emphasis added), Triangle argued that the sale of its assets was an extraordinary or occasional sale and thus was not business income—even though while owned, Triangle had used the property to

produce business income. *Id.* Citing earlier decisions it had rendered, the Board stated that it had "specifically rejected the reasoning of the Kansas and New Mexico decisions" opining the same view as argued by Triangle. *Id.* at *2, 1984 Cal. Tax Lexis at *7. (This rejection included *McVean & Barlow, Inc. v. New Mexico Bureau of Rev.*, 88 N.M. 521, 543 P.2d 489 (Ct. App.), *cert. denied*, 89 N.M. 6, 546 P.2d 71 (Sup. Ct. 1975), upon which the majority relies.) Instead, the Board stated that California had readily accepted that there were two alternative tests under the Code, including the functional test; and under that test,

> income from the disposition of an asset is generally business income *if the asset produced business income while owned by the taxpayer*; there is no requirement that the transaction giving rise to the income occur in the regular course of the taxpayer's trade or business.
>
> [Therefore,] [t]he income from the sales of the divisions and the building falls squarely within the ambit of the functional test. They were all reported by [Triangle] as parts of its unitary business, and any income or loss from them while owned by [Triangle] was apparently reported by [Triangle] as business in character. [Triangle's] contention on appeal that the divisions were separate businesses directly contradicts, without basis, its own earlier characterization. . . .

In re Appeal of Triangle Publ'n., Inc., 1984 WL 16175, at *3, 1984 Cal. Tax Lexis 86, at *7-8 (emphasis added).

Comparing the case at bar to the *Triangle* case, I see no difference in what Lenox did and what Triangle did. Both corporations counted any income or loss from the asset sold as business income/loss *while the asset was under their ownership*. In addition, North Carolina's statute does not require that the corporation's acquisition and management of the asset be integral parts of the business *along with* the corporation's disposition of the same asset. Thus, where California can find all three requirements exist as to Triangle, I believe this Court is bound upon the finding of only one.

Likewise, I am persuaded by another California case, *In re Appeal of Borden, Inc.*, 1977 WL 3818, 1977 Cal. Tax Lexis 108 (Cal. St. Bd. of Equal. Feb. 3, 1977) (per curiam), upon which *Triangle Publications* was based. In *Borden*, the Board held that the key to both the transactional and functional tests is the concept of "unitary

income." *In re Appeal of Borden, Inc.*, 1977 WL 3818, at *2, 1977 Cal. Tax Lexis 108, at *3-4. The Board stated that under prior California law,

> income from tangible or intangible property was considered unitary income, subject to apportionment by formula, if the acquisition, management, and disposition of the property constituted integral parts of the taxpayer's unitary business operations. *Where that requirement was satisfied, income from such assets was considered unitary income even if it arose from an occasional sale or other extraordinary disposition of the property. . . .*
>
> The underlying principle in these cases is that any income from assets which are integral parts of the unitary business is unitary income. It is appropriate that all returns from property which is developed or acquired and maintained through the resources of and in furtherance of the business should be attributed to the business as a whole. And, with particular reference to assets which have been depreciated or amortized in reduction of unitary income, *it is appropriate that gains upon the sale of those assets should be added to the unitary income.*

Id. at *2, 1977 Cal. Tax Lexis at *4-5 (citations omitted) (emphasis added).

Again, I find no distinguishing factors between *Borden* and the case before us. It is undisputed that Lenox reported any income or loss with regard to ArtCarved as business income or loss while it owned ArtCarved. Thus, I would hold that income from the sale of ArtCarved was also business income.

Conversely, while the majority finds *Laurel Pipe Line Co. v. Pennsylvania*, 537 Pa. 205, 642 A.2d 472 (1994) analogous, I do not agree it is applicable. The distinguishing fact in that case is that Laurel had ceased to operate the pipeline at issue three full years before disposing of it. Thus, I agree with the *Laurel* court that "the pipeline was not disposed of as an integral part of Laurel's regular trade or business. Rather, the effect of the sale was that the company liquidated a portion of its assets." *Id.* at 211, 642 A.2d at 475. Therefore, I do not agree with the majority opinion, in its recitation of *Laurel*, that the court's determination was based on "factors other than how the property was used by the corporation." Instead, the only important factor was whether, *while Laurel owned it*, the

pipeline constituted integral parts of Laurel's regular trade or business. After three years of sitting dormant, how could it have reasonably been said that the disposed-of pipeline was integral to Laurel's regular trade or business?

Likewise, while the majority cites *McVean & Barlow, Inc. v. New Mexico Bureau of Rev.*, 88 N.M. 521, 543 P.2d 489 to support its position, I disagree that it applies. In *McVean*, the corporation was in the business of laying pipelines. In the course of a major reorganization, the corporation liquidated its "big-inch" pipeline business. *Id.* at 522, 543 P.2d at 490. The state Commissioner of Revenue held that because the taxpayer had "testified that he regularly bought and/or sold as much as five hundred thousand dollars worth of equipment annually, of the types the receipts of which are taxed in the instant assessment," the taxpayer was in the business of buying and selling pipeline equipment and thus, income from the sale of its "big-inch" pipeline business was business income. *Id.* However, New Mexico's Court of Appeals reversed the Commissioner's ruling, opining that because the taxpayer's "buying and selling of equipment was done in the course of replacing used or scrapped equipment used in the business with new," the taxpayer was not in the business of buying and selling pipeline equipment. *Id.* Thus, the court stated:

> ". . . It is not the use of the property in the business which is the determining factor under the statute. The controlling factor by which the statute identifies business income is the *nature of the particular transaction giving rise to the income.* To be business income the transaction and activity must have been in the regular course of taxpayer's business operations."

Id. at 523, 543 P.2d at 491 (emphasis added) (quoting *Western Natural Gas Co. v. McDonald*, 202 Kan. 98, 101, 446 P.2d 781, 783 (1968)). Therefore, the court held that *McVean* "was a partial liquidation of taxpayer's business and a total liquidation of taxpayer's big inch business. The sale of equipment did not constitute an integral part of the regular trade or business operations of taxpayer. This sale contemplated a cessation of taxpayer's big inch business." *Id.* at 524, 543 P.2d at 492.

Our Supreme Court has already held that "[w]hen determining whether a source of income constitutes business income under the functional test, *the extraordinary nature or infrequency of the event is irrelevant.*" *Polaroid*, 349 N.C. at 296, 507 S.E.2d at 289 (emphasis added). Therefore, I believe the majority errs by relying on the

McVean court's reasoning when it is in direct conflict with our own Supreme Court's holding.

Furthermore, under the functional test, the fact that the proceeds from the sale were distributed to its shareholders as a dividend does not preclude the gain from being business income. *See Simpson Timber Co. v. Dept. of Revenue*, 326 Or. 370, 373, 953 P.2d 366, 368 (1998) (proceeds gained from municipal condemnation of taxpayer's timberland held to be business income even though taxpayer "distributed $49 million of the [gain] to its shareholders as a 'dividend.' None of the delay compensation was reinvested in timberland anywhere").

Having found no case law which deters me from my interpretation of *Polaroid*, I would hold that the sale of ArtCarved generated business income for Lenox. Thus, I would affirm the trial court's ruling.

STATE OF NORTH CAROLINA v. LAWRENCE HANTON

No. COA99-1422

(Filed 5 December 2000)

1. Criminal Law— instructions—burden of proof

The trial court did not err in a second-degree murder prosecution in its instruction on the burden of proof where defendant contended that the court reduced the State's burden of proof by using the phrase "if you are not satisfied as to one or more of these things," but the court used "beyond a reasonable doubt" at three pivotal points in the instruction and accurately described the State's burden of proof.

2. Criminal Law— continuance—evidence discovered the night before trial

The trial court did not abuse its discretion in a second-degree murder prosecution by denying defendant's motion for a continuance where defendant learned the night before his trial was to begin that a witness could positively identify him as the gunman. The trial court granted defendant's counsel additional time to talk with defendant about the testimony, defense counsel effectively cross-examined the witness, and defendant's attorney had

already studied the lighting of the crime scene, the weather conditions, and the description of the gunman, and knew that the witness could describe the shooter in detail.

3. Constitutional Law— right to remain silent—refusing to write a statement—subsequent to oral statement

The trial court did not err in a second-degree murder prosecution by admitting testimony that defendant refused to write a statement after answering questions. The refusal to reduce a voluntarily given oral statement to writing is not an invocation of the right to remain silent.

4. Evidence— identification of defendant by officer—prior investigation

The trial court did not err by admitting evidence concerning a second-degree murder defendant's involvement with narcotics where a narcotics detective testified before the jury that she had seen defendant at an address behind the murder scene and had found papers there bearing his name. The testimony aided the jury in understanding the connection between a nickname and the identity of defendant, showed a link between the address and defendant, tended to show knowledge of a path used by the murderer, did not prove that defendant had committed other crimes, wrongs, or acts, and did not show that defendant had a propensity to commit murder. Even assuming the jury drew an inference from the fact that the detective was a narcotics officer, any possible prejudice would be slight in light of other strong evidence of guilt by the detective.

5. Sentencing— prior record level—out-of-state offenses—stipulation

The trial court erred when sentencing defendant for second-degree murder in the calculation of his prior record level. A defendant may stipulate that out-of-state offenses are substantially similar to corresponding North Carolina offenses, but it is not clear that this defendant was stipulating that his out-of-state convictions were substantially similar to charges under North Carolina law.

Appeal by defendant from judgment entered 24 March 1999 by Judge Richard D. Boner in Cleveland County Superior Court. Heard in the Court of Appeals 12 October 2000.

On 22 March 1999, defendant Lawrence Hanton was tried before a Cleveland County jury for the murder of Donnell Williamson. Evidence for the State tended to show that during the early morning hours of 27 July 1998, defendant Hanton, also known as "Fu," attended a party at the home of Robert Taylor in Shelby, North Carolina. During the party, there were several arguments, some of which became violent. One of the arguments was between defendant and an individual named Kareem. The two men exchanged words, but were kept apart by Taylor and one of the party guests, Donnell Williamson. Taylor detained defendant in the kitchen at the rear of the house, while Williamson kept Kareem in the front area of the house. Shortly thereafter, defendant left the party.

Williamson broke up another fight and then left the party on foot, because he had loaned his car to another person earlier in the evening. As Williamson was walking home in the rain, Levi Miller, a friend of Williamson's, picked him up in Miller's automobile. Miller parked in the lighted parking lot of a beauty parlor where he and Williamson sat talking. A man walked out of the adjacent woods, crossed the parking lot, and approached the Miller automobile. Williamson asked Miller to roll down the window on the passenger side where Williamson was seated, and Miller did so. The man standing outside the car then said, "What's up?" and Williamson responded that he and Miller were on their way home. The man then stuck a gun inside the car and shot Williamson four times. Miller quickly exited the car and ran across the parking lot, where he remained until the gunman began walking back to the woods. Miller then ran back to the car, where Williamson was still seated. Williamson was gasping for breath, but was still conscious. Miller asked him, "Do you know who done it?" to which Williamson replied, "Fu." Miller then drove Williamson to the hospital, where he later died from his wounds. Miller was questioned by police officers at the hospital, and gave them a statement. Miller stated that Williamson told him "Fu" shot him. He also told police that the gunman was wearing a gray shirt with writing on it and blue jeans. He said the gunman was about 5'9", 180 pounds, and had a stocky build. Miller was later asked to look at a photo lineup and identified a photograph of "Fu," whose real name is Lawrence Hanton, as the gunman who killed Donnell Williamson.

Police then went to defendant's apartment, which was behind the parking lot where Williamson was shot, and arrested defendant for second-degree murder. After defendant was advised of his *Miranda*

rights, he made an oral statement to Investigator Price. Defendant refused to sign any papers, stating that he was "no dummy" and that he refused to be fooled by the police officer's "little tricks." The police later searched the apartment where defendant was living, and found a gray t-shirt and blue jeans, both of which were slightly damp.

Defendant testified that he paged his girlfriend, Tracy Brown, sometime after 1:00 a.m. on 27 July. He said he went to her place, and that Torsha Surratt picked them up and took them to her apartment, where they stayed together until Ms. Brown was driven back to her apartment, sometime just before sunrise.

Several witnesses placed defendant at Robert Taylor's party on 27 July, while others identified defendant as "Fu" and confirmed the clothing he was wearing at the party. Robert Taylor testified that he was on his front porch and had a good view of the parking lot where Miller's car was parked. Taylor stated he saw a man in jeans and a hooded sweatshirt come up a path from the woods, stick a gun into Miller's car, and fire four times. He stated that Lawrence Hanton, also known as "Fu," was the gunman.

Defendant was found guilty of second-degree murder for the shooting death of Donnell Williamson, and appealed from a judgment of imprisonment.

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

Attorney General Michael F. Easley, by Special Deputy Attorney General H. Alan Pell, for the State.

HORTON, Judge.

Defendant argues that the trial court erred by (I) giving an incorrect instruction on the State's burden of proof; (II) denying defendant's motion for a continuance; (III) allowing two State's witnesses to testify about defendant's invocation of the right to remain silent; (IV) overruling defendant's objections to highly prejudicial evidence that he was involved in narcotics; and (V) incorrectly determining defendant's prior record level. We disagree with defendant's first four arguments and affirm his conviction. However, we remand the case to the trial court for resentencing at the proper record level.

I. Instructions on the State's Burden of Proof

[1] In its instructions to the jury, the trial court stated:

> So I charge, ladies and gentlemen, if the State has proved to you beyond a reasonable doubt that the defendant, Lawrence Hanton, intentionally and with malice killed Donnell Allen Williamson with a deadly weapon, and that the act of Lawrence Hanton was a proximate cause of the death of Donnell Allen Williamson, then it would be your duty to return a verdict of guilty of second degree murder.
>
> On the other hand, if you are not satisfied as to one or more of these things, then it would be your duty to return a verdict of not guilty.

Defendant correctly states that an instruction which lessens the State's burden of proof to anything less than "beyond a reasonable doubt" is grounds for a new trial. *State v. Brady*, 238 N.C. 407, 410, 78 S.E.2d 129, 131 (1953). Here, defendant focuses on the phrase "if you are not satisfied as to one or more of these things [the elements of second degree murder]" and argues that this lowers the burden of proof from "beyond a reasonable doubt" to "the satisfaction of the jury." While this phrase does not contain the words "beyond a reasonable doubt," it cannot be read in isolation. When reviewing a jury instruction for error, the Court must construe it contextually. " '[I]n determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments.' " *State v. Hartman*, 344 N.C. 445, 467, 476 S.E.2d 328, 340 (1996), *cert. denied by Hartman v. North Carolina*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997) (quoting *State v. Wright*, 302 N.C. 122, 127, 273 S.E.2d 699, 703 (1981)). "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47, 38 L. Ed. 2d 368, 373 (1973).

A review of the entire instruction reveals that the phrase "beyond a reasonable doubt" was used at three pivotal points in the instruction on second-degree murder. The trial court instructed the jury as follows:

> Ladies and Gentlemen, second degree murder is the unlawful killing of a human being with malice. Now, I charge for you to find the defendant, Lawrence Hanton, guilty of second degree

> murder, *the State of North Carolina must prove two things beyond a reasonable doubt:*
>
> . . . .
>
> *If the State proves beyond a reasonable doubt* that the defendant, Lawrence Hanton, intentionally killed Donnell Allen Williamson, with a deadly weapon or intentionally inflicted a wound upon Donnell Allen Williamson with a deadly weapon that proximately caused his death, you may infer first that the killing was unlawful, and second that it was done with malice, but you are not compelled to do so. . . .
>
> . . . .
>
> So I charge, Ladies and Gentlemen, *if the State has proved to you beyond a reasonable doubt* that the defendant, Lawrence Hanton, intentionally and with malice killed Donnell Allen Williamson with a deadly weapon, and that the act of Lawrence Hanton was a proximate cause of the death of Donnell Allen Williamson, then it would be your duty to return a verdict of guilty of second degree murder.
>
> On the other hand, if you are not satisfied as to one or more of these things, then it would be your duty to return a verdict of not guilty.

(Emphasis added.) Thus, when examined in context, the trial court's charge was proper and correctly charged the jury that the State was required to prove defendant's guilt "beyond a reasonable doubt."

Our Supreme Court addressed a similar question in *State v. Coffey*, 345 N.C. 389, 480 S.E.2d 664 (1997). There, the Supreme Court stated that " '[o]nly in a "rare case" will an improper instruction "justify reversal of a criminal conviction when no objection has been made in the trial court." ' " *Id.* at 396, 480 S.E.2d at 668 (citations omitted). The *Coffey* Court also stated that

> [a]s this Court has previously held, no reversal will occur when the trial court's instructions, read as a whole and considered in context, reflect that the judge fairly advised the jury of every element of the offense charged and provided a correct statement of the law. *State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984).

Id. We find that the trial court accurately described the State's burden of proof in this case, and we therefore overrule this assignment of error.

II. Defendant's Motion for a Continuance

[2] Defendant's second argument centers on the trial court's denial of his motion for a continuance. Defendant contends that on the night before his trial was to begin, he learned for the first time that Robert Taylor could positively identify him as the gunman. Defendant's attorney argued to the trial court that this new information warranted a continuance so that he could prepare a new strategy for his defense. Taylor had previously given a statement to police officers which described defendant in detail, but had not indicated that he was able to positively identify defendant by name as the gunman. Defendant's attorney conceded that he had received Mr. Taylor's statement some time before the trial, and had incorporated that information into his defense strategy.

The trial court denied defendant's motion to continue, but recessed court until 2:00 p.m. that day to allow defense counsel an opportunity to talk with defendant about the Taylor identification. During the trial, defense counsel vigorously cross-examined Robert Taylor and pointed out several inconsistencies between his testimony and that of Levi Miller, the other eyewitness.

Unless the trial court abuses its discretion, the denial or grant of a motion for continuance will not be grounds for reversal of a conviction. *State v. Trull*, 349 N.C. 428, 437, 509 S.E.2d 178, 185 (1998), *cert. denied by Trull v. North Carolina*, — U.S. —, 145 L. Ed. 2d 80 (1999). To prevail, defendant must show that the denial of his motion for a continuance was erroneous and that he suffered prejudice because of it. *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). Defendant has not been able to do so in this case. The trial court granted defendant's counsel additional time to talk with defendant about Taylor's testimony. Defendant's attorney effectively cross-examined Robert Taylor in an effort to show that Taylor did not actually see the gunman's face. Further, defendant's attorney had already studied the lighting of the crime scene, the weather conditions, and the description of the gunman and knew that Taylor could describe the shooter in detail.

Here, no abuse of the trial court's discretion has been shown by defendant, and this assignment of error is overruled.

III. Defendant's Refusal to Give a Written Statement

[3] After defendant was arrested, he was transported to the Shelby Police Department, where he was advised of his *Miranda* rights by Detective Price. Price testified that defendant appeared to understand his rights and signed and initialed each individual right. Defendant then talked with Detective Price and Detective Haynes for some time, and was asked where he was at the time of the shooting on 27 July 1998. Defendant answered questions, but refused to write out a statement concerning his whereabouts. Detective Haynes testified that defendant told them "that he was no dummy and that he was not going to put anything in writing [and] don't try to trick me into your little games."

It is true that "the State may not introduce evidence that a defendant exercised his fifth amendment right to remain silent." *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983). Defendant argues that the officer's testimony was a comment on his exercise of the right to remain silent. We disagree.

We first note that defendant did not object at trial to the officer's testimony about his refusal to sign a written statement, and his objection is deemed waived. *See* N.C.R. App. P. 10(b)(1) (2000). However, in the interests of justice we have carefully reviewed this assignment of error.

The refusal to reduce a voluntarily given oral statement to writing is not an invocation of the right to remain silent. Such an invocation must be clear and unequivocal. Detective Price testified that he read the *Miranda* rights to defendant and that defendant then made an oral statement. Price later asked defendant if he would write out a statement about his whereabouts at the time of the alleged murder, and defendant refused to do so. There was no objection to any of Detective Price's testimony. It seems clear that after being advised of his right to remain silent, defendant waived that right by voluntarily speaking to the detectives about the events of 27 July 1998. A defendant who waives his rights and makes oral statements, but then refuses to make a written statement, may not thereafter complain that the oral statement is not admissible. *Connecticut v. Barrett*, 479 U.S. 523, 525, 93 L. Ed. 2d 920, 926 (1987). This is so because "Miranda gives the defendant a right to choose between speech and silence, and [the defendant] chose to speak." *Id.* at 529, 93 L. Ed. 2d at 928. Thus, under the holding of *Barrett*, defendant waived his right to remain silent by giving an oral statement, and his refusal to put the

statement in writing was not an invocation of the right to remain silent. Therefore, this assignment of error is without merit.

IV. Evidence about Narcotics

[4] Defendant contends the trial court erred by admitting evidence which he characterized as "highly prejudicial testimony concerning his prior involvement with narcotics." We agree with the State that there was no reference in the evidence to any involvement by defendant with narcotics, and overrule this assignment of error.

Detective Endicott, a narcotics officer with the Shelby Police Department, testified that she worked in the Narcotics Division of the Police Department. She further stated that on the morning of 27 July 1998, she attempted to learn from her informants who had the nickname "Fu." As she began to testify about "a previous investigation," defendant objected, and the trial court conducted a voir dire in the absence of the jury. On voir dire, Detective Endicott testified that she learned from an informant the name of the person known as "Fu," and then went to her files of an earlier investigation and obtained a photograph of defendant to be used in a photographic lineup. The detective also testified on voir dire that 308 Black Street is at the end of the path which was apparently used by the murderer to approach the automobile in which Donnell Williamson, the victim, was seated, and was also the path used by the murderer to flee the scene of the crime. When Detective Endicott executed a search warrant in February 1998 as part of a narcotics investigation, she found defendant and three other persons at 308 Black Street, along with money orders with defendant's name on them. After hearing the testimony on voir dire, the trial court gave the following cautionary instruction to the prosecutor:

> THE COURT: [S]he may testify that she observed him on a previous occasion, whenever it was, in the apartment. She was present in the apartment on [sic] previous occasion. She saw him there and that she also observed documents in the apartment. Stay away from the mention of search warrant.
>
> . . . .
>
> THE COURT: And stay away from the mention of the investigation. I'll limit it to that. She can testify that she was there on whatever occasion it was, . . . observed him there . . . saw documents with his name on it . . . , and she's familiar with the area and familiar with where the path starts. Do not mention the word

> investigation. Do not mention the word search warrant, drug charges, or anything like that.

The detective then testified before the jury about seeing defendant at the 308 Black Street address and finding papers there bearing defendant's name. Defendant argues that the testimony of Detective Endicott was inadmissible under N.C. Rule of Evidence 404(b). That rule states:

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

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). However, the State did not introduce evidence of other "crimes, wrongs, or acts" committed by defendant. His photograph was used to prove identity, which is permissible under Rule 404(b). Both Williamson and Levi Miller identified the gunman as "Fu." The testimony by Detective Endicott did not show that defendant had committed other crimes, wrongs or acts, nor did it show that defendant had a propensity to murder. It aided the jury in understanding the connection between the nickname "Fu" and the identity of defendant. Further, the papers found at 308 Black Street showed a link between defendant and that location, that defendant either lived there or was there on a frequent basis. Still further, the testimony tended to show that defendant had knowledge of the path. In turn, this makes a fact of consequence more probable, and is permissible under Rule 404(b). The use of the evidence was in accordance with our Rules of Evidence, and the trial court's cautionary instruction provided adequate protection to defendant.

Defendant does not contend that the State violated the trial court's cautionary instructions, but argues that, because Detective Endicott was a narcotics officer, the jury could infer that defendant was in some way connected to narcotics. Even if we assume that the jury drew such an inference, any possible prejudice to defendant would be slight in light of other strong evidence of defendant's guilt. Thus, this assignment of error is also without merit.

V. Defendant's Prior Record Level

[5] Finally, defendant assigns error to the trial court's calculation of his prior record level; specifically, to the number of points assigned

to his out-of-state convictions. Defendant contends that he should have been a Level IV offender, not a Level V. For the purposes of determining prior record levels for felony sentencing,

> a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony . . . . If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (1999). Defendant contends the State did not meet its burden, and that the trial court erred by assigning the convictions a total of eighteen points, rather than the maximum of twelve points they would be assigned if they were all classified as Class I felonies. Defendant correctly points out that the State presented no formal evidence on the matter, except the prosecutor's statement to the trial court and his presentation of a work sheet and a computer printout. The record shows the following exchange between defense counsel, the prosecutor, and the trial court:

> [THE PROSECUTOR]: [T]he State would like to present a work sheet on Mr. Hanton. If I may approach, Your Honor.
>
> THE COURT: All right.
>
> [THE PROSECUTOR]: Mr. Hanton, by the State's reckoning, has 18 prior points, making him a Level 5.
>
> . . . .
>
> THE COURT: Mr. Farfour, with the exception of the kidnapping charge, is there any disagreement about the other convictions on there?
>
> [THE DEFENSE ATTORNEY]: No, Your Honor.
>
> THE COURT: All right.
>
> [THE PROSECUTOR]: If I may approach, Your Honor, with that and the computer documentation supporting the charges.

N.C. Gen. Stat. § 15A-1340.14(a) provides that the prior record level of a felony offender is determined by calculating the sum of points assigned to each of the offender's prior convictions which the

court finds to have been proven. There is no distinction between in-state and out-of-state convictions in N.C. Gen. Stat. § 15A-1340.14(a), nor does the section preclude the court from accepting stipulations by the attorneys.

The State characterizes this as an issue of first impression in a non-plea bargain case. In an appeal following a judgment entered based upon a "plea bargain," we have stated that if a defendant "essentially stipulate[s] to matters that moot the issues he could have raised under [N.C. Gen. Stat. § 15A-1444] subsection (a2), his appeal should be dismissed." *State v. Hamby*, 129 N.C. App. 366, 369, 499 S.E.2d 195, 196 (1998). We see no reason to treat cases in which a defendant is sentenced following a conviction by a jury differently from sentences entered as the result of a "plea bargain."

N.C. Gen. Stat. § 15A-1340.14(f) allows proof of *prior convictions* to be made by stipulation of the parties or any other method the court finds to be reliable. The State asserts that in the colloquy between the prosecutor, trial court, and defense counsel, defendant stipulated to the State's proposed classifications and point total, and stipulated that the offenses were substantially similar to the respective North Carolina offenses. While we agree that a defendant might stipulate that out-of-state offenses are substantially similar to corresponding North Carolina felony offenses, we do not agree that defendant did so here.

It appears that defendant denied that he had been convicted of a New York kidnapping charge which appeared on the State's record level work sheet. The prosecutor then removed the kidnapping charge from the work sheet. When the trial court asked defendant's counsel whether "with the exception of the kidnapping charge, is there any disagreement with the other convictions on there?", counsel answered "No." That statement might reasonably be construed as an admission by defendant that he had been convicted of the other charges appearing on the prosecutor's work sheet, but it is not clear that defendant was stipulating that the out-of-state convictions were substantially similar to felony charges under North Carolina law which are classified as Class I felonies or higher. As it appears likely, however, that the State relied on the statement of defendant's counsel in failing to offer evidence about the nature of defendant's out-of-state convictions, the matter must be remanded to the trial court for resentencing. In the interests of justice, both the State and defendant may offer additional evidence at the resentencing hearing. Unless the State proves by a preponderance of the evidence that the out-of-state

felony convictions are substantially similar to North Carolina offenses that are classified as Class I felonies or higher, the trial court must classify the out-of-state convictions as Class I felonies for sentencing purposes.

In summary, it appears there is no error in defendant's conviction, but the case must be remanded to the Superior Court of Cleveland County for resentencing.

No error and remanded for resentencing.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. SCOT A. JONES

No. COA99-1142

(Filed 5 December 2000)

1. Motor Vehicles— driving a commercial vehicle while impaired—sufficiency of evidence

The trial court did not err by failing to grant defendant's motion to dismiss the charge of driving a commercial vehicle while impaired in violation of N.C.G.S. § 20-138.2 even though defendant contends he was not driving a commercial motor vehicle as specified by N.C.G.S. § 20-4.01(3d)(a) at the time of his arrest based on the facts that he was driving the tractor for his own private use and that he had detached the trailer portion of the tractor-trailer, because: (1) defendant used the vehicle in question to haul a load of strawberries from California to North Carolina, establishing that the vehicle was designed or used to transport property, N.C.G.S. § 20-4.01(3d); (2) the weight specified by defendant for the tractor-trailer more than satisfied the statutory requirement that a vehicle have a combined gross vehicle weight rating (GVWR) of 26,001 pounds or more to be considered a commercial motor vehicle; (3) the trailer's weight exceeded the statutory requirement that the GVWR of a Class A commercial motor vehicle's towed unit weigh at least 10,001 pounds; (4) neither the statute defining commercial motor vehicle nor the statute detailing the crime for which defendant was convicted specify that if the vehicle is being used in a private

application at the time of the crime, it is no longer a commercial motor vehicle; and (5) the tractor and trailer were properly considered as one unit for the purpose of determining whether the vehicle was a commercial motor vehicle based on the facts that defendant did not change the nature of the vehicle or what it was designed or used to transport by simply detaching the trailer, nor did detaching the trailer change the vehicle's GVWR.

2. Appeal and Error— preservation of issues—failure to provide argument in support of contention

Although defendant contends the trial court erred in a driving a commercial vehicle while impaired case by instructing the jury that the vehicle defendant operated at the time of his arrest was a commercial vehicle, defendant has abandoned this assignment of error because he provides no argument to support his contention as required by N.C. R. App. P. 28(b)(5).

Appeal by defendant from judgment entered 26 May 1999 by Judge Jerry Cash Martin in Superior Court, Surry County. Heard in the Court of Appeals 24 August 2000.

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

Franklin Smith for defendant-appellant.

TIMMONS-GOODSON, Judge.

Scot A. Jones ("defendant") was convicted by a jury of impaired driving in a commercial motor vehicle. The trial court sentenced defendant to a suspended term of forty-five days imprisonment and further ordered him to serve an eighteen-month term of unsupervised probation. From this judgment, defendant appeals.

The evidence presented at trial tended to show the following: While driving cross-country from California to the North Carolina coast, defendant stopped at Brindle's Truck Stop ("Brindle's") in Mount Airy, North Carolina, on the morning of 20 March 1998. Defendant was driving a tractor-trailer loaded with strawberries.

Defendant, feeling ill, visited the local hospital emergency room, where he was diagnosed with acute bronchitis with pleurisy. An emergency room physician prescribed a narcotic for defendant's chest pain and an antibiotic for his bronchial infection. Defendant

filled his prescription and returned to the truck stop, where he fell asleep in his tractor-trailer. Defendant testified at trial that although he had been taking Nyquil (an over-the-counter cold medication containing alcohol) prior to visiting the emergency room, he did not take the cold medication after being seen by the physician.

Defendant testified that he awoke at approximately 8:00 p.m. and was still feeling sick. Defendant stated that he unhooked the trailer portion of his tractor-trailer and drove himself to the hospital. Defendant testified, however, that the wait at the emergency room was too long and he therefore did not see a physician at that time.

On 21 March 1998, at approximately 12:00 a.m., North Carolina State Trooper Dan Kiger ("Trooper Kiger") observed two truck tractors parked outside a bar near Mount Airy. Trooper Kiger noticed the driver of one of the truck tractors climb into his vehicle. While in the process of turning his patrol car around, the trooper observed a set of headlights traveling toward his direction, which he assumed belonged to one of the truck tractors. Trooper Kiger followed the tractor, driven by defendant, and observed it swerving left of center and traveling forty-five miles an hour in a fifty-five mile an hour speed zone. The trooper activated his emergency lights and followed the tractor until it pulled into Brindle's.

Trooper Kiger testified that defendant informed him that he had unhooked his trailer, left it at the truck stop, and visited the bar for only a few minutes. Trooper Kiger noted that he "never heard anything about any treatment or anything like that, nothing other than alcohol."

During the encounter, Trooper Kiger detected an odor of alcohol on defendant's breath. Based on this and other observations, the trooper concluded that defendant had consumed a sufficient quantity of alcohol to be appreciably impaired. As such, the trooper arrested defendant for driving a commercial vehicle while impaired. Trooper Kiger confirmed, through a series of physical assessments, that defendant was indeed impaired. Trooper Kiger also administered an Intoxilyzer test, which indicated that defendant's blood alcohol concentration was .06.

At trial, Trooper Kiger offered testimony concerning the vehicle defendant was driving at the time of his arrest. Specifically, the trooper noted that the vehicle was

what generally people talk, they call transfer truck, tractor trailer truck that you see on the major highways. It, however, did not have a trailer attached to it at that time. It was just what people commonly say bobtail. It had the truck tractor, front axle, two rear axles, large heavy truck, big truck.

Defendant testified that he left the hospital at 12:00 a.m., drove straight to the truck stop, and did not visit a bar. Defendant stated that he told the trooper about his visit to the hospital and even showed him his hospital "paperwork" and medication. Defendant also stated that at the time of his arrest, he was driving a vehicle known as a "[19]96 [] Freightliner condo," which he described as "a little apartment." Defendant noted that the truck had a sink, stove, refrigerator, shower, and bunk beds. Defendant testified that he did not know the exact unloaded weight of his tractor-trailer, but that the tractor-trailer's typical loaded weight was between 78,000 and 79,000 pounds. Defendant affirmed that on the day he was arrested, the tractor-trailer's loaded weight was approximately 70,000 pounds. Defendant testified that without the trailer, the three-axle, ten-wheel tractor weighed between 17,000 and 18,000 pounds.

Defendant moved to dismiss the case at the end of the State's presentation of evidence and at the end of the presentation of all evidence. The trial court denied both motions, finding there was substantial evidence to support each and every element of the charged offense.

Defendant also objected to the court's jury instructions concerning "commercial motor vehicles," arguing that the vehicle in question was not being used as a commercial vehicle at the time of his arrest. Defendant asserted that the truck tractor was being operated in a private manner without its commercial load attached. Finding that simply disconnecting a portion of the vehicle does not alter its nature as defined by our General Statutes, the court denied defendant's objection. The jury returned a guilty verdict, and defendant has appealed.

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[1] By his first assignment of error, defendant contends that the trial court erred in failing to grant his motion to dismiss at the close of the State's evidence. As a preliminary issue, we note that because defendant presented evidence below, he has waived his right to challenge the denial of his motion to dismiss made at the close of the State's case-in-chief. N.C. Gen. Stat. § 15-173 (1999); *State v. Franklin*, 327

N.C. 162, 393 S.E.2d 781 (1990). We therefore consider whether the trial court erred in denying defendant's motion to dismiss made following the presentation of all evidence.

In ruling on a motion to dismiss for insufficient evidence, the trial court must examine whether substantial evidence exists to support the essential elements of the charged offense. *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988). The court must examine the evidence in the light most favorable to the State, giving the State the benefit of "every reasonable inference and intendment that can be drawn therefrom." *State v. Barrett*, 343 N.C. 164, 173, 469 S.E.2d 888, 893 (1996) (citation omitted). The court must not grant the motion based on contradictions and discrepancies; "they are for the jury to resolve." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982) (citation omitted). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." State v. Locklear, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988) (citation omitted).

Defendant was charged with driving a commercial motor vehicle while impaired.

> A person commits the offense of impaired driving in a commercial motor vehicle if he drives a commercial motor vehicle upon any highway, any street, or any public vehicular area within the State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.04 or more.

N.C. Gen. Stat. § 20-138.2 (Cum. Supp. 1998).

Defendant does not argue on appeal that the State failed to prove he was driving on a public vehicular area, that he was under the influence of an impairing substance, or that he had a blood alcohol concentration of 0.04 or greater. Rather, defendant argues that the court should have dismissed his case because he was not driving a "commercial motor vehicle" at the time of his arrest. We disagree.

Section 20-4.01(3d) of our General Statutes defines a "Commercial Motor Vehicle" as follows:

> Any of the following motor vehicles that are designed or used to transport passengers or property:
>
> a. A Class A motor vehicle that has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
>
> b. A Class B motor vehicle.
>
> c. A Class C motor vehicle that meets either of the following descriptions:
>
> 1. Is designed to transport 16 or more passengers, including the driver.
>
> 2. Is transporting hazardous materials and is required to be placarded in accordance with 49 C.F.R. Part 172, Subpart F.
>
> d. Any other motor vehicle included by federal regulation in the definition of commercial motor vehicle pursuant to 49 U.S.C. Appdx. § 2716.

N.C. Gen. Stat. § 20-4.01(3d) (Cum. Supp. 1998).

A "Class A Motor Vehicle" is

> [a] combination of motor vehicles that meets either of the following descriptions:
>
> a. Has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
>
> b. Has a combined GVWR of less than 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.

N.C.G.S. § 20-4.01(2a).

A "Class B Motor Vehicle" is

> [a] single motor vehicle that has a GVWR of at least 26,001 pounds [or a] combination of motor vehicles that includes as part of the combination a towing unit that has a GVWR of at least

26,001 pounds and a towed unit that has a GVWR of less than 10,001 pounds.

N.C.G.S. § 20-4.01(2b).

A "Class C Motor Vehicle" is "[a] single motor vehicle not included in Class B" or "[a] combination of motor vehicles not included in Class A or Class B." N.C.G.S. § 20-4.01(2c). A vehicle's "Gross Vehicle Weight Rating" ("GVWR") is "[t]he value specified by the manufacturer as the maximum loaded weight of a vehicle. The GVWR of a combination vehicle is the GVWR of the power unit plus the GVWR of the towed unit or units." N.C.G.S. 20-4.01(12a).

We find that there was sufficient evidence to infer that defendant was driving a "commercial motor vehicle," as specified by section 20-4.01 (3d)(a) of our General Statutes. As noted above, under section 20-4.01(3d)(a), a vehicle is a "commercial motor vehicle" if it is designed or used to transport property and is a "Class A motor vehicle that has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds." N.C.G.S. § 20-401(3d)(a). The evidence at trial revealed that defendant used the vehicle in question to haul a load of strawberries from California to North Carolina. This testimony established that the vehicle was "designed or used" to transport property. Although there was no direct evidence indicating the vehicle's GVWR, defendant himself testified that the typical loaded weight of the tractor-trailer was between 78,000 and 79,000 pounds. The weight specified by defendant more than satisfies the statutory requirement that a vehicle have a combined GVWR of 26,001 pounds or more to be considered a "commercial motor vehicle." Based upon defendant's testimony that the tractor portion of the tractor-trailer weighed between 17,000 and 18,000 pounds and that its typical loaded weight was between 78,000 and 79,000 pounds, a jury could infer that the trailer, the towed unit, weighed at least 61,000 pounds. This weight far exceeds the statutory requirement that the GVWR of a Class A commercial motor vehicle's towed unit weigh at least 10,001 pounds.

Defendant argues on appeal that because he was driving the tractor for his own private use and because he had detached the trailer portion of the tractor-trailer, it was no longer a commercial motor vehicle. We are unpersuaded by this argument for two reasons. First, neither the statute defining "commercial motor vehicle" nor the statute detailing the crime for which defendant was convicted specify that if the vehicle is being used in a private application at the time

of the crime, it is no longer a "commercial motor vehicle." Rather, section 20-4.01(3d) specifies that a vehicle is a "commercial motor vehicle" if the vehicle is "*designed or used* to transport passengers or property" and meets other requirements. N.C.G.S. § 20-4.01(3d) (emphasis added). As noted above, there was sufficient evidence to infer that the vehicle in question met the statutory definition of a "commercial motor vehicle."

The second reason we reject defendant's argument is that the tractor and trailer were properly considered as one unit for the purpose of determining whether the vehicle was a "commercial motor vehicle." There was sufficient evidence that the portion of the vehicle driven by defendant was an integral part of a larger, two-part vehicle that was designed to transport property as one unit. Trooper Kiger's testimony established that defendant's vehicle was "what generally people . . . call [a] transfer truck, tractor trailer truck that you see on the major highways. *It, however, did not have a trailer attached to it at that time.*" (Emphasis added). By simply detaching the trailer portion of a tractor-trailer, defendant did not change the nature of the vehicle or what it was designed or used to transport. Nor, did detaching the trailer change the vehicle's GVWR, the maximum loaded weight of the vehicle, which defendant's own testimony established was between 78,000 and 79,000 pounds. We therefore conclude that the court did not err in refusing to grant defendant's motion to dismiss.

[2] By his second assignment of error, defendant contends that the trial court erred in instructing the jury that the vehicle he operated at the time of his arrest was a "commercial vehicle." Although defendant references this assignment of error in his brief to this Court, he provides no argument to support his contention. Defendant has therefore abandoned his second assignment of error on appeal. *See* N.C.R. App. P. 28(b)(5) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.")

Based on the foregoing analysis, we hold that defendant received a fair trial free from prejudicial error.

No error.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. RODRIGUEZ FERGUSON

No. COA99-1237

(Filed 5 December 2000)

1. Witnesses— prosecutor as witness—evidence available elsewhere

The trial court did not abuse its discretion by not permitting a first-degree murder and assault defendant to call the prosecutor as a witness where defendant was permitted to ascertain the information he sought through the availability of other witnesses.

2. Discovery— tapes of interview—transcript provided

The trial court did not err in a first-degree murder and assault prosecution by denying defendant's request to review tapes of an interview between a prosecutor and a State's witness pursuant to N.C.G.S. § 15A-903(f)(2) where defendant was provided with a transcript which was a "substantially verbatim" copy of the recording.

3. Evidence— cross-examination of witness—prior unrelated charge

The trial court did not err in a first-degree murder and assault prosecution by limiting defendant's examination of a State's witness regarding a prior unrelated conviction where there was no evidence of any pending criminal charges against the witness or that he was on probation, and nothing to indicate that the prosecutor's office was in any position to intimidate the witness or influence his testimony.

4. Homicide— first-degree murder—instruction on manslaughter—defense of another—evidence insufficient

A first-degree murder defendant was not entitled to a manslaughter instruction based upon defense of another, Ferguson, where the evidence, in the light most favorable to defendant, shows that defendant shot the victim in the head when the victim approached defendant and Ferguson while they were outside a club; the victim, who was wearing a long coat, made no threats to either defendant or Ferguson and made no movement suggesting that he was going to harm defendant or Ferguson; and, although the confrontation took place in an environment where others were shooting guns in celebration of the New Year, there is no

basis for the conclusion that the victim was about to kill or cause great bodily harm to anyone.

Appeal by defendant from judgments dated 6 December 1997 by Judge D. Jack Hooks, Jr. in Bladen County Superior Court. Heard in the Court of Appeals 19 September 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Amy C. Kunstling, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

GREENE, Judge.

Rodriguez Ferguson (Defendant) appeals from judgments entered after a jury rendered verdicts finding him guilty of five counts of first-degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury.

On the night of 31 December 1994, Defendant, who had been drinking all day, went to the Puppy Creek Family Fun Center (Puppy Creek) to rob Steve Locklear. After Defendant arrived at Puppy Creek, he shot five people: killing four and paralyzing a fifth victim. A few hours later in the early morning hours of 1 January 1995, Defendant and his brother Kendrick Ferguson (Ferguson) went to the Zodiac Club (the Zodiac) along with some other relatives. After Ferguson and Defendant arrived at the Zodiac, Ferguson got into an argument outside the Zodiac with Aaron Goode (Goode). After this argument terminated, Defendant and Ferguson were approached by James Morrison (Morrison), who was wearing a long trench coat and had his hand behind his back. Defendant and Morrison had a brief conversation about the whereabouts of Goode. After this conversation, Defendant fatally shot Morrison in the head.

On 2 January 1995, Defendant was taken into custody and charged with five counts of first-degree murder and one count of assault with a deadly weapon with the intent to kill inflicting serious injury. Defendant subsequently waived his Miranda rights and told Detective Bob Conerly (Conerly), of the Hoke County Sheriff's Department, he had "shot them all." When questioned about Morrison's death, Defendant stated:

> I saw [Morrison coming] toward[] us and I heard a female voice say, 'he's got a gun.' . . . I was standing by a tree . . . and talking and arguing and that is when I saw this guy running toward[] them and I . . . heard this girl say . . . that he had a gun and I just walked up to him and I shot him . . . .

Conerly asked Defendant "what made you kill these people, was it something they said, something they did, or how they looked at you, what?" Defendant responded, "[a]ll I can say is that I was drunk."

On 18 July 1997, Ferguson agreed to a series of interviews with the State and to testify for the State at Defendant's trial. On 18 July 1997 and 24 September 1997, Kristy Newton (Newton), the prosecutor, conducted two three-hour interviews with Ferguson about the Zodiac and Puppy Creek shootings. At times during these interviews, Newton's tone of voice was "angry" and Newton used profane language in questioning Ferguson. Ferguson stated his statements changed based on what Newton wanted to hear and "on the advice and the instruction of [his] lawyer."

On 6 October 1997, jury selection began and on that day a search warrant was served on Defendant, without the presence of his counsel. The warrant was issued to search Defendant's body and clothing for any indication of gang involvement. On 8 October 1997, Defendant filed a motion for sanctions against the attorneys for the State in connection with the 6 October search warrant. At the sanctions hearing, Defendant made a motion to call Newton as a witness in light of her alleged extensive involvement in the preparation of the search warrant affidavit. The trial court denied Defendant's request to call Newton as a witness, but did order Newton to step aside and allow the examination of witnesses connected with the search warrant to be conducted by someone other than Newton. Defendant was permitted to question Detective Sergeant W.J. Blackburn concerning Newton's involvement in the preparation of the search warrant affidavit.

At trial, Ferguson testified for the State concerning the Zodiac and Puppy Creek shootings. Defendant made a motion to review the tape recordings of the interviews conducted between Newton and Ferguson to hear "[Newton's] statements, promises, assurance, [and] coercion" and "[her] tone of voice." Prior to Ferguson's testimony, Defendant had been given a transcript of the Newton-Ferguson interview which, according to the prosecution, "was a substantially ver-

batim recital of the electronic recording of the interviews," personally prepared by Newton. After conducting an *in camera* review of the tapes, the trial court denied Defendant's motion to review the tapes, determining the transcript was "frightening[ly] close to verbatim, there is nothing about the tone on there that is significantly different than the tone used . . . in open court."

Telly Stephens (Stephens), an eyewitness to the shooting of Morrison, testified concerning the events surrounding the shooting of Morrison by Defendant. During Defendant's cross-examination of Stephens, Defendant attempted to inquire into criminal charges filed by the Hoke County District Attorney's Office against Stephens for events occurring in 1996 and unrelated to the events surrounding the killings at the Zodiac and Puppy Creek. The State objected to this line of questioning and, in response, the trial court conducted a *voir dire* hearing.

The *voir dire* revealed that in the summer of 1996, in a matter unrelated to the Zodiac and Puppy Creek killings, Stephens was charged with assault with a deadly weapon with intent to kill inflicting serious injury and felony robbery with a dangerous weapon. The police officer Stephens "talk[ed] to with respect to [the summer 1996] charges" was the same officer he spoke with concerning Morrison's death and the same prosecutor's office in Defendant's case also prosecuted Stephens's 1996 charges. The felony robbery charge against Stephens was dismissed by the district court after conducting a probable cause hearing. With respect to the other charge, Stephens was permitted to plead guilty to misdemeanor assault and was sentenced to "time served." Subsequent to the *voir dire*, the trial court sustained the State's objection, but did express the court's willingness to allow Defendant to "make inquiry as to past convictions[,] . . . to make some brief inquiry regarding the circumstances of those convictions[,] . . . [and Defendant] may ask . . . if that was a concession. [Defendant] may argue it to the jury, if [he] believe[s] it was [a concession]."

In the presence of the jury, the trial court permitted Stephens to testify that in December 1996, he entered into a plea agreement with the district attorney's office whereby he was permitted to plead guilty to a misdemeanor assault in exchange for the dismissal of the felony charge of assault with intent to kill.

Freddie McLaughlin (McLaughlin) testified concerning the events that occurred at the Zodiac and the circumstances surrounding

Morrison's death. On cross-examination, Defendant attempted to impeach McLaughlin with an alleged prior inconsistent statement McLaughlin made to Newton. McLaughlin, however, denied making such statement and Defendant made a motion to call Newton to have her testify about McLaughlin's prior statement. Newton informed the court that in addition to herself, McLaughlin's mother, Mae, was present during the interview. The trial court denied Defendant's request to call Newton as a witness and Defendant never attempted to question McLaughlin's mother concerning the interviews.

Shon Singletary (Singletary) testified the Zodiac was a violent establishment and he and Defendant had witnessed a murder there sometime in 1991. In the early morning hours of 1 January 1995, Defendant, Singletary, Ferguson, and others, who were all intoxicated, went to the Zodiac. Shortly after the group arrived at the Zodiac, Ferguson and Goode argued. Goode "had his hand in his back . . . like he was ready to pull out a gun. . . . [H]e [was] known for carrying guns." At the time, shots were being fired in apparent celebration of the New Year, and people were running. When Morrison, with his hand behind his back, "ran up behind" Defendant, it was dark and Morrison was wearing a long trench coat. Singletary did not see Morrison approach, but when he saw Morrison it appeared "he was going to shoot somebody."

On cross-examination, Newton asked Singletary if he had "refused to speak with law enforcement, [or] the [d]istrict [a]ttorney's [o]ffice." Defendant objected to Newton asking Singletary this question and the court sustained Defendant's objection. Defendant made a motion, out of the presence of the jury, to call Newton as a witness to confront allegations of Singletary's unwillingness to speak with law enforcement. The trial court, however, denied Defendant's request. On redirect, Defendant was allowed to question Singletary concerning his refusal to speak with Newton about the events that took place on 1 January 1995.

At the close of the evidence, the trial court instructed the jury on first-degree murder with respect to all five killings. The jury was also instructed on second-degree murder with respect to the killing of Morrison. The trial court denied Defendant's request for an instruction on manslaughter with regard to the Morrison killing. This request was based on Defendant's claim the "killing [was] done in defense of family or third person."

The issues are whether: (I) the participation of the prosecuting attorney in the investigation of this case made her a necessary witness; (II) Defendant was entitled, under N.C. Gen. Stat. § 15A-903(f)(2), to review the tape recorded interviews of Ferguson although he had previously been provided with a written transcript of the tapes; (III) Defendant should be permitted to cross-examine a witness concerning a prior plea bargain; and (IV) evidence was present in this case from which the jury could have concluded Defendant shot Morrison in lawful defense of Ferguson.

I

[1] Defendant argues he should have been allowed to call Newton, the prosecutor, to testify concerning her alleged extensive involvement in the preparation of a search warrant affidavit, McLaughlin's alleged prior inconsistent statement, and Singletary's refusal to speak with Newton.

While there is a "reluctance to allow attorneys to appear in a case as both advocate and witness," a prosecutor is competent to testify on behalf of a defendant. *State v. Simpson*, 314 N.C. 359, 373, 334 S.E.2d 53, 62 (1985). There must exist, however, compelling reasons to allow a defendant to call a prosecuting attorney as a witness and whether these compelling circumstances exist is within the trial court's discretion. *Id.* There are no compelling reasons if other witnesses are available who can provide the information sought. *State v. Daniels*, 337 N.C. 243, 265, 466 S.E.2d 298, 312 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995).

On all three occasions disputed by Defendant, after the trial court denied Defendant's request to call Newton as a witness, Defendant was permitted to ascertain the information he sought through the availability of other witnesses. Accordingly, there were no compelling reasons to permit Defendant to call Newton as a witness and the trial court did not abuse its discretion.

II

[2] Defendant next argues the tape recorded interview of Ferguson should have been provided to Defendant so Defendant could ascertain whether the prosecution unduly influenced Ferguson's testimony. We disagree.

After a witness has testified for the State on direct examination, a defendant is entitled to "any statement of the witness in the possession of the State that relates to the subject matter as to which the

witness has testified." N.C.G.S. § 15A-903(f)(2) (1999). A "statement," within the meaning of section 15A-903(f)(2), includes *either* "[a] stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital." N.C.G.S. § 15A-903(f)(5)(b) (1999).

In this case, Defendant was provided with a transcript of the tape recorded interviews of Ferguson and that transcript was a "substantially verbatim" copy of the recording. Thus, the trial court did not err in denying Defendant's request to review the tapes.

III

[3] Defendant argues he should have been permitted to impeach Stephens by cross-examining him about his plea bargain with the Hoke County District Attorney's Office on a 1996 felony assault charge, which is unrelated to the current charges against Defendant.

The constitutional right to cross-examine a witness includes the right to examine that witness about any pending criminal charges or any criminal convictions for which he is currently on probation. *State v. Prevatte*, 346 N.C. 162, 163-64, 484 S.E.2d 377, 378 (1997). This is so because the jury is entitled to consider, in evaluating a witness's credibility, the fact the State has a "weapon to control the witness." *Id.* at 164, 484 S.E.2d at 378; *see State v. Jordan*, 120 N.C. App. 364, 370, 462 S.E.2d 234, 238 (the possibility criminal charges can be reinstated against a witness is within proper scope of cross-examination), *disc. review denied*, 342 N.C. 416, 465 S.E.2d 546 (1995).

In this case, there is no evidence there were any pending criminal charges against Stephens or that he was on probation. Furthermore, there is nothing in this record or in Defendant's brief to suggest the Hoke County District Attorney's Office was in any position to intimidate Stephens or influence his testimony. Therefore, Defendant had no constitutional right to inform the jury that Stephens' plea to the misdemeanor charge was the result of a plea agreement with the district attorney's office. Accordingly, the trial court did not err in restricting Defendant's examination of Stephens with regard to the 1996 conviction.

IV

[4] Defendant finally argues the trial court erred in failing to instruct on manslaughter because there is sufficient evidence he shot Morrison in defense of Ferguson. We disagree.

In general, a trial court is required "to comprehensively instruct the jury on a defense to the charged crime when the evidence viewed in the light most favorable to the defendant reveals substantial evidence of each element of the defense." *State v. Hayes*, 130 N.C. App. 154, 178, 502 S.E.2d 853, 869-70 (1998), *aff'd in part, dismissed in part*, 350 N.C. 79, 511 S.E.2d 302 (1999). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1990)).

To support a charge of manslaughter based on the defense of others, there must be substantial evidence: (1) it appeared to defendant and he believed it necessary to kill the deceased to save another from death or great bodily harm; and (2) defendant's belief was reasonable. *State v. Perry*, 338 N.C. 457, 466-67, 450 S.E.2d 471, 476 (1994).

In this case, the evidence, considered in the light most favorable to Defendant, *State v. Blackmon*, 38 N.C. App. 620, 621-22, 248 S.E.2d 456, 457 (1978), *disc. review denied*, 296 N.C. 412, 251 S.E.2d 471 (1979), shows Defendant shot Morrison in the head when Morrison approached Defendant and Ferguson when they were outside the Zodiac. Morrison, who was wearing a long coat, made no threats to either Defendant or Ferguson, and he made no movement suggesting he was going to harm Defendant or Ferguson. Although this confrontation took place in an environment where others were shooting guns, in apparent celebration of the New Year, there is no basis for supporting a conclusion Morrison was about to kill or cause great bodily harm to anyone. Accordingly, Defendant was not entitled to the manslaughter instruction.[1]

No error.

Judges MARTIN and EDMUNDS concur.

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1. Because Defendant does not argue self-defense in his brief, we do not address his assignment of error to the trial court's failure to instruct the jury on self-defense. *See* N.C.R. App. P. 28(a) (questions raised by assignments of error but not "discussed in a party's brief, are deemed abandoned").

STATE OF NORTH CAROLINA ON BEHALF OF BARBARA M. HARNES, PLAINTIFF-APPELLANT v. PAUL A. LAWRENCE, DEFENDANT-APPELLEE

No. COA99-1254

(Filed 5 December 2000)

1. **Child Support, Custody, and Visitation— support—New Jersey order—continuing exclusive jurisdiction**

The trial court erred by finding a 1995 North Carolina child support order controlling over a 1982 New Jersey order where plaintiff and the child continued to reside in New Jersey and plaintiff did not sign or consent to North Carolina exercising jurisdiction to modify the New Jersey order. Under the Full Faith and Credit for Child Support Orders Act, New Jersey retained continuing, exclusive jurisdiction over the action and the North Carolina court erred in failing to register the New Jersey order and in entering a North Carolina Voluntary Support Agreement contrary to the terms of the New Jersey order.

2. **Child Support, Custody, and Visitation— support—New Jersey order—continuing until age 22**

The trial court erred by finding a 1995 North Carolina child support order controlling over a 1982 New Jersey order, contrary to the Uniform Interstate Family Support Act. The plain meaning of N.C.G.S. § 52C-2-207 requires that, if the current home state of the child issued the support order, then that state retains continuing exclusive jurisdiction. Our state's courts must apply New Jersey law in the enforcement of the child support order, even if the law of New Jersey is contradictory to the law of North Carolina, and the New Jersey court in this case had the authority to order child support until the age of twenty-two under its state law.

Appeal by plaintiff from order entered 29 June 1999 by Judge Jerry F. Waddell in Carteret County District Court. Heard in the Court of Appeals 25 August 2000.

Attorney General Michael F. Easley by Assistant Attorneys General Gerald K. Robbins, Kathleen U. Baldwin and Susana E. Honeywell for plaintiff-appellant.

No brief filed for defendant-appellee.

McGEE, Judge.

This action arises out of plaintiff Barbara M. Harnes' attempt to enforce a New Jersey child support order. Plaintiff and defendant Paul A. Lawrence were married to each other on 17 September 1977 and their daughter was born 3 December 1979. The parties were divorced in Ocean County, New Jersey Superior Court on 29 January 1982. The Final Judgment of Divorce ordered the defendant to provide support for the couple's daughter "until the infant child reaches the age of twenty-two (22) years, or is emancipated whichever event will occur first." The order required defendant to pay child support in the amount of $65.00 per week. Attorneys for plaintiff and defendant signed the judgment consenting to its form.

Plaintiff, who still resides in New Jersey, initiated this action on 13 January 1995 by transmitting a Certificate and Order and a Uniform Support Petition from the Chancery Division, Family Part, Ocean County Probation Division, Superior Court of New Jersey to the North Carolina Division of Social Services and its department of Child Support Enforcement. Plaintiff's petition requested entry of an order for child support of $65.00 per week and collection of an arrearage of $2805.00 as of 9 December 1994. Plaintiff included copies of the New Jersey reciprocal child support statute pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA) and the original New Jersey child support order. She alleged in her petition that defendant was residing in Morehead City, North Carolina.

Defendant responded to plaintiff's petition by signing a voluntary support agreement and order entered in Carteret County District Court by Judge Kenneth Crow on 30 August 1995. Pursuant to this order, defendant agreed to pay an arrearage of $5945.00 at a monthly rate of $50.00 per month, in addition to ongoing child support of $282.00 per month beginning 1 September 1995. However, plaintiff neither consented to a modification of the New Jersey child support order nor did she authorize any approval of the voluntary support agreement and order. The IV-D Attorney signed the voluntary order as a representative of the Carteret County Child Support Enforcement Division. *See* N.C. Gen. Stat. § 110-130.1(c) (1995) (no attorney client relationship shall be considered to have been created between the attorney who represents the child support enforcement agency and any person by virtue of the action of the attorney in providing the services required.) The New Jersey order was not registered in Carteret County District Court as requested by plaintiff.

Defendant again failed to pay child support for his daughter in compliance with the 1995 North Carolina Voluntary Support Agreement and Order and an order of willful contempt of court was entered against him in Carteret County District Court on 24 July 1998. The court ordered defendant to pay $200.00 per month in arrearage but terminated defendant's ongoing child support obligation "as of 30 June 1998 as the child is 18 and graduated from high school." The provision of the order terminating child support at age eighteen directly controverted the 1982 New Jersey child support order to continue child support until the daughter attained the age of twenty-two.

Plaintiff forwarded another New Jersey child support enforcement transmittal to Carteret County on 24 July 1998, requesting registration of the New Jersey child support order in accordance with the 1982 New Jersey judgment and included a copy of the original order. The URESA transmittal also noted that the New Jersey court-ordered child support was to continue until the child reached the age of twenty-two and that the child was attending college and not emancipated. The 1982 New Jersey order was finally registered in Carteret County on 28 April 1999 and a notice of Registration of Foreign Support Order was served on defendant on 13 May 1999.

Carteret County Support Enforcement Agency, through its IV-D agency attorney, filed a motion in the cause on 11 May 1999 requesting that the court determine whether the 1982 New Jersey support order or the 1995 North Carolina support order was controlling and to determine the amount of child support arrearage based on the controlling order. The matter was heard in Carteret County District Court on 29 June 1999. The trial court determined that the 1995 North Carolina order was controlling "due to the fact that the North Carolina order is newer and due to the lapse of time considering that the New Jersey order dates from 1982." Plaintiff appeals.

Plaintiff argues the trial court erred in finding the 1995 North Carolina order is controlling because: (I) the North Carolina court did not have subject matter jurisdiction under the federal Full Faith and Credit for Child Support Orders Act, 28 U.S.C. 1738B (1994) and (II), the 1982 New Jersey order was the controlling order pursuant to the Uniform Interstate Family Support Act (UIFSA), Chapter 52C of the North Carolina General Statutes.

I.

[1] Plaintiff first argues that the trial court erred in finding the 1995 North Carolina order controlling because the court in 1995 was with-

out subject matter jurisdiction. Plaintiff contends that the federal Full Faith and Credit for Child Support Orders Act provides that the state in which a child support order is issued has continuing, exclusive jurisdiction over the order and therefore the 1995 North Carolina child support order and the 1998 North Carolina order of contempt are void. We agree.

The United States Congress enacted the Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. 1738B (1994) on 20 October 1994. The FFCCSOA requires that state courts afford "full faith and credit" to child support orders issued in other states and refrain from modifying or issuing contrary orders except in limited circumstances. The purpose of FFCCSOA is

> (1) to facilitate the enforcement of child support orders among the States; (2) to discourage continuing interstate controversies over child support in the interest of greater financial stability and secure family relationships for the child; and (3) to avoid jurisdictional competition and conflict among State courts in the establishment of child support orders.

Pub. L. No. 103-383, § 2(c), 108 U.S. Stat. 4064 (to be codified at 28 U.S.C. § 1738B (1994)). Section 1738B(a) provides that "[t]he appropriate authorities of each State—(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and (2) shall not seek or make a modification of such an order except in accordance with subsection (e)."

"Under the supremacy clause of the United States Constitution, the provisions of FFCCSOA are binding on all states and supersede any inconsistent provisions of state law, including any inconsistent provisions of uniform state laws such as URESA[.]" *Kelly v. Otte*, 123 N.C. App. 585, 589, 474 S.E.2d 131, 134, *disc. review denied*, 345 N.C. 180, 479 S.E.2d 204 (1996). FFCCSOA "obligates states to enforce, according to its terms, a child support order issued by another state which is made consistent with the Act's jurisdiction and due process standards." *Welsher v. Rager*, 127 N.C. App. 521, 528, 491 S.E.2d 661, 665 (1997); *see also Kelly*, 123 N.C. App. at 589, 474 S.E.2d at 134. Modification of a valid order is permitted only when: (1) all parties have consented to the jurisdiction of the forum state to modify the order; or (2) neither the child nor any of the parties remains in the issuing state and the forum state has personal jurisdiction over the parties. *Id.* Our Court held in *Kelly* that while the law of the forum state may apply to the enforcement and remedy applied to a regis-

tered foreign support order, under URESA and FFCCSOA the law of the rendering state (the state that issued the order) must govern the order's interpretation. *Id.*

In the case before us, consistent with this definition and the statute's intended purpose to prevent the issuance of conflicting child support orders among different states, New Jersey had continuing exclusive jurisdiction over the child support order in 1995. Plaintiff and the child continued to reside in the issuing state of New Jersey. Plaintiff did not sign nor consent to the State of North Carolina exercising jurisdiction to modify the New Jersey order. Therefore, New Jersey retained continuing, exclusive jurisdiction over the action. *See* 28 U.S.C. 1738B(d).

In addition, New Jersey had continuing exclusive jurisdiction over the child support action when the trial court in North Carolina entered a contempt order in 1998 for defendant's failure to pay support. It was error for the trial court to terminate defendant's ongoing child support in 1998 based on the finding that the child was eighteen and graduated from high school. This 1998 order arose from the invalid 1995 child support proceedings and is also governed by FFCCOSA. Therefore, the law of New Jersey must be applied and the New Jersey support order requiring payments to the child until the age of twenty-two years must be upheld. The North Carolina court did not have jurisdiction to modify the 1982 New Jersey order in 1995 nor in 1998. N.C. Gen. Stat. § 52C-2-205 (1995). We also note that the court in Carteret County failed to register plaintiff's 1995 URESA transmittal and instead defendant signed a voluntary support agreement that was entered as an order of the court. Our Court in *Williams v. Williams*, 97 N.C. App. 118, 121, 387 S.E.2d 217, 219 (1990) held that "N.C.G.S. § 52A-29 (repealed by Sessions Law 1995 and codified in 1996 under N.C.G.S. § 52C-6-602, Procedure to register order for enforcement) requires only that certain documents be transmitted to the clerk of court. After submitting the required documents, an obligee seeking registration has no other duties under the statute." The record in this case shows that plaintiff met the requirements by properly transmitting all of the required URESA documentation in 1995. The North Carolina trial court erred both in failing to register the New Jersey order in 1995 and in entering a North Carolina Voluntary Support Agreement contrary to the terms of the New Jersey order. Once the documentation was sent to the clerk of court, North Carolina became the registering tribunal of the New Jersey child support order and the North Carolina court was required to reg-

ister and enforce the New Jersey order. *Welsher*, 127 N.C. App. at 526, 491 S.E.2d at 664.

II.

[2] Plaintiff next argues that the trial court erred in finding the 1995 North Carolina order controlling in conflict with the Uniform Interstate Family Support Act, codified as Chapter 52C of the North Carolina General Statutes. Plaintiff contends that the plain meaning of N.C. Gen. Stat. § 52C-2-207 (1995) requires that if the current home state of the child issued the support order, then that state retains continuing exclusive jurisdiction. We agree.

N.C.G.S. § 52C-2-207 established a priority scheme for the recognition and enforcement of multiple existing child support obligations. N.C.G.S. § 52C-2-207(a). The official comment to N.C.G.S. § 52C-2-207 notes that

> A keystone of UIFSA is to provide a transitional procedure for the eventual elimination of existing multiple support orders in an expeditious and efficient manner . . .[i]n choosing among existing multiple orders, UIFSA subsection (b)(1) gives priority to the order issued by the only tribunal that is entitled to continuing exclusive jurisdiction . . . [when] an individual party or the child continues to reside in that State [which issued the original order].

Our Court stated in *Welsher* that "UIFSA governs the proceedings over any foreign support order which is registered in North Carolina after 1 January 1996, UIFSA's effective date." *Welsher*, 127 N.C. App. at 527, 491 S.E.2d at 664. In the case before us, the New Jersey support order was registered in Carteret County, North Carolina in 1999. Upon notification of the filing, defendant did not contest the order and therefore "a tribunal of this State shall recognize and enforce, but may not modify, a registered order[.]" N.C. Gen. Stat. § 52C-6-603(c) (1995). New Jersey is the child's home state in this case and the support order of the New Jersey court is the controlling order. The 1982 New Jersey order issued by a court in the current home state of the child had priority over the 1995 North Carolina order. The trial court in North Carolina was required to recognize the New Jersey order as controlling. 28 U.S.C.A. 1738B(f)(3) (1994).

As to the choice of state law governing the support order, our courts have clarified that the law of the issuing state must be applied by the adopting state. UIFSA requires that "a support order be inter-

preted according to the law of the state in which it [was] issued." *Welsher*, 127 N.C. App. at 524, 491 S.E.2d at 663. "The FFCCSOA is very stringent in its mandate that a foreign child support order be enforced according to its terms." *Kelly*, 123 N.C. App. at 591, 474 S.E.2d at 135. Therefore, our state's courts must apply New Jersey law in the enforcement of the child support order, even if the law of New Jersey is contradictory to the law of this state. The 1995 North Carolina court order implied that because the age of emancipation in North Carolina is eighteen, then the court could modify the New Jersey support order to end support at age eighteen, not age twenty-two as required by the New Jersey order. This is not in accordance with New Jersey law, which we must apply. N.J.S.A. 2A:34-23 (1988) provides:

> Pending any matrimonial action . . . or after judgment of divorce . . . the court may make such order as to the alimony or maintenance of the parties, and also to the care, custody, education and maintenance of the children . . . as the circumstances of the parties and the nature of the case shall render fit . . . and require reasonable security for due observance of such orders[.]

This statute has been applied by the New Jersey courts to permit enforcement of support orders for children over the age of eighteen. *Quinn v. Johnson*, 247 N.J. Super. 572, 589 A.2d 1077 (1991) (holding that N.J.S.A. 2A:34-23 gives the courts broad authority to continue orders for children over the age of eighteen); *Sakovits v. Sakovits*, 178 N.J. Super. 623, 429 A.2d 1091 (1981) (duty to assure the necessary support for the education of a child over the age of eighteen); *Hoover v. Voightman, I*, 103 N.J. Super. 535, 248 A.2d 136 (1968) (order to increase support for a child over the age of 18 who was attending college).

In the case before us, plaintiff and defendant were both represented by attorneys at the time of their divorce and their attorneys signed the 1982 Final Judgment of Divorce. The New Jersey court had the authority to order child support until the age of twenty-two under its state law. The record shows the child, born on 3 December 1979, was eighteen and attending college in New Jersey and therefore not emancipated under New Jersey case law at the time of the second transmittal request in 1998 and when the 1998 order was entered. *Schumm v. Schumm*, 122 N.J. Super. 146, 299 A.2d 423 (1973) (there is no fixed age for emancipation, custodial parent primarily responsible for determining the factors, such as education, which act to continue a child's dependence upon support); *Keegan v. Keegan*, 326 N.J.

Super. 289, 741 A.2d 134 (1999) (child would not be emancipated, for support purposes when she had plans to attend college and had not moved beyond the sphere of her parents). Therefore, the courts of this state are required under FFCCSOA and UIFSA to enforce the New Jersey support order, until the child of the parties reaches the age of twenty-two.

Plaintiff did not consent to the jurisdiction of this state to modify the New Jersey order in 1995 and New Jersey therefore retained continuing, exclusive jurisdiction over the order. The North Carolina trial court was required to give the New Jersey order full faith and credit, enforcing the order and interpreting the order according to the law of the state of New Jersey. The order of the trial court is vacated and this action is remanded to the trial court for the entry of an order consistent with UIFSA, FFCCSOA, and this opinion.

Vacated and remanded.

Judges WYNN and TIMMONS-GOODSON concur.

CITY OF HILLSBOROUGH, PLAINTIFF v. SAMUEL M. HUGHES, DEFENDANT

No. COA99-1393

(Filed 5 December 2000)

1. Eminent Domain— fair market value of land—timber value—unit rule—not adopted

The trial court in a condemnation action properly admitted testimony regarding the separate value of timber in estimating the fair market value of the land and correctly instructed the jury on the issue. The unit rule is not adopted in this case; the jury should be aware of enhancing components in determining fair market value because this is testimony which any informed appraiser or purchaser would consider. It is not necessarily misleading to allocate values to enhancing components where the ultimate opinions of expert appraisers fix the difference between the value of the property as a whole before the taking and the value after the taking. In those instances where it may be misleading for a witness to add separate values, opposing counsel is

permitted on cross-examination to illustrate the potential invalidity of this approach by bringing out the value of comparable properties sold as a unit.

2. Evidence— eminent domain—value of land—basis of expert opinion

The testimony of an expert in a condemnation action as to the value of timber on the property sufficiently reflected the fair market value at the time of the taking in April 1997 where the numbers composing his estimate were in part derived from a September 1996 appraisal, but he sufficiently updated the estimate by considering the timber market between the appraisal and the taking.

3. Evidence— eminent domain—value of land—expert testimony—reasonable degree of certainty

The opinion of an appraiser in a condemnation action was to a reasonable degree of certainty where there was no indication of a problem with regard to testimony concerning his report, but the Town injected new considerations into the valuation methodology on cross-examination. His uncertainty as to this new matter did not disqualify him as an expert; it was for the jury to determine the weight and significance of his testimony.

Appeal by plaintiff from judgment entered 7 June 1999 by Judge Wiley F. Bowen in Orange County Superior Court. Heard in the Court of Appeals 20 September 2000.

G. Nicholas Herman for the plaintiff-appellant.

D. Michael Parker for the defendant-appellee.

LEWIS, Judge.

The Town of Hillsborough appeals from a judgment fixing compensation in a condemnation proceeding. The property involved is a 93.112-acre parcel of land located in Cedar Grove Township, Orange County, North Carolina. The Town condemned 79.767 acres of this parcel for construction of a reservoir, leaving a 13.345-acre parcel remaining. Pursuant to N.C. Gen. Stat. § 40A-64(b)(I), the jury awarded just compensation as the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remainder immediately after the taking, fixing compensation for the 79.767-acre tract at $323,073. A judgment in

that amount was entered on 7 June 1999, from which the Town appeals.

[1] The first issue on appeal surrounds the methods of valuation used by one of Hughes's expert witness, Charles J. Moody, at trial. The evidence indicates the tract of land taken in this case had on it a significant amount of timber. The Town contends the trial court erred in admitting Moody's testimony as to the separate value of this timber in estimating the fair market value of the land. The Town argues this separate valuation of timber violated the "unit rule" of valuation, a rule that prevents an award of just compensation from assigning separate values to component parts of the property and requires that improved property be valued as a whole. 4 Julius Sackman, *Nichols on Eminent Domain* § 13.09[5] (rev. 3d ed. 1997). For example, an appraiser cannot testify to one value for the land, another value for the water rights, and another value for the timber. As to the rationale underlying this rule, it has been stated that "[t]he fair cash market value of improved property is not the sum of its component parts, i.e., the land and improvements valued separately. To avoid misleading and confusing the jury, the evidence should be confined to the value directly at issue, which is the value of the improved property as a whole." *Department of Transp. v. First Bank of Schaumburg*, 631 N.E.2d 1145, 1149 (Ill. App. Ct. 1992) (citations omitted); *see also Department of Transp. v. Willis*, 299 S.E.2d 82, 83 (Ga. Ct. App. 1983) ("[Evidence of] all elements and uses of the land may be taken into consideration to determine the market value of the land taken and the consequential damages to the land not taken. However . . . a witness may not be permitted to testify separately as to the value of each element. The land and its natural components are one subject matter and what is required is evidence of the fair market value of that one subject matter.") (citations omitted); *Cross v. State*, 36 A.D.2d 361, 362 (N.Y. App. Div. 1971) (holding it impermissible for witness to accord value of marketability of the trees separated from the land plus a distinct value for the naked land).

Here, Charles J. Moody, an expert real estate appraiser specializing in the valuation of timber properties, estimated the fair market value of the entire 93.112-acre tract to be $358,500 and the value of the remainder to be $33,500, valuing the 79.767-acre tract at $325,000. When asked to explain the basis for these conclusions, Moody testified he first valued the land based on twelve comparable sales, from which he estimated the fair market value of the property to be $2500 per acre. Concluding that an astute seller would sell approximately

$125,000 of timber before putting the property on the market, he then adjusted the value of the property to reflect consideration of the timber. Moody based his estimations on a "Forest Inventory Data Summary Appraisal Report" ("the report") compiled by Richard J. Bernard, Jr., defendant's other expert witness.

Hughes also called Bernard, an expert in timber valuation, to corroborate Moody's testimony regarding the report. The report was prepared on 25 September 1996, in response to a letter sent to Hughes by the Town urging him to have the timber on the tract appraised. The report estimated the fair market value of a clear cut of the timber (removing all marketable timber) located on the condemned parcel to be $160,000, and the fair market value of a selective cut of the timber (30-80% removal) located on the condemned parcel to be $131,360.

Our courts have never explicitly addressed the propriety of the unit rule. A panel of this Court, however, did prohibit separate valuation testimony in *Highway Comm. v. Mode*, 2 N.C. App. 464, 469, 163 S.E.2d 429, 432 (1968); *see also In re Condemnation of Lee*, 85 N.C. App. 302, 305, 354 S.E.2d 759, 763 (1987) (alluding to the unit rule in dicta, in reference to the fair market value of land containing mineral deposits). In *Mode*, the landowner's appraiser in a condemnation case testified as to the separate value of a stone deposit on the land. *Mode*, 2 N.C. at 469, 163 S.E.2d at 432. The experts testified to their value on a per ton basis, stating both the value and quantity. *Id.* The Court ultimately held that the appraiser could not opine a per ton value of the stone, but it did allow the existence of the stone deposits to be considered by the jury "insofar as it influenced the fair market value of the land at the time of the taking." *Id.*

We find *Mode* to be somewhat self-contradictory and all in all, not instructive. The Court did not explain and we cannot discern, practically speaking, how the jury is to consider the existence of the stone deposit where testimony regarding its separate value is prohibited. In our opinion, the *Mode* Court's prohibition of separate valuation testimony prevents an appraiser from explaining the true basis for his estimate of the fair market value of the property. In a condemnation proceeding, the jury is specifically required to determine the fair market value of the property. N.C. Gen. Stat. § 136-112(1) (stating that the measure of damages to be used in condemnation cases in which the State does not take the plaintiff's property in its entirety is to be "the difference between the *fair market value* of the entire tract

immediately prior to said taking and the *fair market value* of the remainder immediately after said taking"). Because testimony regarding the enhancing components of the land is that which any informed appraiser or purchaser would necessarily consider in ascertaining the fair market value of property, *United States v. Wise*, 131 F.2d 851, 852 (4th Cir. 1942), the jury, in determining fair market value, should also be made aware of such enhancing components. Preventing an appraiser witness from disclosing such information seems to be at odds with the practice of real estate appraisal, and prevents an accurate reflection for the jury of the fair market value of the condemned property.

Our own Fourth Circuit shares these concerns with respect to valuation testimony. In *Cade v. United States*, 213 F.2d 138 (4th Cir. 1954), the court refused to prohibit testimony as to the separate valuation of enhancing components of the land. The landowner's expert witness valued the land taken at $35,070, and explained to the jury in detail that he arrived at this sum by separately valuing bottom land, upland, woodland, and buildings. *Id.* at 140. He described in detail the buildings on the property and gave what he considered to be the value of each. *Id.* The trial judge struck his testimony on the ground that in arriving at a fair market value it is not proper to show separate valuations of component parts, i.e., that the testimony violated the unit rule. *Id.* Two other witnesses similarly testified as to the value of granite rock deposit on the land and their evidence was also excluded. *Id.* at 141.

The *Cade* court upheld the expert's method of valuation, noting "The trial judge was correct in thinking that the property should be valued as a whole for the purpose of assessing compensation for the taking; but this does not preclude the admission of testimony showing particular elements of value for consideration by the jury in arriving at the overall value which they are required to find as the basis for compensation." *Id.* at 142. The court concluded that valuation of the land as a whole after giving a valuation of the various parts was justified, since this was the manner in which any man of intelligence would have arrived at a valuation for "ordinary business purposes." *Id.* at 140. The court noted, "[W]e know of no reason why a witness testifying under oath as to his opinions should not arrive at a valuation in the same way." *Id.* at 140.

Two years earlier, the Fourth Circuit addressed this valuation issue with respect to timber. In *United States v. 5139.5 Acres of Land*, 200 F.2d 659, 661 (4th Cir. 1952), the Fourth Circuit reversed

the decision of the trial court to exclude evidence of the separate value of timber. The court in that case stated, "The principal reason given by the trial judge for excluding the evidence . . . that the land and timber should be valued as a whole and not separately, while a sound rule of law, was no reason for excluding the evidence as to the separate value of the timber, which was a matter to be considered in valuing the two together." *Id.*

The principles underlying the Fourth Circuit's refusal to prohibit testimony as to separate components of condemned property was explained in *United States v. 25.406 Acres of Land*, 172 F.2d 990 (4th Cir. 1949):

> Certainly such matters would be considered by any business man in selling, buying or valuing the property; and when the court adopts the standards of the market place in making valuations there is no reason why it should close its eyes to how the market place arrives at and applies the standards . . . ." It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse."

Id. at 993 (quoting *Wade v. Telephone Co.*, 147 N.C. 219, 225, 60 S.E. 987, 989 (1908)); *see also Wise*, 131 F.2d at 853 (allowing testimony regarding reproduction cost of structural improvements on the property, evidence of the replacement cost of trees and shrubs in arriving at value of property as a whole, since a shrewd purchaser would consider those factors).

In addition, the rationale underlying the unit rule, that the fair market value of improved property is not the sum of its component parts, *see, e.g., First Bank of Schaumburg*, 631 N.E.2d at 1149, is not entirely sound in application. It is not necessarily true that the values of the components of land submitted by an expert will never equal the value of the whole. *North Side Bank v. Urban Redevelopment Authority of Pittsburgh*, 274 A.2d 215, 217 (Pa. Commw. Ct. 1971). However, in those instances where it may be misleading for a witness to add separate values, opposing counsel is permitted on cross-examination to illustrate the potential invalidity of this approach by bringing out the value of comparable properties sold as a unit. *Id.* Where the ultimate opinions of expert appraisers fix the difference between the value of the property as a whole before the taking and the value of the property as a whole after the taking, it is not necessarily mis-

leading to allocate certain values to the enhancing components of property. *Id.*

We thus refuse to adopt the unit rule in this case, and hold that Moody's testimony regarding the separate valuation for the timber was properly admitted into evidence. We note also the jury instruction comports with our holding on this issue. The jury here was instructed as follows:

> The fair market value of any property is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so . . . . In determining the fair [market] value of the property, you may take into consideration all the factors you conclude affected the fair market value of this property on the date of the taking . . . . If you are persuaded that the existence of the timber on this property affected the market value, you may take this into consideration in your determination of the fair market value of the property. However, you may not add the timber that might have been or could have been removed from this property.

(2 Tr. at 161-62). As previously discussed, the task of the jury is to determine the fair market value of the condemned property. We have concluded that it is proper to consider separate values in determining the fair market value of the property as a whole. As indicated in the instruction, once that fair market value is determined, the jury may not then add any amount for separate enhancing components of the property, which then, would constitute double counting.

[2] The Town next contends that Bernard's testimony as to the value of the timber should have been excluded, as it did not reflect the value at the time of the taking, citing *City of Kings Mountain v. Goforth*, 283 N.C. 316, 322, 196 S.E.2d 231, 236 (1973) (market value of the property is to be determined on the basis of conditions existing at the time of the taking). At the time of trial, Bernard had twice appraised the timber on Hughes's property—once in June 1996 and again in September 1996. The taking occurred on 25 April 1997. At trial, Bernard used the numbers reflected in his September 1996 report to derive an estimated fair market value of the timber in April 1997, arriving at a fair market value $583.16 more than his September 1996 report reflected. He substantiated his opinion by explaining his tracking of the market progression of timber sales since the September 1996 appraisal, and by reviewing market data for the

sale of timber in North Carolina at the time of the taking. Although the numbers composing Bernard's estimate were, in part, derived from his September 1996 appraisal, he sufficiently updated this estimate by considering the timber market during the months between and at the time of the taking. We thus conclude Bernard's testimony sufficiently reflected the fair market value of the timber at the time of the taking.

[3] The Town also contends that Bernard admitted at trial that none of his appraisals were to a reasonable degree of "appraiser" certainty, but were no more than "educated guesses." Specifically, the Town points to its cross-examination of Bernard, in which it asked him to consider the value of the timber on the property given potential "stream buffers," or, areas in which timber may not be cut. The Town asked Bernard to assume such a buffer existed on twenty-five percent of the property, and to adjust accordingly his appraisal of the standing timber which he discussed on direct examination. Bernard responded that an answer would require some investigative work, but estimated the value would be affected from fifteen to thirty percent, and admitted this response was a "guesstimate." (2 Tr. at 16).

Bernard was called by Hughes to testify regarding his timber valuation report of the subject property, and there is no indication in the record or by the Town of a certainty problem in that regard. On cross-examination, the Town, seeking to undermine his report, injected new considerations into the valuation methodology. His uncertainty as to this new matter on cross-examination did not disqualify him as an expert in this case. It was for the jury to determine the weight and significance to be attached to his testimony, which the Town sought to undermine on cross-examination.

In light of our rejection of the unit rule of valuation in this case, it is unnecessary to address the Town's remaining argument.

Affirmed.

Judges WYNN and HUNTER concur.

MARTHA HILLARY SCHOUT, PLAINTIFF v. ANNE COOPER SCHOUT AND WACHOVIA BANK & TRUST, N.A., DEFENDANTS

No. COA99-1157

(Filed 5 December 2000)

1. Appeal and Error— appealability—grant of summary judgment—interlocutory order—substantial right

Although defendant's appeal from the trial court's grant of summary judgment in favor of plaintiff is from an interlocutory order, a substantial right is affected by the trial court's order directing Wachovia to deliver the corpus of an account to plaintiff when defendant is supposed to maintain the assets for plaintiff's educational needs, because: (1) defendant, as custodian of the monies and securities held in the pertinent Wachovia brokerage account has a right, if not a duty, to preserve those assets for the benefit of plaintiff and to ensure that they are used for the purpose intended by the donors; and (2) plaintiff could dispose of all or most of the assets before this matter comes to a full and final resolution.

2. Gifts— Uniform Gifts to Minors Act—Uniform Transfers to Minors Act—custodianship—age entitled to custodial property

The trial court did not err by granting summary judgment to plaintiff on the issue of whether plaintiff's right to receive the custodial property held in a Wachovia account created by her grandparents in December 1980 under the provisions of the North Carolina Uniform Gifts to Minors Act (UGMA) vested upon her eighteenth birthday, even though Wachovia on its own accord established the account under the provisions of the Uniform Transfers to Minors Act (UTMA) which superseded the UGMA and provides that a custodianship terminates when the beneficiary becomes twenty-one, because: (1) N.C.G.S. § 33A-22(b) provides that all UTMA provisions, including those regarding the age of majority, apply to custodial relationships created under the UGMA unless the application of any provision would impair a constitutionally vested right or extend the duration of a relationship in existence on 1 October 1987; and (2) N.C.G.S. § 33A-22(c) prohibits application of the UTMA's age provisions to custodianships created outside of the UGMA, if they terminated before 1 October 1987 as a result of the minor reaching majority age.

3. Setoff and Recoupment— out-of-pocket payments—additional time to state claim

The trial court did not deprive defendant custodian of the monies and securities held in a Wachovia brokerage account of a reasonable opportunity to pursue her right of setoff for her out-of-pocket payments toward plaintiff's education, because even though defendant failed to assert a counterclaim alleging her right of setoff, the trial court allowed her additional time to state her claim by directing Wachovia not to release $125,000 of the funds in the brokerage account until the expiration of 30 days or a further order of the court directed a release of the funds.

Appeal by defendant Anne Cooper Schout from order entered 22 June 1999 by Judge Marcus Johnson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 17 August 2000.

Templeton & Raynor, P.A., by Kenneth R. Raynor and Erik A. Schwanz, for plaintiff-appellee.

Joe T. Millsaps for defendant-appellant Anne Cooper Schout.

TIMMONS-GOODSON, Judge.

Anne Cooper Schout (hereinafter, "defendant") appeals from an order of partial summary judgment directing Wachovia Bank and Trust to deliver to Martha Hillary Schout (hereinafter, "plaintiff") all funds, with the exception of $125,000, held in account No. 101-10522-1-2. Having carefully considered the record, briefs, and arguments of counsel, we affirm the ruling of the trial court.

The facts relevant to this appeal are summarized as follows: Plaintiff, defendant's daughter, was born on 30 November 1980. When plaintiff was three weeks old, defendant's parents, Mr. and Mrs. P. H. Cooper, gave plaintiff one hundred shares of Abbott Laboratory Stock to be used for her education. The gift was made pursuant to the provisions of the North Carolina Uniform Gifts to Minors Act (hereinafter, the "UGMA"), and defendant was appointed to serve as custodian of the stock. Under the UGMA, the custodial relationship was to terminate when plaintiff attained eighteen years of age. *See* N.C. Gen. Stat. § 33-68 (1) (1986) (now repealed).

In 1981, the original 100 shares of Abbott stock split 2 for 1, and at the advice of the donors, defendant opened a dividend reinvestment account for the stock splits at Bank of Boston. In December of

1981, the Coopers gave plaintiff an additional 200 shares of Abbott stock. All stock splits and all dividends earned from the stock were deposited into the Bank of Boston account.

For several years, defendant allowed the stock to grow and financed plaintiff's education with her own funds. Then, in the summer of 1994, defendant found it necessary to sell some of the stock to help pay plaintiff's private school tuition. Consequently, defendant transferred 300 shares of Abbott stock to a brokerage account, No. 101-10522-1-2, at Wachovia Bank and Trust (hereinafter, "Wachovia"), which procured the sale. The bank, on its own accord, established the account under the provisions of the Uniform Transfers to Minors Act (hereinafter, the "UTMA"), which became effective 1 October 1987 and superseded the UGMA. *See generally*, N.C. Gen. Stat. § 33A-1, *et seq.* (1999). Under the UTMA, a custodianship terminates when the beneficiary becomes twenty-one years old. N.C. Gen. Stat. § 33A-20(1) (1999).

Defendant had additional shares of stock sold in 1997 to pay a portion of plaintiff's tuition. The profits from the sale also went toward the purchase of a car and computer for plaintiff. In 1998, after becoming dissatisfied with the services rendered by Bank of Boston, defendant closed the dividend reinvestment account with the institution and transferred all remaining stock and dividends to the Wachovia brokerage account. Later that year, defendant authorized the sale of 300 to 400 shares of stock, the proceeds of which paid the tuition for the first semester of plaintiff's senior year at Country Day.

Plaintiff reached her eighteenth birthday on 30 November 1998. One month later, she dropped out of school and moved to Atlanta, Georgia with a man who was ten years her senior and had no discernible means of support. In response to plaintiff's behavior, defendant caused 3,100 shares of stock to be sold in order to recoup the money she had spent on plaintiff's private school education. The sale proceeds were deposited in the Wachovia brokerage account.

Following her eighteenth birthday, plaintiff demanded custody and control of the assets in Wachovia account No. 101-10522-1-2, i.e., more than 3,000 shares of Abbot stock and approximately $150,000 in cash. Citing the provisions of the UTMA, defendant claimed that plaintiff was not entitled to the funds, as she had not yet attained the age of twenty-one. On 26 January 1999, plaintiff filed a complaint

against defendant and Wachovia alleging breaches of common law fiduciary duties, breaches of fiduciary duties under the UGMA, and conversion. Plaintiff also sought a writ of mandamus directing Wachovia to transfer all monies and securities remaining in the account to plaintiff. On cross-motions of the parties for summary judgment, the trial court entered an order directing Wachovia to surrender all funds held in account No. 101-10522-1-2, with the exception of $125,000, to which defendant claims a right of set-off. From this order of partial summary judgment, defendant appeals.

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[1] Before proceeding to the merits of defendant's arguments, we must determine whether the present appeal is premature. To be sure, the order from which defendant appeals is interlocutory, in that it disposes of fewer than all of the claims between the parties. The record does not show that the trial court certified the order as immediately appealable pursuant to Rule 54(b) of our Rules of Civil Procedure. Hence, the propriety of this appeal turns on whether the order at issue adversely affects a substantial right of defendant. We conclude that it does.

As our Supreme Court recognized in *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978), "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied." *Id.* at 208, 240 S.E.2d at 343. The reason for the difficulty in applying the test is that "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Id.* The test has two prongs: First, the right affected by the order of the trial court must be a "substantial" one. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5, 362 S.E.2d 812, 815 (1987). A "substantial right" is "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." *Oestreicher v. Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (adopting the definition of "substantial right" appearing in Webster's Third New International Dictionary (1971)), *declined to follow on other grounds*, *Day v. Coffey*, 68 N.C. App. 509, 315 S.E.2d 96 (1984). The second prong of the test is that the ability to enforce the right "must be lost, prejudiced or . . . less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry*, 88 N.C. App. at 6, 362 S.E.2d at 815.

In the case *sub judice*, defendant, as custodian of the monies and securities held in Wachovia brokerage account No. 101-10522-1-2, has a right, if not a duty, to preserve those assets for the benefit of plaintiff and to ensure that they are used for the purpose intended by the donors. We are of the opinion that this right is substantial and that the order of the trial court directing Wachovia to deliver the corpus of the account to plaintiff jeopardizes defendant's right to maintain the assets for plaintiff's educational needs. Furthermore, since plaintiff could dispose of all or most of the assets before this matter comes to a full and final resolution, prompt review of the order is necessary to protect defendant's right. Therefore, we hold that defendant's appeal is properly before us, and we turn now to the questions presented.

[2] Defendant argues first that the trial court erroneously granted summary judgment to plaintiff on the issue of whether plaintiff's right to receive the custodial property held in Wachovia account No. 101-10522-1-2 vested upon her eighteenth birthday. Defendant contends that pursuant to the provisions of the UTMA, plaintiff is not entitled to possession and control of the property until she reaches twenty-one. We must disagree.

Summary judgment is appropriate if the moving party demonstrates that the pleadings, depositions, and other evidentiary materials create no triable issue of fact and that the movant is entitled to judgment as a matter of law. *Lynn v. Burnett*, 138 N.C. App. 435, 437-38, 531 S.E.2d 275, 278 (2000). The moving party may achieve this result in one of two ways:

> "(1) by showing that an essential element of the opposing party's claim is nonexistent; or (2) [by] 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 [her] claim."

Whitman v. Kiger, 139 N.C. App. 44, 46, 533 S.E.2d 807, 807-08 (2000) (quoting *Wilhelm v. City of Fayetteville*, 121 N.C. App. 87, 89, 464 S.E.2d 299, 300 (1995) (citation omitted)). The trial court, in deciding whether summary judgment is proper, must examine the evidence in the light most favorable to the non-moving party, drawing all legitimate inferences and intendments to her advantage. *Meares v. Jernigan*, 138 N.C. App. 318, 320, 530 S.E.2d 883, 885 (2000).

In matters of statutory construction, this Court's task is to effectuate the intent of the legislature, *Whitman*, 139 N.C. App. at 46, 533

S.E.2d at 808, which is revealed in "the language of the statute, the spirit of the statute, and what it seeks to accomplish," *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983). A statute that is facially clear and unambiguous, however, requires no judicial construction. *Carrington v. Brown*, 136 N.C. App. 554, 558, 525 S.E.2d 230, 234, *disc. review denied*, 352 N.C. 147, 543 S.E.2d 892 (2000). Instead, we "must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* (quoting 27 Strong's North Carolina Index 4th, *Statutes* § 28 (1994) (footnotes omitted)). Moreover, where multiple statutory provisions address the same subject matter, they must be construed together and harmonized, if possible, so that each provision is given effect. *Jordan v. Foust Oil Company*, 116 N.C. App. 155, 163, 447 S.E.2d 491, 496 (1994).

The parties in the instant case do not dispute that the 1980 and 1981 gifts of Abbott stock were made pursuant to the UGMA and that at the time of the gifts, the age of majority in North Carolina was eighteen. As previously noted, however, the UGMA was repealed effective 1 October 1987 and was superseded by the UTMA, under which a custodianship terminates upon "[t]he minor's attainment of 21 years of age." N.C. Gen. Stat. § 33A-20 (1999). As to the effect of the new statute on existing custodial relationships, section 33A-22 of the UTMA relevantly provides as follows:

> (b) This Chapter applies to all transfers made before October 1, 1987, in a manner and form prescribed in the Uniform Gifts to Minors Act of North Carolina, except insofar as the application impairs constitutionally vested rights or extends the duration of custodianships in existence on October 1, 1987.
>
> (c) G.S. 33A-1 and G.S. 33A-20 with respect to the age of a minor for whom custodial property is held under this Chapter shall not apply to custodial property held in a custodianship that terminated because of the minor's attainment of the age of majority and before October 1, 1987.

N.C. Gen. Stat. § 33A-22 (b) & (c) (1999).

Plaintiff argues that under the plain language of section 33A-22(b), the UTMA age provisions do not apply to the custodianship established for her by her grandparents, because to do so would "impair[] [her] constitutionally vested rights" and would "extend[] the

duration of [the] custodianship[]." *See id.* Plaintiff, therefore, contends that the custodianship terminated on her eighteenth birthday. Defendant, on the other hand, takes the position that section 33A-22(c) excludes application of the UTMA age provisions only where the custodianship terminated prior to 1 October 1987 as a result of the minor reaching the age of majority. Thus, defendant asserts that the custodianship at issue here continues until plaintiff reaches the age of twenty-one.

Contrary to defendant's position, we do not believe that sections 33A-22(b) and (c) are repugnant. Section 33A-22(b) speaks only to "transfers made . . . in a manner and form prescribed in the Uniform Gifts to Minors Act." N.C.G.S. § 33A-22(b). The UGMA was but one means of transferring property to minors, *see* N.C. Gen. Stat. § 33-76(b) (1986) (now repealed) (explaining that UGMA provided alternative, and not exclusive, method for making gifts to minors), and the Act dealt solely with gifts of securities, money, and life insurance, *see* N.C. Gen. Stat. §§ 33-69(a), 33-68(5)a (1986) (now repealed). It follows then that prior to 1 October 1987, the effective date of the UTMA, there existed custodianships outside of the UGMA. These custodianships, we conclude, are the focus of section 33A-22(c).

Accordingly, we construe section 33A-22(b) to mean that all UTMA provisions, including those regarding the age of majority, apply to custodial relationships created under the UGMA, unless the application of any provision would impair a constitutionally vested right or extend the duration of a relationship in existence on 1 October 1987. In turn, we interpret section 33A-22(c) to prohibit application of the UTMA's age provisions to custodianships created outside of the UGMA, if they terminated before 1 October 1987 as a result of the minor reaching majority age. We, therefore, hold that under section 33A-22(b), the custodianship in question terminated when plaintiff attained eighteen years of age, and the trial court correctly entered summary judgment for plaintiff on the issue of whether she is entitled to custody and control of the custodial property.

[3] Defendant further argues that the order of the trial court deprived her of a reasonable opportunity within which to pursue her right of set-off for her out-of-pocket payments toward plaintiff's education. However, notwithstanding that defendant failed to assert a counterclaim alleging her right of set-off, the court graciously allowed her additional time to state her claim, directing Wachovia not to release $125,000 of the funds in account No. 101-10522-1-2 "until the expiration of 30 days, or a further order of this Court di-

recting a release of the funds, whichever occurs first." As we find nothing unreasonable about the court's order, we reject defendant's argument.

Based upon the foregoing, we affirm the order of summary judgment for plaintiff.

Affirmed.

Judges WYNN and McGEE concur.

CHRISTINE STALAS COOPER, PLAINTIFF v. LISA SHEALY, DEFENDANT

No. COA99-1276

(Filed 5 December 2000)

1. Appeal and Error— appealability—denial of motion to dismiss—jurisdiction

Although the denial of a motion to dismiss is generally not immediately appealable, the Court of Appeals will consider defendant's appeal from the denial of her motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) based on lack of personal jurisdiction, because N.C.G.S. § 1-277(b) provides a movant the right to an immediate appeal where there has been an adverse ruling as to the jurisdiction of the court over the person or property of defendant.

2. Jurisdiction— personal—long-arm statute

The trial court did not err by denying defendant's motion to dismiss plaintiff's claims of alienation of affections and criminal conversation, and by concluding that North Carolina's long-arm statute authorized personal jurisdiction over defendant, a South Carolina resident, because: (1) N.C.G.S. § 1-75.4(4)(a) requires only that the action claim injury to person or property within this state in order to establish personal jurisdiction, and plaintiff alleged the necessary elements of each claim; (2) actions for alienation of affections and criminal conversation constitute "injury to person or property" under N.C.G.S. § 1-75.4(3); and (3) plaintiff's claims of injury based on defendant's telephone calls and e-mails were solicitations within the meaning of

N.C.G.S. § 1-75.4(4) based on the facts that plaintiff's injury allegedly occurred within North Carolina and was allegedly caused by defendant's solicitation of the love and affection of plaintiff's husband by telephoning plaintiff's home in North Carolina.

3. Jurisdiction— personal—minimum contacts—convenience

Plaintiff's suit in North Carolina against a South Carolina resident for alienation of affections and criminal conversation does not offend traditional notions of fair play and substantial justice, because: (1) minimum contacts were sufficient for purposes of N.C.G.S. § 1-75.4, especially considering that the alleged injury of the destruction of plaintiff's marriage was suffered by plaintiff allegedly within this state; (2) plaintiff cannot bring the claims for alienation of affections and criminal conversation in South Carolina since that state has abolished those causes of action; (3) North Carolina's legislature and courts have repeatedly demonstrated the importance of protecting marriage; (4) several possible witnesses and evidence relevant to plaintiff's marriage and the destruction thereof would more likely be located in North Carolina; and (5) there is a minimal traveling burden on defendant to defend the claims in North Carolina since she is a resident of our neighboring state.

4. Alienation of Affections; Criminal Conversation— which substantive law to be applied—where tort occurred

Plaintiff must prove that the tortious injuries of defendant's alienation of her husband's affection and criminal conversation occurred in North Carolina before North Carolina substantive law can be applied, and if it is determined that the torts occurred in defendant's state of South Carolina, then no substantive law would apply since none of these alleged acts are torts in that state.

Appeal by defendant from an order entered 19 July 1999 by Judge Susan E. Bray in Guilford County District Court. Heard in the Court of Appeals 13 September 2000.

J. S. Pfaff for plaintiff-appellee.

Floyd and Jacobs, L.L.P., by Robert V. Shaver, Jr., for defendant-appellant.

HUNTER, Judge.

Lisa Shealy ("defendant") appeals the trial court's denial of her motion to dismiss Christine Stalas Cooper's ("plaintiff's") claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) (1999) for lack of personal jurisdiction. Defendant contends that the trial court inappropriately denied her motion because the allegations in plaintiff's complaint neither satisfy the requirements of the North Carolina long-arm statute nor do they establish the necessary minimum contacts between defendant and North Carolina sufficient to meet due process requirements. We disagree. Accordingly, we affirm the trial court's order.

[1] Generally, the denial of a motion to dismiss is not immediately appealable. However, N.C. Gen. Stat. § 1-277(b) (1999) provides a movant the right of immediate appeal where there has been "an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ." *Id. See also Godwin v. Walls*, 118 N.C. App. 341, 455 S.E.2d 473, *petition for disc. review granted but subsequently withdrawn*, 341 N.C. 419, 461 S.E.2d 757 (1995). Therefore, we consider defendant's assignments of error.

On 23 November 1998, plaintiff, a resident of Guilford County, North Carolina, filed a complaint against defendant, a resident of Lexington, South Carolina. Plaintiff's complaint alleged that defendant engaged in criminal conversation with plaintiff's husband, which resulted in the alienation of the affections of her husband. Plaintiff also alleged that defendant intentionally caused her severe emotional distress. Defendant filed a motion to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction, and also pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. In its order, the trial court found that defendant had wrongfully contacted "Plaintiff and Plaintiff's husband by telephone, which contacts include[d] both telephone conversations and telephone transmitted e-mail to Plaintiff's home." In determining whether the court had personal jurisdiction to hear the claim under the North Carolina long-arm statute N.C. Gen. Stat. § 1-75.4(4), the trial court further found that:

> Such contacts were solicitations within the meaning of the statute carried on within this State for the affections of Plaintiff's husband . . . [and made] with the intent of harming the Plaintiff and the Plaintiff's marriage. Further[,] such solicitations and activities in and of themselves harmed the Plaintiff and Plaintiff's marriage.

Thus, the trial court concluded that it had jurisdiction over defendant pursuant to N.C. Gen. Stat. § 1-75.4(4), and that plaintiff's complaint did state claims upon which relief could be granted. Accordingly, defendant's motions to dismiss were denied.

[2] As to the merits of defendant's appeal, "[t]he standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). "The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact." *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999). To resolve a question of personal jurisdiction, the court must engage in a two step analysis. First, the court must determine if the North Carolina long-arm statute's (N.C. Gen. Stat. § 1-75.4) requirements are met. If so, the court must then determine whether such an exercise of jurisdiction comports with due process. *See ETR Corporation v. Wilson Welding Service*, 96 N.C. App. 666, 386 S.E.2d 766 (1990).

N.C. Gen. Stat. § 1-75.4(4) confers *in personam* jurisdiction:

> In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury . . . :
>
> a. Solicitation or services activities were carried on within this State by or on behalf of the defendant[.]

N.C. Gen. Stat. § 1-75.4(4)(a) (1999).

We recognize that "the statute requires only that the action 'claim' injury to person or property within this state in order to establish personal jurisdiction." *Godwin v. Walls*, 118 N.C. App. 341, 349, 455 S.E.2d 473, 480. The statute does not require there to be evidence of proof of such injury. *Id.* Therefore, in order for plaintiff's claim for alienation of affections to withstand defendant's motion to dismiss, plaintiff must have alleged in her complaint that: "(1) plaintiff and [her husband] were happily married and a genuine love and affection existed between them; (2) the love and affection [between them] was alienated and destroyed; and (3) the wrongful and malicious acts of defendant produced the alienation of affections." *Chappell v.*

Redding, 67 N.C. App. 397, 399, 313 S.E.2d 239, 241, *review denied*, 311 N.C. 399, 319 S.E.2d 268 (1984). Furthermore, for plaintiff's criminal conversation action to survive, plaintiff must have alleged that there were sexual relations between defendant and plaintiff's husband. *Horner v. Byrnett*, 132 N.C. App. 323, 511 S.E.2d 342 (1999).

From the record, we see that plaintiff alleged that "[she] and her husband were happily married and genuine love and affection existed between them; which love and affection was alienated and destroyed by the wrongful and malicious acts of the Defendant." Thus, plaintiff has effectively stated a claim for alienation of affections by addressing all of the necessary elements. Plaintiff also alleged that "[t]he Defendant has engaged, and continues to engage in acts of criminal conversation and sexual intercourse with [her] husband," thereby addressing the required element for a criminal conversation claim. For purposes of personal jurisdiction analysis, plaintiff's claims of injury due to defendant's telephone and e-mail solicitations are sufficient.

The question remains whether criminal conversation and alienation of affections are the type of "injury" contemplated by the statute. This Court has stated that the term

> "injury to the person or property" as used in G.S. 1-75.4(3) should be given a broad meaning consistent with the legislative intent to enlarge the concept of personal jurisdiction to the limits of fairness and due process, which negates the intent to limit the actions thereunder to traditional claims for bodily injury and property damages.

Sherwood v. Sherwood, 29 N.C. App. 112, 115, 223 S.E.2d 509, 512 (1976).

Accordingly, this Court has acknowledged that actions for alienation of affections and criminal conversation constitute "injury to person or property" as denoted by N.C. Gen. Stat. § 1-75.4(3). *Golding v. Taylor*, 19 N.C. App. 245, 198 S.E.2d 478, *cert. denied*, 284 N.C. 121, 199 S.E.2d 659 (1973). Furthermore, this Court concluded that the claims for negligent infliction of emotional distress and loss of consortium were similar enough to the claims in *Sherwood* and *Golding* to also be classified as "injur[ies] to person or property" under N.C. Gen. Stat. § 1-75.4(4). *Godwin*, 118 N.C. App. 341, 455 S.E.2d 473. Thus, in the case *sub judice*, since the actions of alienation of affec-

tions and criminal conversation are identical to those in *Golding*, and the present plaintiff claims loss of marital consortium as did the plaintiff in *Godwin*, we will not deviate from precedent. Thus, plaintiff's claims are within the purview of N.C. Gen. Stat. § 1-75.4(4).

The trial judge found that the alleged telephone contacts (including telephone calls and telephone transmitted e-mail) were "solicitations" within the meaning of N.C. Gen. Stat. § 1-75.4(4) and we agree. Plaintiff alleged that defendant telephoned her husband in North Carolina in order to solicit his affections and entice him to leave his family. In addition, plaintiff claimed that she suffered injury, the destruction of her husband's love and affection, as the direct result of defendant's wrongful conduct. We conclude, therefore, that the North Carolina long-arm statute authorizes personal jurisdiction since the plaintiff's injury allegedly occurred within North Carolina and was allegedly caused by defendant's solicitation of plaintiff's husband's love and affection by telephoning plaintiff's home in North Carolina.

[3] Since we have determined that personal jurisdiction is authorized by the long-arm statute, we must now address whether defendant had such minimum contacts with the forum state to comport with due process. *Fraser v. Littlejohn*, 96 N.C. App. 377, 386 S.E.2d 230 (1989). Due process requires that the defendant have "minimum contacts" with the state in order to satisfy " 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). The factors to consider when determining whether defendant's activities are sufficient to establish minimum contacts are: "(1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interests of the forum state, and (5) the convenience to the parties." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114, 516 S.E.2d 647, 650 (1999).

In the principal case, we have no transcript of the hearing and plaintiff's complaint does not allege the number of contacts defendant had with plaintiff's husband here in North Carolina. Therefore, we do not know how many contacts defendant had with plaintiff and her husband in North Carolina. However, we note that federal courts have found personal jurisdiction when the defendant had only minimal contacts with the forum state. See *Brown v. Flowers Industries, Inc.*, 688 F.2d 328 (5th Cir. 1982), cert. denied, 460 U.S. 1023, 75 L. Ed. 2d 496 (1983), and *J.E.M. Corporation v. McClellan*,

462 F. Supp. 1246 (D.Kan 1978) (exercising personal jurisdiction when defendant's sole contact with the forum state was a single phone call from out-of-state).

The quantity of defendant's contacts with North Carolina may not have been extensive. However, we have already determined that the contacts were sufficient for purposes of N.C. Gen. Stat. § 1-75.4, especially considering that the alleged injury under the claim (ultimately the destruction of plaintiff's marriage) was suffered by plaintiff allegedly within this state. Plaintiff claims that there is a direct relationship between the contacts and plaintiff's injuries. Furthermore:

> North Carolina has a strong interest in protecting its citizens from local injury caused by the tortious conduct of foreign citizens:
>
> > "In light of the powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors, the court has more readily found assertions of jurisdiction constitutional in tort cases."

Saxon v. Smith, 125 N.C. App. 163, 173, 479 S.E.2d 788, 794 (1997) (quoting *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 608, 334 S.E.2d 91, 93 (1985)). It is important to note that plaintiff cannot bring the claims for alienation of affections and criminal conversation in South Carolina (defendant's resident state) since that state has abolished those causes of actions. *Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992). Therefore, North Carolina's interest in providing a forum for plaintiff's cause of action is especially great in light of the circumstances. Furthermore, North Carolina's legislature and courts have repeatedly demonstrated the importance of protecting marriage. N.C. Gen. Stat. § 8-57(c) (spouses may not be compelled to testify against each other if confidential information made by one to the other would be disclosed); *Thompson v. Thompson*, 70 N.C. App. 147, 319 S.E.2d 315 (1984), *rev'd on other grounds*, 313 N.C. 313, 328 S.E.2d 288 (1985) (attorneys representing a client in a divorce proceeding may not use contingent fee contracts since they tend to promote divorce and discourage reconciliation); *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (the causes of action for alienation of affections and criminal conversation are still in existence).

Finally, we must consider the convenience to the parties. As mentioned earlier, plaintiff would be unable to bring her claims in South

Carolina (defendant's resident state) since those causes of action are no longer in existence in South Carolina. Furthermore, several possible witnesses and evidence relevant to plaintiff's marriage and the destruction thereof would more than likely be located in North Carolina. In addition, because defendant is a resident of our neighboring state, South Carolina, there is a minimal traveling burden on defendant to defend the claims in North Carolina. For the reasons stated above, we do not believe that allowing plaintiff to bring these claims against defendant in North Carolina in any way "offend[s] 'traditional notions of fair play and substantial justice.' " *International Shoe Co.*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283).

[4] However, we note that the issue of determining which state's substantive law is applicable to plaintiff's claims for alienation of affections and criminal conversation is not before us. For instance, since alienation of affections is a transitory tort, the substantive law of the state where the tort occurred is the applicable law. *See Darnell v. Rupplin*, 91 N.C. App. 349, 371 S.E.2d 743 (1988). Therefore, plaintiff must prove that the tortious injuries, defendant's alienation of her husband's affection and criminal conversation, occurred in North Carolina before North Carolina substantive law can be applied. *Id.* Nevertheless, we find that North Carolina has jurisdiction to hear this case. Should the evidence persuade the trial court that the alleged torts occurred in North Carolina, then our substantive law will apply. Should it be determined that the torts occurred in South Carolina, then no substantive law could apply since none of these alleged acts are torts in that state. In that event, the case would, by necessity, be dismissed.

In sum, both our long-arm statute and federal due process permit exercise of personal jurisdiction by our courts over defendant for alienation of affections and criminal conversation. Accordingly, we affirm the ruling of the trial court.

As to defendant's appeal from the denial of her motion to dismiss pursuant to Rule 12(b)(6), we hold that the appeal is interlocutory thus we will not consider it. *See O'Neill v. Bank*, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Affirmed.

Judges LEWIS and WALKER concur.

MARIKA VON VICZAY, PLAINTIFF v. SELINE THOMS, DEFENDANT

No. COA99-1312

(Filed 5 December 2000)

Premises Liability— fall on icy walkway—knowledge of icy conditions

The trial court properly granted defendant's motion for summary judgment in a negligence action arising from plaintiff's fall on an icy walkway at defendant's house while leaving a party in high heels. Plaintiff testified to her knowledge of the ice on the walkway and is not absolved of her duty to exercise reasonable precaution simply because she claims she was distracted by the lack of light from the house or because her eyes had not adjusted to the darkness.

Judge GREENE dissenting.

Appeal by plaintiff from judgment entered 12 July 1999 by Judge Oliver L. Noble, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 12 September 2000.

John E. Tate, Jr. for plaintiff-appellant.

Frank J. Contrivo and Rick S. Queen for defendant-appellee.

SMITH, Judge.

Plaintiff Marika Von Viczay (plaintiff) appeals the entry of summary judgment in favor of defendant Seline Thoms (defendant). Evidence presented on the motion tended to establish that on the evening of 20 December 1996 plaintiff attended a holiday party at defendant's home as an invited guest. The temperature on the day of the party did not rise above freezing. Snow and ice had fallen the previous night. Defendant's evidence was to the effect that all her walkways were shoveled and salted the day of the party, her driveway was plowed, and therefore, the snow and ice had melted and the walkways were "one hundred percent clear."

Plaintiff's evidence tended to show that she arrived at defendant's house at approximately 9:00 p.m. dressed in an evening gown and shoes with two to three-inch heels. Plaintiff parked her car and proceeded up the front walkway to the house, noticing the grounds surrounding the house were covered in snow and ice. Plaintiff saw

patches of snow and ice along the walkway, but was able to avoid them because the walkway was sufficiently illuminated by light coming from the house.

Plaintiff left defendant's party at approximately 11:30 p.m. She exited through the front door and proceeded down the same front walkway on which she had arrived. Plaintiff had difficulty seeing the walkway because her back was to the light of the house and her eyes had not adjusted to the darkness. After taking approximately ten steps down the walkway, plaintiff slipped on a patch of ice and fell, sustaining injuries which included a compound wrist fracture.

On 17 September 1998, plaintiff filed the instant action alleging defendant's negligence in failing to discover and remove the ice from the front walkway and in failing to warn plaintiff of the dangerous condition. On 1 March 1999, defendant moved for summary judgment, and on 12 July 1999 the trial court granted the motion, finding "no genuine issue as to any material fact" and that defendant is "entitled to a judgment as a matter of law." Plaintiff appeals.

Plaintiff assigns error to the trial court's grant of summary judgment in favor of defendant on grounds that plaintiff presented evidence demonstrating a genuine issue of material fact as to defendant's negligence. It is well established that the standard of review of the grant of a motion for summary judgment requires a two-part analysis of whether, "(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." *Gaunt v. Pittaway*, 139 N.C. App. 778, —, 534 S.E.2d 600, — (2000) (citations omitted).

In order to survive a defendant's motion for summary judgment, a plaintiff must establish a prima facie case of negligence by showing: "(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *LaVelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996). If any such elements are lacking from plaintiff's show of evidence, summary judgment is proper. *See Id.* at 862, 467 S.E.2d at 571.

Our Supreme Court recently abolished the distinction between licensees and invitees and held both are owed the duty of reasonable care. *See Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999). Plaintiff expends considerable effort in her brief to this Court focusing on defendant's knowledge of the dangerous condition. Indeed, defendant's own testimony that she had the driveway plowed and walkways surrounding the house plowed and salted evidences her knowledge of the potential danger. However, the pivotal issue in this case is not defendant's knowledge of the condition, but is plaintiff's knowledge.

A landowner is under no duty to protect a visitor against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered. *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646 (citation omitted), *cert. denied*, 351 N.C. 107, —— S.E.2d —— (1999); *see also Hussey v. Seawell*, 137 N.C. App. 172, 175, 527 S.E.2d 90, 92 (2000). Similarly, a landowner need not warn of any "apparent hazards or circumstances of which the invitee has equal or superior knowledge." *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 105, 479 S.E.2d 259, 262 (1997) (citation omitted). Rather, "[a] reasonable person should be observant to avoid injury from a known and obvious danger." *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 546, 459 S.E.2d 23, 27 (1995) (citation omitted).

In *Bryd v. Arrowood*, 118 N.C. App. 418, 421, 455 S.E.2d 672, 674 (1995), the plaintiff slipped on the floor of the defendant-church after rain water had been tracked into the church. In holding summary judgment for the defendant proper, our Supreme Court emphasized the plaintiff could not forecast evidence that the church had actual or constructive notice of the dangerous condition; rather, the evidence established the plaintiff had equal or superior knowledge of the condition:

> Even if the floor was wet due to the rain that evening, this condition would have been an obvious danger of which plaintiff should have been aware since she knew it was raining outside and it was likely that people would track water in on their shoes. Plaintiff's assertions that the crowded conditions and the presence of young children prevented her from seeing the floor do not overcome the obvious fact that the floor might have been wet due to people tracking in. These factors would only put plaintiff on notice to be extra careful. Since plaintiff and the church had equal knowledge of this obvious danger and since plaintiff has

> not shown that the church had actual or constructive notice that this spot was wet, the church had no duty to warn plaintiff of this potential peril.

Id. at 421-22, 455 S.E.2d at 674.

Similarly, in *Wrenn v. Hillcrest Convalescent Home, Inc.*, 270 N.C. 447, 448, 154 S.E.2d 483, 484 (1967), our Supreme Court affirmed dismissal of the plaintiff's suit where evidence showed the plaintiff had equal or superior knowledge of the icy condition of the defendant's sidewalk on which the plaintiff slipped and fell:

> There is plenary evidence that plaintiff had full knowledge of the freezing and icy condition of the area. The danger created by this condition was obvious, and plaintiff's evidence presents no facts from which it can be inferred that defendant had more knowledge than plaintiff of the alleged dangerous or unsafe condition. Thus, considering all the evidence . . . we hold that the evidence shows no actionable negligence on the part of defendant.

Id. at 448-49, 154 S.E.2d at 484.

In the present case, plaintiff testified to her knowledge of the ice on the walkways; she saw icy patches as she traversed the walkway that led to the front door. Furthermore, as in *Byrd*, plaintiff is not absolved of her duty to exercise reasonable precaution simply because she claims she was distracted by the lack of light from the house or because her eyes had not focused to the darkness. The fact remains that plaintiff, wearing high heeled dress shoes, proceeded down a darkened walkway which she knew contained patches of ice. Defendant had no duty to either protect plaintiff from or warn plaintiff about this obvious danger where the "evidence presents no facts from which it can be inferred that defendant had more knowledge than plaintiff of the alleged dangerous or unsafe condition." *Wrenn*, 270 N.C. at 449, 154 S.E.2d at 484; *see also, e.g., Lorinovich*, 134 N.C. App. at 162, 516 S.E.2d at 646; *Jenkins*, 125 N.C. App. at 105, 479 S.E.2d at 262. The trial court properly granted defendant's motion for summary judgment.

Affirmed.

Judge EDMUNDS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority that no genuine issue of material fact exists regarding whether defendant owed plaintiff a duty. I, therefore, dissent. Additionally, because I believe there is a genuine issue of material fact regarding defendant's duty to plaintiff, I address defendant's argument that plaintiff is barred from recovery on the ground she was contributorily negligent.

Duty

Generally, "there is no duty to protect a lawful visitor against dangers which are either known to him or so obvious and apparent that they reasonably may be expected to be discovered." *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646, *cert. denied*, 351 N.C. 107, — S.E.2d — (1999). An occupier of land, however, has a duty to take precautions against " '*obvious*' " dangers when a reasonable person would " 'anticipate an unreasonable risk of harm to the [visitor] *notwithstanding* [the visitor's] *knowledge, warning, or the obvious nature of the condition.*' " *Southern Railway Co. v. ADM Milling Co.*, 58 N.C. App. 667, 673, 294 S.E.2d 750, 755 (quoting William L. Prosser, *Handbook of the Law of Torts* § 61, at 394-95 (4th ed. 1971) [hereinafter *Law of Torts*]), *disc. review denied*, 307 N.C. 270, 299 S.E.2d 215 (1982). When a plaintiff presents evidence that an unreasonable risk of harm exists, the issue of whether a defendant has "fulfilled its responsibility to keep the premises in a reasonably safe condition so as not to expose [the plaintiff] to unnecessary dangers" is a question of fact for the jury. *Id.* at 674, 294 S.E.2d at 756.

In this case, plaintiff presented evidence that defendant had a party in her home and appropriate attire for the party included dress shoes. Defendant's walkway leading from a parking area to her home contained patches of ice and snow and was illuminated only by lighting coming from inside the home. Visitors to defendant's home used this walkway to enter and leave the home. Based on this evidence, viewed in the light most favorable to the plaintiff, a jury could determine that a reasonable person would "anticipate an unreasonable risk of harm" to a visitor using the walkway regardless of whether the visitor was aware the walkway contained patches of ice and snow. *See id.* at 673, 294 S.E.2d at 755 (conditions such as icy steps that " 'cannot be negotiated with reasonable safety even though the [visitor] is fully aware of [the conditions]' " may create unreasonable risk of harm to the visitor (quoting *Law of Torts* § 61, at 394-95)). Whether

defendant owed a duty to plaintiff and whether that duty was breached was, therefore, a question for the jury.

Contributory negligence

Defendant argues in her brief to this Court that, assuming she breached a duty owed to plaintiff, plaintiff is nevertheless "barred from recovery as a matter of law since there is no genuine issue as to [plaintiff's] own contributory negligence." I disagree.

"[A] plaintiff's right to recover in a personal injury action is barred upon a finding of contributory negligence." *Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998). A plaintiff is contributorily negligent when she fails to use due care to protect herself from risk of injury if the risk would have been apparent to "a prudent person exercising ordinary care for [her] own safety." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980). "In those instances where the landowner retains a duty to [a] lawful visitor even though an obvious danger is present, the obvious nature of the danger is *some* evidence of contributory negligence on the part of the lawful visitor." *Lorinovich*, 134 N.C. App. at 162-63 n.2, 516 S.E.2d at 646 n.2 (emphasis added).

In this case, assuming the jury determined defendant owed a duty to plaintiff and defendant breached that duty, the obvious nature of the danger caused by snow and ice on the walkway would be some evidence that plaintiff was contributorily negligent by walking on the walkway. Plaintiff, however, presented evidence that when she went to leave defendant's party, an employee of defendant unlocked and opened an exit door leading to the walkway and plaintiff exited through the door. The employee locked the door behind plaintiff. Whether a reasonable person would have attempted to reenter defendant's house and ask for assistance under these circumstances is a question of fact for the jury. *See id.* at 163, 516 S.E.2d at 647. Accordingly, I would reverse the trial court's order granting summary judgment in favor of defendant.

STATE OF NORTH CAROLINA v. WILLIAM MARTIN BATES

No. COA99-1376

(Filed 5 December 2000)

1. Evidence— hearsay—medical diagnosis or treatment exception—no intent to obtain treatment

Out-of-court statements made by an alleged child victim of sexual abuse to a psychologist were not made with the intent to obtain medical treatment and thus were not admissible under the medical diagnosis or treatment exception to the hearsay rule, because: (1) the record does not disclose that the psychologist explained to the child the medical purpose of the interview or the importance of truthful answers; (2) the interview was not conducted in an environment emphasizing the need for honesty since it was conducted in a child-friendly room with child-sized furniture and lots of toys; and (3) the child's statements lack inherent reliability based on the nature of the psychologist's leading questions.

2. Evidence— hearsay—victim's statements to psychologist

The trial court erred in an indecent liberties case by admitting a psychologist's testimony recounting an alleged child sexual abuse victim's out-of-court statements without a limiting instruction, because: (1) the trial court explicitly ruled the testimony was substantive evidence and therefore did not limit the jury's consideration of her testimony as corroborative; (2) the psychologist's testimony was both longer and more certain than the child's testimony, and included many facts not mentioned by the child; and (3) the charge of taking indecent liberties with a minor does not require that all jurors agree on the act which formed the basis for the crime, and it is uncertain whether the psychologist's testimony formed the basis of some jurors' opinions.

3. Evidence— opinion testimony—doctor—sexual abuse—improper foundation

The trial court erred in an indecent liberties case by admitting the opinion testimony of a doctor that the child had been abused, because: (1) the doctor testified that the child's body showed no signs of abuse, yet the doctor opined that the child was the victim of sexual abuse based entirely on statements made by the child to a psychologist; and (2) the doctor did not

base her opinion on what the child said, but instead on what the psychologist said happened to the child.

Appeal by defendant from judgment entered 22 February 1999 by Judge Henry V. Barnett, Jr. in Superior Court, Harnett County. Heard in the Court of Appeals 11 October 2000.

Michael F. Easley, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.

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

WYNN, Judge.

The primary issue on appeal is whether the defendant who was convicted by a jury on one count of taking indecent liberties with a minor is entitled to a new trial under the recent ruling of our Supreme Court in *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000). Having carefully reviewed that decision in light of the facts of this case, we are compelled to follow the law of our Supreme Court and grant the defendant a new trial. The defendant also pled guilty to a second charge of taking indecent liberties against a different child and received a separate sentence of seven years of probation. However, the defendant does not appeal from that conviction, nor does it appear he would have the right to do so under the limited grounds provided by N.C. Gen. Stat. § 15A-1444 (1997). Since he does not challenge the conviction stemming from his guilty plea, the sentence of seven years of probation remains in effect. *See* N.C.R. App. P. 10 and 28 (the scope of our review is limited to assignments of error set forth in the record on appeal and argued in the briefs).

The facts pertinent to the issues before us involve testimony that was rendered by two expert witnesses. First, Lauren Rockwell-Flick, a psychologist with the Sexual Abuse Team at Wake Medical Center testified that she talked to the alleged child victim for about ten minutes, during which the child told her a number of things about the defendant: That he showed her his penis and made her wash it, that he performed cunnilingus on her, that he "french kissed" her, had intercourse with her, and put his finger and a crayon in her rectum. Rockwell-Flick concluded that the defendant had abused the child.

Second, Dr. Denise Everette of Wake Medical Center performed a physical examination of the child. Although she found no physical evidence of abuse, Dr. Everette relied on the information given to her by Rockwell-Flick and concluded that the child had been sexually abused.

Following his conviction and after filing his brief with this Court, the defendant moved for appropriate relief citing our Supreme Court's pronouncement of a new interpretation of the medical treatment hearsay exception under North Carolina Rule of Evidence 803(4) in *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000). In that case, our Supreme Court held that "the proponent of Rule 803(4) testimony must affirmatively establish that the declarant . . . made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* at 287, 523 S.E.2d at 669. This proclamation overruled a long line of cases, such as *State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988), which downplayed the importance of the declarant's motives, so long as the declarant's statements led to medical treatment.

Our Supreme Court in *Hinnant* pointed out the difficulty of determining whether a declarant—especially a young child—understood the purpose of his or her statements, and set forth the general rule that the court "should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 670. Some factors to consider in determining whether a child had the requisite intent are whether an adult explained to the child the need for treatment and the importance of truthfulness; with whom and under what circumstances the declarant was speaking; the setting of the interview; and the nature of the questions. *See id.*

The defendant argues that much of the testimony offered in his case—particularly that offered by Rockwell-Flick—was inadmissible under the new *Hinnant* test. The State responds first by arguing that this Court should not consider this new argument because N.C. Gen. Stat. § 15A-1419 provides that we may deny a motion for appropriate relief if:

> Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

N.C. Gen. Stat. § 15A-1419(a)(3) (2000). However, this statute is inapplicable to the present motion since it applies only to appeals *after* the first appeal. The subject appeal is the defendant's *first* appeal, so N.C. Gen. Stat. § 15A-1415 controls and allows the present motion.

In North Carolina, a defendant may file a motion for appropriate relief if:

> There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

N.C. Gen. Stat. § 15A-1415(b)(7) (2000). The *Hinnant* decision resulted in a substantial change in the application of N.C.R. Evid. 803(4) and the Supreme Court expressly stated that the decision applied to all cases currently on appeal. *See Hinnant*, 351 N.C. at 287, 523 S.E.2d at 669. Thus, the defendant has the right under N.C. Gen. Stat. § 15A-1415(b)(7) to file his motion, and we have the duty to consider it. Since the defendant's motion and the State's response adequately address the impact of *Hinnant* on the case at bar, we will treat both documents as supplemental briefs and address the merits of their arguments in this opinion.

The State argues that the case at bar is distinguishable from *Hinnant* because the minor child in this case *did* have a treatment motive when she made statements to various people, and the minor child in the case at bar testified and therefore most of the challenged testimony is *corroborative*, not substantive, evidence. We disagree.

[1] First, we note that the facts in the case at bar are very similar to the facts in *Hinnant*, at least in terms of Rockwell-Flick's interview methods and testimony. As in *Hinnant*, the record on appeal fails to show that the child had a treatment motive when she told Rockwell-Flick about the defendant's conduct. In fact, when the child arrived at Rockwell-Flick's office, Rockwell-Flick asked her why she was there. The child responded that she did not know why she was there. Although Rockwell-Flick eventually told the child that it was her job to "talk to kids about their problems," she never made it clear that the child needed treatment nor did she emphasize the need for honesty. Further, like the child in *Hinnant*, the child in this case talked to Rockwell-Flick in a "child-friendly" room that contained only child-sized furniture and lots of toys. This environment, according to our Supreme Court, does not emphasize the need for honesty. *See id.* at

290, 523 S.E.2d at 671. Finally, as in *Hinnant*, the child's statements lack inherent reliability because of the nature of Rockwell-Flick's leading questions. *See id.* Indeed, almost none of the child's statements about the defendant were spontaneous, but rather responded to direct questions such as whether anyone had ever touched or kissed her.

[2] Second, although the child testified, unlike the minor child in *Hinnant*, we cannot treat Rockwell-Flick's testimony as corroborative testimony since the trial court *explicitly ruled that it was substantive evidence.* Consistent with that ruling, the trial court did not limit the jury's consideration of her testimony as corroborative. *See State v. Quarg*, 334 N.C. 92, 101-02, 431 S.E.2d 1, 5 (1993) (holding that a trial court errs when it fails to give a limiting instruction properly requested by a party).

In this case, there was no physical evidence of abuse and the child's testimony was fairly brief and consisted mainly of responses to leading questions. The State relied heavily on the testimony of adults who interviewed the child, including Rockwell-Flick's testimony. Indeed, her testimony was both longer and more certain than the child's testimony, and included many facts not mentioned by the child, such as the possibility of french kissing and the insertion of objects into her rectum. Had this evidence been excluded or limited to corroborative purposes only, there is a reasonable possibility that the jury would have reached a different verdict. This is especially true in light of the fact that the charge of taking indecent liberties with a minor does not require that all jurors agree on the act which formed the basis for the crime. *See State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). Conceivably, each juror used a different act to form his or her opinion that the defendant was guilty of taking indecent liberties with the child, and we cannot say that Rockwell-Flick's testimony did not form the basis of some jurors' opinions.

We conclude that under *Hinnant*, the trial court erroneously admitted Rockwell-Flick's testimony without a limiting instruction. Further, this testimony was sufficiently prejudicial to warrant a new trial.

[3] The defendant raises another meritorious issue by contending that the trial court erred in admitting the opinion testimony of Dr. Everette that the child had been abused. Specifically, the defendant argues that Dr. Everette's "diagnosis" of the child's sexual abuse was based solely on Rockwell-Flick's interview with the child.

The trial court allowed Dr. Everette to testify as an expert on child sexual abuse. An expert may testify about her opinion so long as her opinion is relevant, helpful to the jury, and based on an adequate scientific foundation. N.C.R. Evid. 702 and 705; *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995) (adopting *Daubert v. Merrill Dow*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993)). The defendant argues that Dr. Everette's opinion that the child was sexually abused lacked a proper foundation and should not have been admitted. We agree with this assertion.

The testimony offered by Dr. Everette is similar to testimony offered by two doctors in *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987) and *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993). In both of those cases, a doctor conducted an interview and a physical examination of a child who claimed she had been abused. In both cases, the physical examination revealed no evidence that the child had been sexually abused. But in both cases, the doctors "diagnosed" the children as victims of sexual abuse based solely on the children's statements that they had been abused. Our Supreme Court in *Trent* and this Court in *Parker* found that this opinion testimony lacked a proper foundation and should not have been admitted.

In the case at bar, Dr. Everette testified that she completed a thorough physical examination of the child and tested her for a variety of sexually transmitted diseases. The child's body showed no signs of abuse—no scars, no enlarged vaginal opening, no missing or torn hymen, etc.—and the tests for disease all came back negative. Yet Dr. Everette opined that the child was the victim of sexual abuse, which opinion was based entirely on statements made by the child to Rockwell-Flick. In fact, the defendant asked Dr. Everette, "the only thing that leads you to believe it's sexual abuse is what the child told Ms. Flick?" Dr. Everette answered "Correct." We need not address the legitimacy of Rockwell-Flick's methods or findings to hold that Dr. Everette's "diagnosis" was improperly admitted.

The defendant is entitled to a new trial if there is a reasonable possibility that had the error not been committed, a different result would have been reached. N.C. Gen. Stat. § 15A-1443(a) (2000). Like the doctors' testimony in *Trent* and *Parker*, we find that Dr. Everette's testimony most likely resulted in a different result than would have been reached otherwise. Further, Dr. Everette did not base her opinion on what the child said, but on Rockwell-Flick's rendition of what happened to the child.

In conclusion, we hold that the defendant is entitled to a new trial upon his jury conviction on the charge of taking indecent liberties for which he received an active sentence of 16 to 20 months imprisonment. However, his plea and conviction on a second charge of taking indecent liberties with a minor resulting in a sentence of seven years of probation must stand. N.C. Gen. Stat. § 15A-1444; N.C.R. App. P. 10 and 28.

No. 97 CRS 12310A—New Trial.

No. 97 CRS 12988—No Error.

Judges LEWIS and HUNTER concur.

E. SHEPARD HUNTLEY, PLAINTIFF v. EUNICE J. HUNTLEY, DEFENDANT

No. COA99-1404

(Filed 5 December 2000)

1. Divorce— premarital agreement—revocation

The trial court erred by finding that a premarital agreement had been rescinded by the conduct of the parties after their marriage; the Uniform Premarital Agreement Act, N.C.G.S. § 52B-6, is unambiguous in providing that a premarital agreement may be amended or revoked after marriage only by a written agreement signed by the parties.

2. Divorce— equitable distribution—premarital agreement

The trial court erred by granting equitable distribution when a premarital agreement remained valid and enforceable.

3. Divorce— equitable distribution—marital debts

The question of whether debts incurred by a husband following the date of separation were marital debts was moot because it concerned equitable distribution, and a valid premarital agreement existed.

Appeal by defendant from judgment entered 26 August 1997 by Judge Charles L. White and judgment entered 31 August 1999 by

Judge Susan E. Bray in District Court, Guilford County. Heard in the Court of Appeals 20 September 2000.

Barbara R. Morganstern, for the plaintiff-appellee.

Johnson Tanner Cooke Younce & Moseley, by J. Sam Johnson, Jr., for the defendant-appellant.

WYNN, Judge.

Plaintiff and Defendant were married on 3 December 1994 and lived together until they separated on 1 January 1996. No children were born of the marriage, but the parties did acquire marital property during the course of the marriage. However, this appeal concerns the disposition of the marital residence, owned by the husband before the parties married. After separating, the husband moved out and the wife continued living in the marital residence.

In November 1996, the husband brought an equitable distribution action and further sought an order of interim allocation of the marital residence and its contents to him. The wife answered and counterclaimed alleging the existence of a valid written Premarital Agreement executed 28 November 1994. The Agreement, signed by both parties and notarized, provided in part relevant to the marital home the following clause:

> 7. Home at 3905 Henderson Road in Greensboro. Husband and Wife plan to live in the home now owned by Husband at 3905 Henderson Road. Shortly after the marriage, Husband will convey to Wife a ½ undivided interest, as tenant in common, in this real estate. In addition, he will convey to her the right to live in the home after the death of the Husband, as long as she chooses to make it her home.

The wife alleged by counterclaim that the husband had breached the Agreement by failing to convey the property interest as agreed; so, she sought specific performance. The Agreement also contained a waiver by each party of their equitable distribution rights.

The husband replied to his wife's counterclaim admitting the existence of the Agreement, admitting his failure to convey to his wife the agreed upon property interest as stipulated in the Agreement, and asserting defenses of (1) waiver by laches, (2) a subsequent contrary oral agreement, (3) unjust enrichment, and (4) nonperformance of the Agreement.

Both parties moved for summary judgment on the issue of specific performance of the Agreement. The trial court, per District Court Judge Charles L. White, denied both motions. The husband then brought on for hearing his motion for interim allocation of the marital property, which was heard on 11 June 1997 before Judge White. By order entered 25 August 1997, *nunc pro tunc* 11 June 1997, Judge White found that the parties had rescinded the Agreement by their conduct, declared the Agreement null and void, ruled that the husband was entitled to proceed on his claim for equitable distribution of the marital property, and granted the husband's motion for interim allocation of the marital property.

The wife appealed to this Court from that order; but, we held that her appeal was interlocutory, and remanded the matter to the trial court for disposition of the equitable distribution action. Following judgment in that action entered by District Court Judge Susan E. Bray favoring the husband, the wife then properly appealed to this Court from the order entered by Judge White which declared the Agreement to be rescinded, null and void, and from the equitable distribution judgment favoring the husband entered by Judge Bray.

In her appeal, the wife asserts five assignments of error: (1) that under N.C. Gen. Stat. § 52B-6, the trial court erred in rescinding the Agreement based on the parties' conduct following the execution of the Agreement, (2) that, alternatively, the facts do not support the trial court's finding that the Agreement was rescinded under general contract law principles, (3) that the trial court erred in allowing the admission of parol evidence to alter the terms of the Agreement, which led to its rescission, (4) that the trial court erred in allowing equitable distribution under the judgment entered by Judge Bray, as the Agreement, which waived any equitable distribution rights, remained valid and enforceable, and (5) that the trial court erred in granting judgment to the husband reimbursing him for payment of debts incurred after the date of separation. We conclude that the trial court committed reversible error.

[1] We first consider the wife's claims regarding the order entered by Judge White. She contends that the trial court committed error in finding that the Agreement was rescinded by the conduct of the parties subsequent to its execution. We agree.

The wife alleges that she waived her equitable distribution rights in the Agreement in exchange for the husband's written promise to convey to her the property interest as provided in paragraph 7 of the

Agreement. The husband argues that there were sporadic discussions between the parties following their wedding concerning the conveyance, but that no interest was ever conveyed, and that the wife never made a demand for performance prior to their separation. The trial court determined that the parties, by their conduct after the execution of the Agreement, had rescinded paragraph 7 of the Agreement, which was an essential term thereof. The trial court thus determined that the entire Agreement, as a result of the rescission of paragraph 7, was null and void.

The North Carolina Uniform Premarital Agreement Act governs premarital agreements. N.C. Gen. Stat. §§ 52B-1 *et seq.* (1999). That Act became effective on 1 July 1987 and is applicable to premarital agreements executed on or after that date. 1987 N.C. Sess. Laws ch. 473, § 3. The Agreement in this case is therefore governed by the Uniform Premarital Agreement Act.

Under the Uniform Premarital Agreement Act, N.C. Gen. Stat. § 52B-6 provides in part that "[a]fter marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties." N.C. Gen. Stat. § 52B-6 (1999). N.C. Gen. Stat. § 52B-7 sets forth the conditions which must be proven by a party seeking to avoid the enforcement of a premarital agreement, but generally concerns inequitable conditions surrounding the execution of the agreement, such as voluntariness and unconscionability. *See* N.C. Gen. Stat. § 52B-7 (1999). N.C. Gen. Stat. § 52B-9 addresses the limitation of actions related to such agreements, stating that "[a]ny statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party." N.C. Gen. Stat. § 52B-9 (1999).

In general, "principles of construction applicable to contracts also apply to premarital agreements." *Howell v. Landry*, 96 N.C. App. 516, 525, 386 S.E.2d 610, 615 (1989) (citing *Turner v. Turner*, 242 N.C. 533, 539, 89 S.E.2d 245, 249 (1955)), *disc. review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990). Our Supreme Court has held that premarital agreements may be amended or rescinded after marriage if the parties fully and freely consent thereto. *Turner*, 242 N.C. at 538, 89 S.E.2d at 249. In construing premarital agreements executed after 1 July 1987, however, we must bear in mind, in addition to general contract principles, the strict requirements of the Uniform Premarital

Agreement Act. While we have not previously had an opportunity to consider an alleged amendment or revocation of a premarital agreement since the passage of the Act, we conclude the plain language of § 52B-6 mandates that any amendment or revocation of a premarital agreement following the marriage of the parties requires a signed, written agreement. As no such written amendment or revocation was alleged or proved in the instant case, we follow the expressed law of our legislature and hold that the trial court committed error in finding that paragraph 7 was rescinded and thereby declaring the Agreement null and void.

Significantly, all but one of the authorities cited by the husband either pre-date the Act, or concern contracts other than premarital agreements, and thus those authorities are not controlling. The one authority cited by the husband concerning a premarital agreement executed after 1 July 1987 is not dispositive. In *In re Estate of Pate*, 119 N.C. App. 400, 459 S.E.2d 1, *disc. review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995), we considered whether the parties' cancellation of wedding plans, and subsequent reconciliation and marriage, nullified their premarital agreement. *Id.* We relied on the intent of the parties, determined from the language of the agreement and the facts of the particular case, to find that the premarital agreement was not terminated by the temporary cancellation of the wedding plans. *Id.* at 405, 459 S.E.2d at 4. Because the agreement did not specify a time period within which the wedding should take place, we relied on general contract principles to conclude that the wedding must only have occurred within a reasonable time period. *Id.*

The Uniform Premarital Agreement Act is silent as to the amendment and revocation of premarital agreements *prior* to marriage, and thus it was appropriate to apply general contract principles to determine the outcome in *Pate*. However, we find no such ambiguity in the statute's language regarding the amendment or revocation of premarital agreements *after* marriage. As the statute is unambiguous on this issue, we need not consider the wife's second assignment of error concerning whether the Agreement was rescinded under general contract law principles.

The wife further contends that the trial court erred in permitting the plaintiff to introduce parol evidence, which the trial court relied upon in determining that the parties had rescinded the Agreement by their conduct. The trial court allowed the husband to introduce testimony in an attempt to show that the parties had not performed the

Agreement, or had intended to amend the Agreement at some later time. The husband also was permitted to introduce testimony indicating that the parties engaged in discussions after their marriage, which discussions often included the husband's accountant and attorney, to the effect that the terms of the conveyance would be altered. The husband testified at the initial hearing, over the wife's objection, that the parties discussed the conveyance of a one-third interest instead of a one-half interest, and contemplated the wife reimbursing or compensating the husband for the value of the interest conveyed, contrary to the terms of the Agreement. The wife objected at the hearing that this evidence was being introduced to alter the terms of the Agreement, which objection was overruled by the trial court under the reason that the testimony was relevant not for purposes of amending the Agreement but as to whether paragraph 7 of the Agreement was rescinded. The trial court's basis for this distinction between amendment and partial rescission under the circumstances is unclear. What is clear is that there was no evidence presented that the parties ever entered into a written agreement amending or revoking the original Agreement. As such, we decline to rule on whether the admitted testimony was impermissible parol evidence since our ruling on the wife's first assignment of error renders this point moot.

[2] In her fourth assignment of error the wife asserts that the trial court erred in granting equitable distribution when the Agreement remained valid and enforceable. We agree.

The parties stipulated that a valid and enforceable premarital agreement was entered into by the parties. Undisputedly, the Agreement became effective on 3 December 1994 upon the parties' marriage. *See* N.C. Gen. Stat. § 52B-5 (1999). As we have found that the Agreement was not subsequently revoked or amended by written agreement, the Agreement remains valid and enforceable. The Agreement specifically provides that if the parties are separated, "each party waives and relinquishes all claims and rights to an equitable distribution of marital property within the meaning of North Carolina law . . . ." Such agreements are enforceable under statute. *See* N.C. Gen. Stat. § 52B-4 (1999). Therefore, we conclude that the trial court erred in allowing the husband an equitable distribution of the marital property.

[3] The wife's final assignment of error concerns debts incurred by the husband following the date of separation. As part of the equitable distribution proceedings, the husband introduced evidence of various

debts which he incurred following the date of separation, and the trial court considered these debts as distributional factors under N.C. Gen. Stat. § 50-20(c)(12) supporting the husband's assertion that an equal distribution would not be an equitable distribution. *See* N.C. Gen. Stat. § 50-20(c)(12) (1999). The wife alleges that these debts were improperly considered as they did not constitute marital debt pursuant to N.C. Gen. Stat. § 50-20. *See* N.C. Gen. Stat. § 50-20 (1999). As this assignment of error concerns the equitable distribution proceedings, we find that the issue is moot based on our conclusion that a valid premarital agreement exists, and we therefore decline to rule on the merits of this issue.

We conclude that the trial court erred in finding that paragraph 7 of the Agreement was rescinded by the parties' conduct following its execution, and that the Agreement was thereby rescinded, and remand to the trial court for proceedings consistent with this opinion.

Reversed and remanded.

Judges LEWIS and HUNTER concur.

KATHERINE LOOMIS, PLAINTIFF v. IMRAN HAMERAH AND KHLOUD KAFF, DEFENDANTS

No. COA99-1373

(Filed 5 December 2000)

Landlord and Tenant— summary ejectment—summary judgment

Summary judgment should not have been granted for plaintiff landlord for summary ejectment where there was a conflict as to whether defendant lessees timely provided business interruption insurance as required by the lease and as to whether defendants reimbursed plaintiff for the cost of fire and casualty insurance as required by the lease.

Appeal by defendants from order filed 25 August 1999 by Judge Paul G. Gessner in Wake County District Court. Heard in the Court of Appeals 19 September 2000.

Michael W. Strickland & Associates, P.A., by Nelson G. Harris, for plaintiff-appellee.

David S. Crump for defendant-appellants.

GREENE, Judge.

Imran Hamerah (Hamerah) and Khloud Kaff (Kaff) (collectively, Defendants) appeal an order filed 25 August 1999 granting a motion for summary judgment in favor of Katherine Loomis (Plaintiff).

Plaintiff, as the landlord, and Defendants, as the tenants, entered into a five-year Lease Agreement (the Lease) on 21 June 1994 for the property located at 3001 Hillsborough Street, Raleigh, North Carolina (the Premises). Plaintiff and Defendants relied heavily on Perry Mastromichalis (Mastromichalis), the attorney for Plaintiff, to prepare the Lease. The Lease provided in pertinent part:

> 9. Alterations and Improvements. [Defendants] shall have the right and privilege at any time during . . . [the Lease] to make, at [Defendants'] own expense, such changes, improvements and alterations to the Premises as [Defendants] may desire; provided, however, [Defendants] shall not make any material or structural changes to . . . [the Premises] without the prior written permissions of [Plaintiff] . . . [Defendants agree] . . . to make improvements to the [P]remises in excess of $30,000.00 and . . . provide [Plaintiff] with the plans for the remodeling of the [Premises].
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> . . . .
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> 11. Indemnification and Liability Insurance. . . . [Defendants] . . . will procure and keep in force at [their] own expense public liability insurance . . . which policy or policies of insurance shall show [Plaintiff] as an additional insure[d] . . . . [Defendants] will cause a certificate of insurance to be furnished to [Plaintiff] evidencing such coverage and said policy shall provide that said insurance may not be cancelled [sic] without written notice to [Plaintiff] at lease [sic] thirty (30) days prior to any cancellation.
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> 12. Property Insurance and Taxes.
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> . . . .
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> B. [Defendants] shall also, at [Defendants'] sole cost and expense, obtain and keep in force business interruption insur-

ance on the operation of the Premises in an amount satisfactory to [Plaintiff].

C. . . . [Plaintiff's cost of maintaining fire and casualty insurance on the building] in such amount and to such extent as [Plaintiff] determines desirable . . . shall be paid by [Defendants], [and] shall be due and payable as additional rent . . . and shall be paid to [Plaintiff] at such time as [Plaintiff] is required to make such payment.

. . . .

16. Default. . . .

. . . .

(b) . . . [With the exception of nonpayment of rent default occurs upon Defendants' noncompliance with the] performance of any of the . . . covenants, agreements or conditions of [the] Lease, [provided such noncompliance] shall continue for a period of thirty (30) days after written notice thereof is given by [Plaintiff] to [Defendants].

17. Remedies. (a) Upon such a default, it shall be lawful for [Plaintiff], at [her] option, to declare the said term ended and to enter into the Premises or any part hereof, either with or without process of law, and expel [Defendants] . . . .

. . . .

(c) . . . [Plaintiff] may employ an attorney to enforce [Plaintiff's] rights and remedies and [Defendants] agree[] to pay to [Plaintiff] . . . reasonable attorney's fees.

. . . .

20. Option to Purchase. [Defendants] shall have the option to purchase [the Premises] after five (5) years of the [Lease] for $175,000 . . . [p]rovided that [Defendants are] not in default as provided herein . . . .

Beginning in February 1998, Plaintiff notified Defendants they were in noncompliance with the Lease in several respects. Defendants responded to each of the notices, contesting some of the matters and attempting to comply with others. Defendants received a notice from Plaintiff dated 24 November 1998, which informed Defendants they were in noncompliance in the following respects: (1)

the payment of attorney's fees incurred by Plaintiff as a result of Plaintiff's efforts to obtain Defendants' compliance with the Lease; (2) failure to provide business interruption insurance in the amount of $100,000.00; (3) failure to pay fire and casualty insurance cost incurred by Plaintiff for purchase of a $250,000.00 policy; (4) failure to list Plaintiff as an additional insured in the public liability insurance policy; and (5) Defendants' structural changes to the building without Plaintiff's written consent. Plaintiff informed Defendants in this 24 November notice that these unauthorized structural changes must be inspected and approved by the City of Raleigh building inspector on or before 24 December 1998.

On 3 December 1998, Defendants responded to Plaintiff's 24 November notice by providing Plaintiff with certain insurance policies,[1] denying any obligation to pay attorney's fees, and agreeing to "complete and have final inspections for renovations prior to February 24, 1999." The delay in the inspections was necessitated, according to Defendants, because Kaff was hospitalized in her home country of Jordan and Hamerah needed to be with her in Jordan. Defendants also indicated they had sent Plaintiff a check in the amount of $450.00 to reimburse Plaintiff for the cost of the fire and casualty insurance policy.

On 13 December 1998, Plaintiff responded to Defendants' 3 December 1998 letter by reasserting Defendants' noncompliance and informing Defendants if these issues were not corrected by 24 December 1998, the Lease would be terminated. The noncompliance issues asserted are as follows: (1) the payment of attorney's fees incurred by Plaintiff as a result of Plaintiff's efforts to obtain Defendants' compliance with the Lease; (2) failure to provide business interruption insurance in the amount of $100,000.00; (3) failure to pay fire and casualty insurance cost incurred by Plaintiff for purchase of a $250,000.00 policy; and (4) the 24 February 1999 inspection of the structural changes by the City of Raleigh was unacceptable.

On 31 December 1999, Plaintiff notified Defendants the Lease was terminated and Defendants were directed to immediately vacate the Premises and surrender possession to Plaintiff. The grounds asserted in this notification for the termination are as follows:

1. Defendants provided Plaintiff with a copy of a public liability insurance policy in the amount of $1,000,000.00 effective 27 October 1998 through 27 October 1999, which named Plaintiff as an additional insured and a copy of a business interruption insurance policy providing coverage in the amount of $25,000.00 per quarter.

(1) [Defendants'] failure to provide adequate public liability insurance;

(2) [Defendants'] failure to provide adequate insurance coverage on the building;

(3) [Defendants'] failure to provide adequate business interruption insurance;

(4) [Defendants'] blatant defiance of [Plaintiff's] rights of ownership through fraudulent misrepresentations of [Defendants'] ownership of the [P]remises, including but not limited to

(a) falsely stating both orally and in writing to city and county officials that [Defendants] are the owner of the [P]remises, and

(b) stating the same under oath in a civil deposition, and

(c) failing to correct such false statements at the written request of the landlord;

(5) [Defendants'] failure to keep the building in compliance with all building codes; and

(6) [Defendants'] failure to provide proper building permits to [Plaintiff] upon her request.

Plaintiff filed a complaint in summary ejectment on 31 December 1998 demanding to recover possession of the Premises based on the six grounds asserted in Plaintiff's 31 December letter to Defendants. On 20 January 1999, the magistrate entered a judgment in action for summary ejectment granting Plaintiff possession of the Premises and Defendants appealed to district court.

On 23 July 1999, Plaintiff moved for summary judgment. In support of her motion for summary judgment, Plaintiff offered evidence that she had not received any indication from Defendants showing compliance with building permits or building inspections and did not receive the endorsement changing Defendants' business interruption insurance coverage amount to $100,000.00 until 18 February 1999.

There was also evidence that in December 1998, Defendants were "in their home country, Jordan" because Kaff was hospitalized there and they had "made every reasonable effort to comply with any alleged defaults of" the Lease. Hamerah stated he obtained verbal

permission from Plaintiff or her attorney for all the repairs or improvements he made to the building, which improvements cost nearly $130,000.00, and he obtained a City building permit for each of the repair projects. Hamerah said he obtained a business interruption insurance policy in November 1998 in the amount of $100,000.00. Mastromichalis stated in his deposition that Plaintiff informed Defendants to "do what you want to do [to the building]; don't come to me; just pay money, pay rent." When Mastromichalis confronted Plaintiff about the Lease requirement that structural changes to the building required her prior written consent, Plaintiff responded "don't worry about it. It doesn't have to be."

On 25 August 1999, after considering the arguments of Plaintiff and Defendants and the evidence, the trial judge determined "there [was] no genuine issue as to any material fact, and that the Plaintiff [was] entitled to judgment as a matter of law."

The dispositive issue is whether there is a genuine issue of material fact as to Defendants' breach of the Lease, as asserted in Plaintiff's letter to Defendants dated 13 December 1998.

Plaintiff contends Defendants have breached the Lease in several respects and these breaches justify the termination of the Lease and the consequent summary ejectment.

A breach or default under the Lease occurs upon the nonpayment of rent and/or upon the failure of Defendants to correct a noncompliance with the Lease within 30 days after Plaintiff's notification of noncompliance. Defendants were notified on 24 November 1998 that they were in noncompliance with the Lease in several respects. Defendants responded to this notification and on 13 December 1998, Plaintiff again notified Defendants of their noncompliance with certain provisions of the Lease, namely: (1) the payment of attorney's fees incurred by Plaintiff as a result of Plaintiff's efforts to obtain Defendants' compliance with the Lease; (2) failure to provide business interruption insurance in the amount of $100,000.00; (3) failure to pay fire and casualty insurance cost incurred by Plaintiff for purchase of a $250,000.00 policy; and (4) the 24 February 1999 inspection by the City of Raleigh of the structural changes was unacceptable.

Plaintiff asserts, in her 31 December 1998 notice of the Lease termination, six different grounds of default. Because Plaintiff only referenced four grounds for default in her 13 December 1998 letter, she

had no bases to terminate the Lease on any ground outside those provided for in the 13 December letter.[2]

Defendants contend there are genuine issues of material fact as to whether they breached the Lease, as asserted in the 13 December letter. We agree. There is a conflict in the evidence as to whether Defendants timely provided business interruption insurance in the amount of $100,000.00 and as to whether Defendants reimbursed Plaintiff for the cost of the fire and casualty insurance.[3] As for the inspections by the City of Raleigh building inspector, the Lease does not provide for such inspections. Furthermore, to the extent Defendants made structural changes to the building without Plaintiff's written consent, there is evidence in the record that Plaintiff waived this requirement. Finally, the payment of attorney's fees is an obligation placed on Defendants only if they have otherwise defaulted in the terms of the Lease. If there has been no default by Defendants, there is no obligation to pay Plaintiff's attorney's fees.

Accordingly, summary judgment was not proper and this case is remanded to the trial court. *See Smith v. Smith*, 65 N.C. App. 139, 142, 308 S.E.2d 504, 506 (1983) (summary judgment proper only if no genuine issues of material fact exist and movant entitled to judgment as a matter of law).

Reversed and remanded.

Judges MARTIN and EDMUNDS concur.

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2. A default does not occur under the Lease until after Defendants have been notified of the alleged Lease noncompliance and 30 days have expired. In this case, Defendants were notified of several alleged instances of noncompliance in a letter dated 24 November 1998. After Defendants responded to that letter, Plaintiff modified her 24 November list of alleged instances of noncompliance. It is this modified list, included in the 13 December 1998 letter, which forms the present bases of Plaintiff's termination claim.

3. To the extent there has been a breach of any provision of the Lease, not every breach "justifies a cancellation and rescission" of the contract. *Childress v. Trading Post*, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957). To justify termination of a lease, the breach "must be so material as in effect to defeat the very terms of the contract." *Id.* (citations omitted); *see also* 2 Richard R. Powell, *Powell on Real Property* § 17.02(1) (Michael Allan Wolf ed., 2000) (if a breach is immaterial, it will not permit termination of the lease); Restatement (Second) of Property: Landlord and Tenant § 13.1 (1977) (a landlord can terminate a lease if the tenant fails to perform a promise contained in the lease and the landlord is "deprived of a significant inducement to the making of the lease"). Whether or not a breach is material is generally a question of fact and not sub-

RENEE G. KELLIHAN, ADMINISTRATRIX OF THE ESTATE OF DALTON KELLIHAN, DECEASED, AND RENEE G. KELLIHAN AND ROBERT KELLIHAN, INDIVIDUALLY, PLAINTIFFS V. F. RAY THIGPEN, M.D., WHITEVILLE MEDICAL ASSOCIATES, P.A., AND COLUMBUS COUNTY HOSPITAL, INC., DEFENDANTS

No. COA99-1512

(Filed 5 December 2000)

Appeal and Error— appellate rules—multiple violations—appeal dismissed

Plaintiffs' appeal from the trial court's order granting partial summary judgment in favor of defendants on the issue of negligent infliction of emotional distress is dismissed based on plaintiffs' failure to follow the Rules of Appellate Procedure.

Appeal by plaintiffs from an order entered 3 June 1999 by Judge Abraham Penn Jones in Columbus County Superior Court. Heard in the Court of Appeals 18 October 2000.

Britt & Britt, PLLC, by William S. Britt, for plaintiff-appellants.

Walker, Clark, Allen, Herrin & Morano, L.L.P., by Scott T. Stroud, for defendant-appellees F. Ray Thigpen, M.D. and Whiteville Medical Associates, P.A.

Marshall, Williams & Gorham, L.L.P., by John D. Martin, for defendant-appellee Columbus County Hospital, Inc.

HUNTER, Judge.

Renee G. Kellihan, Administratrix of the Estate of Dalton Kellihan, deceased, and Renee G. Kellihan, and Robert Kellihan, individually (herein collectively "plaintiffs"), appeal from the trial court's order granting partial summary judgment on the issue of negligent infliction of emotional distress in favor of Frank Ray Thigpen, M.D., Whiteville Medical Associates, P.A., and Columbus County Hospital, Inc. (herein collectively "defendants"). Plaintiffs bring forward one assignment of error, while defendants cross-appeal with a second. However, we are unable to reach the merits of these arguments as this appeal must be dismissed for violation of our appellate rules.

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ject to summary judgment. John D. Calamari and Joseph M. Perillo, *Contracts* § 11-18, at 415 (4th ed. 1998); *see also Insurance Co. v. McDonald*, 36 N.C. App. 179, 184, 243 S.E.2d 817, 820 (1978); *Coleman v. Shirlen*, 53 N.C. App. 573, 578, 281 S.E.2d 431, 434 (1981).

On 14 January 1994, Renee Kellihan gave birth to an infant that was delivered by emergency caesarian section at Columbus County Hospital, located in Whiteville, North Carolina. Complications at birth—the infant was not breathing and had a poor heart rate—caused the hospital staff to have to intubate the infant with an endotracheal ("ET") tube. After a short amount of time, a chest x-ray was performed on the infant to check the placement of the ET tube. The x-ray found that the tip of the ET tube might have been within the infant's esophagus. Hospital staff extubated, and then reintubated the infant. Immediately, the infant's heart rate increased and his skin color became pink. The infant, however, remained in critical condition and died four days later on 18 January 1994.

Plaintiffs instituted this action by filing a complaint on 21 August 1997 alleging wrongful death and negligent infliction of emotional distress. On 11 March 1999, defendants filed a motion for partial summary judgment on the negligent infliction of emotional distress claim. This motion was heard before the Honorable Abraham Penn Jones at the 12 April 1999 Civil Session of Columbus County Superior Court. On 3 June 1999, Judge Jones issued an order allowing partial summary judgment on the negligent infliction of emotional distress issue. Plaintiffs subsequently filed a notice of voluntary dismissal on 6 June 1999 as to their wrongful death claim. Then on 14 June 1999, plaintiffs filed their notice of appeal as to Judge Jones' order.

"The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal." *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). The rules "are designed to keep the process of perfecting an appeal flowing in an orderly manner." *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979). " 'Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process' " *Id.* (quoting *Ledwell v. County of Randolph*, 31 N.C. App. 522, 523, 229 S.E.2d 836, 837 (1976)).

In settling the record on appeal, N.C.R. App. P. 11(c) states in pertinent part:

> If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have served, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. . . . If only one

> appellee or only one set of appellees proceeding jointly have so served, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so served, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

At bar, plaintiffs timely served the proposed record on appeal on defendants. On 25 and 26 October 1999, defendants timely notified plaintiffs of their objections and amendments to the proposed record by letter sent via United States mail. Plaintiffs failed to respond to defendants or to make a request for judicial settlement. As a result, the proposed record on appeal, in conformity with defendants' objections and amendments, became the record on appeal thirteen (13) days later (ten (10) days as per N.C.R. App. P. 11(c) plus three (3) days as per N.C.R. App. P. 27(b) since defendants served their objections and amendments by United States mail) on 8 November 1999.

According to N.C.R. App. P. 12(a), "[w]ithin 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken." This Court has not hesitated in the past to dismiss an appeal for failure to timely file the record on appeal pursuant to N.C.R. App. P. 12(a). *See Taylor v. City of Lenoir*, 140 N.C. App. 337, 536 S.E.2d 848 (2000), *opinion superseded on rehearing*, 141 N.C. App. 660, 542 S.E.2d 222 (2001) (appeal dismissed due to class counsels' violation of Rule 12(a)'s mandate to file the record on appeal within fifteen (15) days after it had been settled); *see also Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 519 S.E.2d 316 (1999) (appeal dismissed because *pro se* appellant violated the appellate rules, including failing to file the record on appeal within fifteen (15) days after it was settled in violation of Rule 12(a)); *see also Higgins v. Town of China Grove*, 102 N.C. App. 570, 402 S.E.2d 885 (1991) (violation of appellate rules led to dismissal in case where appellant failed to settle record and time for settling record had expired, thus record was not filed within fifteen (15) days as per Rule 12(a)); *see also Richardson v. Bingham*, 101 N.C. App. 687, 400 S.E.2d 757 (1991) (plaintiff failed to request judicial settlement; thus record on appeal was settled in accordance with defendant's objections and amendments; and plaintiff's failure to file the

record with this Court within fifteen (15) days after settlement led to dismissal for violation of Rule 12(a)).

Here, plaintiffs had until 23 November 1999 (fifteen (15) days per N.C.R. App. P. 12(a) after 8 November 1999) to file the record on appeal with this Court, however, they failed to do so. Instead, plaintiffs attempted to serve defendants a second proposed record on appeal on 30 November 1999. Defendants asserted that this proposed record on appeal was still not complete and was not consistent with their previous objections and amendments. Thus defendants refused to sign this proposed record on appeal. Plaintiffs then filed the record on appeal with this Court on 3 December 1999. On that same date, plaintiffs filed a motion to deem the record timely filed. Subsequently defendants filed a motion to dismiss.

Plaintiffs violated N.C.R. App. P. 12(a) by filing the settled record on appeal with this Court after the fifteen (15) day time period under the rule had expired. Defendants make several other arguments that are compelling to warrant dismissal of plaintiffs' appeal. First, defendants contend that the record on appeal that has been filed with this Court is not yet in conformity with their objections and amendments that were served on plaintiffs on 25 and 26 October 1999. Defendants argue that the pleadings and documents presented in the record on appeal do not clearly depict the date on which they were filed with the court; their cross-assignment of error is incorrect as defendants are cross-appealing a previous trial court order regarding the negligent infliction of emotional distress claim; and lastly, the first motion for partial summary judgment made by defendants Thigpen and Whiteville Medical Associates, P.A. filed on 27 August 1998 is not included. The argument could be made that the record on appeal has never in fact been settled, but as we find other grounds for dismissal, we choose not to address this argument.

We note that plaintiffs' inclusion of pleadings and documents presented in the record on appeal that do not clearly depict the date on which they were filed with the court is in violation of N.C.R. App. P. 9(b)(3) which states, "[e]very pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed . . . . Every judgment, order, or other determination shall show the date on which it was entered. . . ."

Next, defendants argue that as they are separate appellees proceeding separately, failure of plaintiffs to make a timely request for judicial settlement after they were served with defendants' objec-

tions and amendments resulted in abandonment of their appeal as per N.C.R. App. P. 11(c). As there are other adequate grounds for dismissal, we choose not to address this issue here.

N.C.R. App. P. 25(a) states:

> If after giving notice of appeal from any court, . . . the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. . . .

"The time deadlines set out in our appellate rules are important and should be followed." *Taylor v. City of Lenoir*, 141 N.C. App. 660, 664, 542 S.E.2d 222, 224. Plaintiffs failed to meet the time deadline set out in N.C.R. App. P. 12(a), and therefore their filing of the record on appeal in this case was late. This violation of our appellate rules subjects this appeal to dismissal on defendants' motion.

Our decision is consistent with other recent decisions dismissing appeals for appellate rules violations. *See Taylor v. City of Lenoir*, 140 N.C. App. 337, 341, 536 S.E.2d 848, 850; *Bowen v. N.C. Dep't of Health and Human Servs.*, 135 N.C. App. 122, 519 S.E.2d 60 (1999); *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 519 S.E.2d 316; *Talley v. Talley*, 133 N.C. App. 87, 513 S.E.2d 838, *review denied*, 350 N.C. 599, 537 S.E.2d 495 (1999); *Webb v. McKeel*, 132 N.C. App. 816, 513 S.E.2d 596 (1999); *Duke University v. Bishop*, 131 N.C. App. 545, 507 S.E.2d 904 (1998).

Furthermore, we have reviewed this case on its merits, and we conclude that plaintiffs' arguments are without merit.

Based on plaintiffs' violation of our appellate rules, we hereby dismiss this appeal.

Appeal dismissed.

Judges LEWIS and WYNN concur.

CADDELL v. JOHNSON

[140 N.C. App. 767 (2000)]

IN THE MATTER OF MYRNA CADDELL, PATRICIA CURRIN, AS GUARDIAN, PETITIONER v. JAMES M. JOHNSON, GUARDIAN AD LITEM FOR MYRNA CADDELL, RESPONDENT

AND

IN THE MATTER OF VELMA CADDELL, PATRICIA CURRIN, AS GUARDIAN, PETITIONER v. DWIGHT W. SNOW, GUARDIAN AD LITEM FOR VELMA CADDELL, RESPONDENT

No. COA99-1153

(Filed 5 December 2000)

Guardian and Ward— renunciation of estate—not in ward's best interest

The clerk of superior court did not err by concluding that it was not in the interest of the ward to disclaim her share in an estate where there was no obvious benefit in renouncing her share of the estate. There was no reason to artificially create a need for public assistance when private funds are available to pay the cost of her nursing home care. Furthermore, there is no evidence that the ward would, if mentally competent, disclaim this inheritance in favor of other legatees.

Appeal by petitioner from order entered 5 May 1999 by Judge Henry V. Barnette, Jr. in Superior Court, Harnett County. Heard in the Court of Appeals 17 August 2000.

Sharon A. Keyes for petitioner-appellant Patricia Currin, as Guardian for Velma and Myrna Caddell.

Dwight W. Snow, Guardian Ad Litem for respondent-appellee Velma Caddell, and James M. Johnson, Guardian Ad Litem for respondent-appellee Myrna Caddell.

TIMMONS-GOODSON, Judge.

Patricia Currin ("petitioner") appeals the denial of her petition for leave to disclaim the interests of her wards, Velma and Myrna Caddell, in the estate of Carson R. Coats. The relevant facts follow.

At the time of the 8 October 1998 hearing before the Clerk of Superior Court, Velma was eighty-two years old and was in reasonably good health. Her daughter, Myrna, was fifty-eight years old and, like her mother, had no significant physical ailments. Velma and Myrna both were born with mental disabilities and, throughout their

respective lives, have depended heavily on Velma's siblings, the Coats family, to care for them and to support them financially. After Velma's marriage to Jesse Caddell and the birth of their daughter, Myrna, the Coats family made it possible for the Caddells to live somewhat independently in a house situated on Coats property. However, when Jesse died in April of 1996, the Coats family moved Velma and Myrna to the Brookfield Retirement Center in Lillington, North Carolina, where they currently reside.

As residents of Brookfield, Velma and Myrna each incur monthly living expenses in the amount of $950.00. Both women receive public assistance totaling $944.00 per month, i.e., a Social Security payment of $499.00, a SSI disbursement of $15.00, and a State Special Assistance benefit of $430.00. In addition, the Coats family supplies Velma and Myrna with food, clothing and personal health care items, the cost of which approximates $100.00 per month for each.

In October 1996, Velma's brother, Carson R. Coats, died testate in the State of Virginia. Under his will, he bequeathed his entire estate in four equal shares to his surviving siblings, Velma, Wayne Coats, Valeria Adams, and Coma Lee Currin. Velma's inheritance is approximately $200,000.00, and since she has no other assets, the bequest comprises her entire estate. Because of her mental disability, Velma lacks the capacity to make and execute a will. Thus, upon her death, her estate will pass by intestate succession to her daughter, Myrna (provided she survives Velma). Similarly, Myrna's estate, upon her death, will be distributed to her intestate heirs.

In 1997, Velma's sisters, Valeria and Coma Lee, disclaimed their inheritances under Carson's estate so that the monies would pass directly to their children without incurring additional estate taxes. Seeking a similar result with respect to Velma's inheritance, petitioner, as Guardian for Velma and Myrna, petitioned the Harnett County Clerk of Superior Court for leave to disclaim Velma's share of the estate and the interest that would pass to her daughter, and sole heir, Myrna. Following two evidentiary hearings, the Clerk denied the petition, concluding that it was not in Velma's best interest to disclaim her inheritance. The Clerk's ruling rendered moot the issue of whether petitioner should then be permitted to disclaim Myrna's interest in the estate. On appeal, the Superior Court approved and affirmed the Clerk's order. Petitioner filed notice of appeal to this Court.

The Clerk of Superior Court has original jurisdiction over matters involving the management by a guardian of her ward's estate. *See In re Lancaster*, 290 N.C. 410, 423, 226 S.E.2d 371, 379 (1976) (recognizing that duty to protect infants and incompetents "has been entrusted by statute to the clerk of superior court in the first instance.") An appeal to the Superior Court from an order of the Clerk " 'present[s] for review only errors of law committed by the clerk.' " *In re Flowers*, 140 N.C. App. 225, 227, 536 S.E.2d 324, 327 (2000) (quoting *In re Simmons*, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966) (internal citations omitted)). The reviewing judge conducts a hearing on the record, rather than *de novo*, with the objective of correcting any error of law. *Id.* "Likewise, when the superior court sits as an appellate court, '[t]he standard of review in this Court is the same as in the Superior Court.' " *Id.* (quoting *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2-3 (1995) (citation omitted)).

Petitioner first contends that the Clerk erred by concluding that it was not in Velma's best interest to disclaim her inheritance under Carson's estate. Petitioner argues that a renunciation would best serve the interests of her wards, because it would "preserve [their] inheritance for their ultimate intended beneficiaries" and would "maintain the wards' government benefits." We are not persuaded.

The relevant statute, section 35A-1251 of our General Statutes, provides as follows:

> In the case of an incompetent ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:
>
> . . . .
>
> (5a) To renounce any interest in property as provided in Chapter 31B of the General Statutes, or as otherwise allowed by law.

N.C. Gen. Stat. § 35A-1251(5a) (1999). "[T]he guardian is always under a fiduciary obligation to manage the estate reasonably, prudently, and in the ward's best interest[.]" *Cline v. Teich*, 92 N.C. App. 257, 261, 374 S.E.2d 462, 465 (1988). Although the guardian is not

required to exercise infallible judgment in the preservation and management of her ward's estate, she is expected to exhibit "ordinary diligence and the highest degree of good faith" in the performance of her fiduciary responsibilities. *Kuykendall v. Proctor*, 270 N.C. 510, 516, 155 S.E.2d 293, 299 (1967).

As reflected in the Clerk's findings of fact, the evidence of record shows that Velma's monthly expenses at the retirement home total $950.00. Each month, she receives $944.00 in government benefits and approximately $100.00 from the Coats family in food, clothing, and personal items. The record further discloses that Velma's share of Carson's estate is approximately $200,000.00. If she takes the inheritance, she will forfeit her State Special Assistance benefit of $430.00 per month, and she will have to reimburse the State for the amount of such assistance she received over a period of two years, i.e., approximately $10,320.00. However, accepting the bequest will not result in the loss of her monthly SSI disbursement of $15.00 or her Social Security payment of $499.00.

In light of these facts, we can see no obvious benefit to Velma in renouncing her share of Carson's estate. We agree with the finding by the Clerk that the interest and investment income earned on the sum of $200,000.00 (or $189,680.00, after Velma reimburses the State) "will more than offset her loss of $430.00 a month in state benefits" and the $100.00 provided each month by her siblings. Thus, we see no reason to disclaim Velma's inheritance and thereby artificially create a need for public assistance, when private funds are available to pay the cost of her nursing home care. To do so would unnecessarily deplete public resources intended to benefit those exhibiting a genuine financial need. Therefore, we hold that the Clerk did not err in concluding that it was in Velma's best interest to share in Carson's estate.

As to petitioner's contention that a renunciation would preserve the inheritance for the "ultimate intended recipients" of Velma's estate and Myrna's estate, we reiterate that in determining whether renunciation is appropriate, the primary concern is the best interest of the ward. N.C.G.S. § 35A-1251. Furthermore, there is absolutely no evidence in the record that either Velma or Myrna would, if mentally competent, disclaim her inheritance under Carson's will in favor of the other legatees. Nonetheless, petitioner vehemently argues that the bequest should be relinquished to those persons who would take it by default, i.e., Wayne Coats, the children of Valeria Adams, and the children of Coma Lee Currin. As the spouse of Coma Lee Currin's son, petitioner has a personal, albeit indirect, stake in the outcome of this

proceeding. Given petitioner's arguably adverse interest to those of her wards and the absence of any evidence that either ward would renounce her inheritance, we hold that the Clerk did not err by denying petitioner's request for leave to disclaim Velma's and Myrna's interests in the estate of Carson R. Coats.

We have examined petitioner's remaining argument and, in light of the preceding discussion, find it lacking in merit. The order of the Superior Court is affirmed.

Affirmed.

Judges WYNN and McGEE concur.

EVIA L. JORDAN, PETITIONER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA99-1379

(Filed 5 December 2000)

1. Administrative Law— contested case hearing—designation of position as "exempt policymaking"—timely filed

Petitioner's request on 24 July 1996 for a contested case hearing under N.C.G.S. Ch. 150B was timely filed and she is not barred from contesting the designation of her position of Assistant Commissioner of Motor Vehicles as "exempt policymaking" even though she received written notice in August 1995 that her position had been designated as "exempt policymaking" and she did not contest this designation within the 30-day limitation period under N.C.G.S. § 126-38, because: (1) the 30-day limitation period of N.C.G.S. § 126-38 does not begin to run until notice is provided in accordance with the requirements of that statute; and (2) the written notice petitioner received informing her that her position had been designated as "exempt policymaking" did not inform her of her right to contest the designation, the procedure for contesting the designation, or the time limits for filing her objection to the designation.

2. Public Officers and Employees— agency decision— "exempt policymaking" position—determination not supported by substantial evidence

The trial court's order affirming the State Personnel Commission's decision and order determining that the position of Assistant Commissioner of Motor Vehicles is "exempt policymaking" under N.C.G.S. § 126-5(b)(3) is reversed, because: (1) petitioner never assumed any of the duties of the Commissioner and in reality served as the Commissioner's technical assistant; (2) there is nothing in the record to support a conclusion that the position of Assistant Commissioner carried with it the authority to make a final decision as to a settled course of action to be followed within the agency; and (3) even if the record supported a conclusion that the position had final authority within the sections, that authority would not be sufficient to constitute the position as "exempt policymaking."

Appeal by petitioner from order on judicial review filed 7 September 1999 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 19 September 2000.

Marvin Schiller and David G. Schiller for petitioner-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert O. Crawford, III, for respondent-appellee.

GREENE, Judge.

Evia L. Jordan (Petitioner) appeals from a 7 September 1999 order on judicial review in favor of the North Carolina Department of Transportation, Division of Motor Vehicles (Respondent). This order affirmed the Decision and Order of the State Personnel Commission, which affirmed Petitioner's separation from her position as the Assistant Commissioner of Motor Vehicles (Assistant Commissioner).

On 1 June 1993, Petitioner was offered and accepted the position of Assistant Commissioner. The record does not reveal a written job description for this position. Petitioner testified she was "called the chief of staff" and was told

> it was [her] responsibility . . . to be in charge of everything and that the [s]ection directors . . . would report to [her] and that [she] would advise them on policy matters, that [she] would con-

> duct staff meetings, that [she] would help the [Respondent] to set policy, that [she] would go to speaking engagements on [behalf of the Commissioner of Motor Vehicles (the Commissioner)], [and] that [she] would assume [the Commissioner's] duties in his absence.

She further testified, however, that these duties were "in theory" and she "in fact" never assumed any of the duties of the Commissioner. It "became clear" to Petitioner that she "was hired on as a technical . . . assistant." In other words, she was to "steer" people "in the right direction and let them know if maybe a course of action was against the law or against a statute of some sort or any settled policy." Frederick Aikens (Aikens), appointed acting Commissioner in April of 1996, testified the Assistant Commissioner "had several sections that reported to her directly" and the Assistant Commissioner was required to perform "specific responsibilities for specific sections."

Petitioner received a letter, in August 1995, dated 3 May 1993, from Secretary of Transportation Sam Hunt advising her:

> Pursuant to G.S. 126-5(c)(3) and 126-5(d)(1), your position is being redesignated as policy-making exempt effective May 17, 1993. . . . [Y]ou will serve at the pleasure of the Secretary of the Department of Transportation. . . . [T]he provisions of Chapter 126 will no longer apply to your position.
>
> As policy making, your position includes the authority to impose the final decision as to a settled course of action within the mission as defined by the Secretary.
>
> If you have any questions concerning this designation, please feel free to contact the Office of State Personnel.

Petitioner never inquired as to why she received the letter dated 3 May 1993, nor did she review the exemption statutes.

On 25 June 1996, Aikens informed Petitioner he was separating her from her position as Assistant Commissioner. On 24 July 1996, Petitioner filed a petition in the Office of Administrative Hearings for a contested case hearing alleging Respondent acted erroneously in terminating her employment.

On 5-6 January 1998, a contested case hearing was held before an Administrative Law Judge (ALJ). On 7 April 1998, ALJ issued a

Recommended Decision affirming Petitioner's dismissal and determining, in pertinent part, that Petitioner did not timely and properly contest the designation of her position as exempt and the position of Assistant Commissioner was "exempt policymaking." The State Personnel Commission adopted the Recommended Decision on 12 October 1998.

The issues are whether: (I) Petitioner timely and properly contested the designation of her position as exempt policymaking; and (II) Petitioner's position as Assistant Commissioner was properly designated as "exempt policymaking."

I

[1] Respondent argues Petitioner did not timely contest the designation of her position as exempt and, thus, cannot now contest its designation. We disagree.

Once a position is designated as "exempt policymaking," whether or not the designation is correct, an employee wishing to contest such designation must do so according to N.C. Gen. Stat. § 150B. N.C.G.S. § 126-5(h) (1999); N.C.G.S. § 126-34.1(c) (1999). The contested case hearing under N.C. Gen. Stat. § 150B must be requested "no later than 30 days after receipt . . . of the decision" to designate the position as "exempt policymaking." N.C.G.S. § 126-38 (1999); *Clay v. Employment Security Comm.*, 340 N.C. 83, 86, 457 S.E.2d 725, 727 (1995) (N.C. Gen. Stat. § 126-38 applies to "employees" right of appellate review). Notice of the decision must be in writing and inform the employee of her rights, the procedure, and the time limits for filing the contested case hearing. *See Luck v. Employment Security Comm.*, 50 N.C. App. 192, 194, 272 S.E.2d 607, 608-09 (1980) (required by due process); *see also* N.C.G.S. § 150B-23(f) (1999) (for state employment, notice required to applicants who alleged discrimination). The 30-day limitation period of N.C. Gen. Stat. § 126-38 does not begin to run until notice is provided in accordance with these requirements.

In this case, Petitioner received written notice in August 1995 that her position had been designated as "exempt policymaking." The notice did not, however, inform Petitioner of her right to contest the designation, the procedure for contesting the designation, or the time limits for filing her objection to the designation. Accordingly, Petitioner's request for a contested case hearing, filed 24 July 1996,

was timely filed and she is not barred from contesting the designation of her position as "exempt policymaking."

II

[2] Petitioner argues there was not substantial evidence in the record to support the determination her position was "exempt policymaking." We agree.

This Court may reverse or modify an agency's decision if the agency's findings, viewed upon the "whole record," are unsupported by substantial evidence. *Powell v. N.C. Dept. of Transportation*, 347 N.C. 614, 622-23, 499 S.E.2d 180, 184 (1998) (citations omitted). In applying this test, the reviewing court "must review the evidence that was before the [agency]." *Id.* at 624, 499 S.E.2d at 185. A "whole record" review, however, does not allow this Court to replace the agency's judgment in light of two reasonably conflicting views, "but rather requires [this Court] to determine the substantiality of the evidence by taking all the evidence, both supporting and conflicting, into account." *Id.* at 623, 499 S.E.2d at 185 (citations omitted).

A position is "exempt policymaking" if it is "delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division." N.C.G.S. § 126-5(b)(3) (1999).

In this case, there is no written job description for the position of Assistant Commissioner. The evidence shows the Assistant Commissioner had the responsibility to advise section directors on policy matters, assist the Commissioner in setting policy, and act as the Commissioner's chief of staff. Petitioner, however, never assumed any of the duties of the Commissioner and in reality served as the Commissioner's technical assistant. There is nothing in this record, certainly not substantial evidence, to support a conclusion that the position of Assistant Commissioner carried with it the authority to make any "final decision as to a settled course of action to be followed within" Respondent. Even if the record supported a conclusion that the position of Assistant Commissioner had final authority within the sections, which it does not, that authority would not be sufficient to constitute the position as "exempt policymaking." *N.C. Dept. of Transportation v. Hodge*, 347 N.C. 602, 606, 499 S.E.2d 187, 190 (1998).

Accordingly, the order of the superior court affirming the Decision and Order of the State Personnel Commission must be

reversed because the Decision and Order, determining that the position of Assistant Commissioner is "exempt policymaking," is not supported by substantial evidence in this record.

Reversed.

Judges MARTIN and EDMUNDS concur.

IN THE MATTER OF EXPUNGEMENT FOR HEATHER RACHELLE SPENCER

No. COA99-1426

(Filed 5 December 2000)

Criminal Law— expungement—age requirement

The trial court erred by granting appellee's petition for expunction of her conviction when she was twenty-two years old for possession of one-half ounce or less of marijuana in violation of N.C.G.S. § 90-95(a), because N.C.G.S. § 90-96(e) requires that a person who seeks to have his or her record expunged must meet the age requirement of not being over twenty-one years of age at the time of the offense.

On writ of certiorari to review the order for expungement entered 9 February 1999 by Judge Edward H. McCormick in Lee County District Court. Heard in the Court of Appeals on 21 September 2000.

Attorney General Michael F. Easley, by Assistant Attorney General John J. Aldridge, III and Associate Attorney General Jeffrey C. Sugg, for the State.

Harrington, Ward, Gilleland & Winstead, LLP, by Eddie S. Winstead, III, for the appellee.

WALKER, Judge.

On 8 September 1993, the appellee, Heather Rachelle Spencer (Ms. Spencer), pled guilty to the charge of possessing one-half ounce or less of marijuana, a controlled substance included within Schedule VI of the North Carolina Controlled Substance Act, in violation of

N.C. Gen. Stat. § 90-95(a) (1999). Ms. Spencer was 22 years of age at the time she committed the offense. Later, on 10 August 1998, Ms. Spencer filed a petition for expunction of her conviction, pursuant to N.C. Gen. Stat. § 90-96(e) (1999). The trial court granted her petition by order dated 9 February 1999. Upon receiving a copy of the order for expungement, Dalila Loran-Parker of the State Bureau of Investigation (SBI) requested clarification from the trial court regarding the order for expungement, since it was her understanding that "Ms. Spencer's age disqualifies her from obtaining relief under N.C.G.S. 90-96(e)." The trial court responded by way of correspondence, stating "the [s]tatute gives the court broad authority to expunge the records of *anyone* convicted of a misdemeanor possession of [a] controlled substance." *(emphasis added).* The Court of Appeals granted the State's writ of certiorari on 29 October 1999 to review the order for expungement. On appeal, the State argues that the trial court erred in granting Ms. Spencer's petition for expunction because she was over 21 years of age at the time she committed the offense. The State therefore argues that the trial court exceeded its statutory authority.

It is well settled in this State that a person may have his or her record of criminal charges or convictions expunged under certain circumstances. *See* N.C. Gen. Stat. § § 7B-3200 (1999); 15A-145-146 (1999); 90-96(b), (d) and (e) (1999); and 90-113.14(b), (d) and (e) (1999). We specifically address whether N.C. Gen. Stat. § 90-96(e), which provision is included within a statute entitled "Conditional discharge and expunction of records for first offense" is applicable to those persons who are over 21 years of age at the time the offense was committed. N.C. Gen. Stat. § 90-96.

The language of N.C. Gen. Stat. § 90-96(e) provides, in pertinent part:

> Whenever any person who has not previously been convicted of an offense under this Article or under any statute . . . ***pleads guilty to or has been found guilty*** of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia . . ., the court ***may***, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment, or information, trial and conviction.

N.C. Gen. Stat. § 90-96(e) (*emphasis added*). This statute then establishes the following procedures for obtaining an order for expungement:

> The judge to whom the petition [for expunction] is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was ***convicted*** of (i) a misdemeanor under this Article for possessing a controlled substance included within Schedules II through VI of this Article, or for possessing drug paraphernalia . . ., or (ii) a felony under G.S. 90-95(a)(3) for possession of less than one gram of cocaine, that he was ***not over 21 years of age at the time of the offense***, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Health and Human Services, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the offense in question, it ***shall*** enter an order of expunction of the petitioner's court record.

Id. (*emphasis added*).

Ms. Spencer correctly notes that this statute requires the trial court to expunge the record of a person not over age 21 if the required conditions are satisfied. However, she contends that the use of the word "may" in this statute allows the trial court to exercise its discretion in ordering an expungement when the offense was committed by a person over the age of 21.

To the contrary, the State contends that the legislature only intended to authorize the trial court to order expungement of the criminal record of a person not over 21 years of age at the time the offense was committed. The State further contends that N.C. Gen. Stat. § 90-96(e) lacks language granting the trial court's discretionary authority to order expungement regardless of the offender's age.

As to statutory interpretation, our Supreme Court has held "[w]hen the language of a statute is clear and unambiguous," there is no room for judicial construction and the courts must give it its plain meaning. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). However, "[w]hen a statute is ambigu-

ous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will. *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 389 (1978), *citing State v. Humphries*, 210 N.C. 406, 186 S.E. 473 (1936). In so doing, the court may interpolate a word, delete a word, or modify a word, when the legislative intent is clear and such construction is necessary to effectuate that intent. *Humphries*, 210 N.C. at 409-11, 186 S.E. at 476. Further, "[w]here a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded." *In re Banks*, 295 N.C. at 240, 244 S.E.2d at 389. This is because "[w]here possible the language of a statute will be interpreted so as to avoid an absurd consequence . . . ." *Id.* (*citation omitted*). Accordingly, our Supreme Court has held that "[w]ords and phrases of a statute may not be interpreted out of context, but individual expressions 'must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.' " *In re Hardy*, 294 N.C. 90, 95-96, 240 S.E.2d 367, 371-72 (1978), *citing Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 210, 69 S.E.2d 505, 511 (1952).

Because the plain language of N.C. Gen. Stat. § 90-96 does not clearly indicate whether a trial court has discretion to grant an expungement to one who "pleads guilty or has been found guilty," we must determine the statute's legislative intent. *Edmisten*, 291 N.C. 451, 232 S.E.2d 184. We first look at the statute as a "composite whole" to avoid construing any of its words or phrases out of context. *In re Hardy*, 294 N.C. at 95-96, 240 S.E.2d at 371-72. In so doing, we note that the statute contains four separate provisions stating that a petitioner be "not over 21 years of age[.]" N.C. Gen. Stat. § 90-96(a)-(e). Since the requirement for an expungement of "not over 21 years of age" is woven throughout the statute as a whole, this proves a legislative intent to reserve expungement to those persons ages 21 and under. *Id.* In addition, the statute lacks specific language granting discretion to the trial court to order an expungement to a person over 21 years of age. *Id.*

Moreover, the legislature obviously determined there are more compelling reasons to permit a youthful offender to have his or her record expunged without extending this privilege to a person over the age of 21. We recognize there may be persons over the age of 21 at the time of the offense who are deserving and should likewise have

the ability to seek expungement; however, it is up to the legislature to broaden expungement to those over the age of 21.

Based on the foregoing, we hold that a person who seeks to have his or her record expunged must meet the age requirement of being "not over 21 years of age at the time of the offense." N.C. Gen. Stat. § 90-96(e).

Reversed.

Judges McGEE and HORTON concur.

JETTIE RUTH STEVENS, PLAINTIFF v. JACINTO HERRERA GUZMAN, DEFENDANT

No. COA99-1360

(Filed 5 December 2000)

1. **Appeal and Error— notice of appeal—timeliness—motion for new trial**

   An appeal was dismissed as untimely where the notice of appeal was filed beyond the 30 days provided by N.C.G.S. § 1A-1, Rule 3. Plaintiff was not entitled to the tolling provisions of Rule 3 for a motion for a new trial because she filed her motion before the entry of judgment.

2. **Civil Procedure— refusal to enter written order on motion—remedy**

   Appeals from a trial court's refusal to enter a written order on motions for judgment notwithstanding the verdict and a new trial were dismissed; the court has an obligation to enter orders disposing of a party's motions, but the failure to enter an order is to be addressed through a writ of mandamus.

Appeal by plaintiff from order for costs filed 29 April 1999, from judgment filed 5 March 1999, from order filed 4 June 1999, and from orally rendered orders denying plaintiff's motion for judgment notwithstanding the verdict and for a new trial and for a new trial pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure by Judge James F. Ammons, Jr. in Wake County Superior Court. Heard in the Court of Appeals 10 October 2000.

E. Gregory Stott for plaintiff-appellant.

Baker, Jenkins & Jones, P.A., by Roger A. Askew and Kevin N. Lewis; and Jodee Sparkman Larcade, for defendant-appellee.

GREENE, Judge.

Jettie Ruth Stevens (Plaintiff) appeals a judgment filed 5 March 1999 in favor of Jacinto Herrera Guzman (Defendant).[1]

Plaintiff presented evidence at trial that on 2 March 1997, she was injured in an automobile accident caused by Defendant's alleged negligence. At the close of the evidence, the jury returned a verdict finding Plaintiff was not "injured by the negligence of . . . [D]efendant." Subsequent to the reading of the jury verdict, Plaintiff made an oral motion in open court for judgment notwithstanding the verdict on the ground "the verdict [was] contrary to the evidence and law." In the alternative, Plaintiff also made an oral motion for a new trial. The trial court denied these motions in open court, and did not enter a written order on the motions. On 26 February 1999, Plaintiff filed a written Rule 59 motion for new trial on the ground "an error in law occurred at the trial, which was objected to by . . . [P]laintiff." On 1 March 1999, the trial court signed a judgment in conformity with the jury verdict and dismissed Plaintiff's claim with prejudice. This judgment was filed with the Wake County Clerk of Superior Court on 5 March 1999. A hearing was held on Plaintiff's written Rule 59 motion on 29 March 1999, and the trial court orally denied the motion at the hearing.

In a motion dated 12 March 1999, Defendant requested payment by Plaintiff of "costs incurred in preparing for the trial of this matter," pursuant to Rule 68 of the North Carolina Rules of Civil Procedure. The trial court granted Defendant's motion and in an order signed and filed 29 April 1999, awarded Defendant $1,086.28 in costs.

In a motion dated 19 May 1999, Plaintiff requested the trial court "reduce its rulings on [P]laintiff's [oral and written] Motions for new trial to writing so that the same can be filed with the Wake County Clerk of Superior Court." In an order dated 3 June 1999, the trial court denied the motion, finding "there is no need for an order reducing those rulings to writing."

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1. Plaintiff appeals several additional orders of the trial court, which are noted in our recitation of the facts of this case.

On 28 May 1999, Plaintiff gave notice of appeal to the trial court's 29 April 1999 order. Also, in a notice of appeal dated 11 June 1999, Plaintiff gave notice of appeal to the trial court's 5 March 1999 judgment, the trial court's oral orders denying Plaintiff's motions for judgment notwithstanding the verdict and new trial, and the trial court's 3 June 1999 order, in which the trial court refused to reduce its oral orders to writing.

The issues are whether (I) Plaintiff's notice of appeal of the trial court's 5 March 1999 judgment was timely; and (II) Plaintiff's appeal of the trial court's refusal to enter an order in response to her Rule 50 and Rule 59 motions is properly before this Court.

I

[1] "Appeal from a judgment or order in a civil action . . . must be taken within 30 days after its entry." N.C.R. App. P. 3(c). A judgment or order in a civil action is entered "when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C.G.S. § 1A-1, Rule 58 (1999); *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737-38 (quoting N.C.G.S. § 1A-1, Rule 58), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997).

The running of the time period for filing notice of appeal from the judgment is tolled by the timely filing of a motion for judgment notwithstanding the verdict or motion for new trial, pursuant to Rule 50(b) or Rule 59(a) of the North Carolina Rules of Civil Procedure. N.C.R. App. P. 3(c)(1), (4).[2] To be timely, these motions must be filed "[n]ot later than 10 days after entry of [the] judgment," N.C.G.S. § 1A-1, Rule 50(b)(1) (1999); N.C.G.S. § 1A-1, Rule 59(b) (1999), and not before the entry of judgment, *Watson v. Dixon*, 130 N.C. App. 47, 51, 502 S.E.2d 15, 19 (1998).[3] When the period for filing notice of appeal is tolled by the filing of a motion, "[t]he full time for appeal commences to run and is to be computed from the date of . . . entry of an order upon . . . the . . . motions." N.C.R. App. P. 3(c).

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2. Rule 3 of the Appellate Rules also provides for tolling by motions filed pursuant to Rule 52(b) and Rule 59(e). N.C.R. App. P. 3.

3. We are aware the practice in this State is often for attorneys to make their Rule 50 and Rule 59 motions immediately following the return of the jury verdict, which is usually before the entry of the judgment. We also acknowledge the language in Rule 50(b)(1) and Rule 59(b), "[n]ot later than 10 days after entry of [the] judgment," could reasonably be read to permit the filing of these motions at any time after the judgment is rendered, but in no event later than 10 days after entry. In any event, we are bound by *Watson. In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d

In this case, Plaintiff filed her motion for a new trial before the entry of the judgment, which occurred on 5 March 1999.[4] She is thus not entitled to the benefit of the tolling provisions of Rule 3. Accordingly, because her notice of appeal from the judgment was filed 11 June 1999, beyond the 30 days provided for in Rule 3, the appeal is not timely and must be dismissed.[5] *See Currin-Dillehay Bldg. Supply, v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683 ("Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed."), *disc. review denied*, 327 N.C. 633, 399 S.E.2d 326 (1990).

II

[2] Plaintiff also appeals the trial court's refusal to enter a written order on Plaintiff's motions for judgment notwithstanding the verdict and new trial. The trial court has an obligation to enter orders disposing of a party's motions. The failure of the trial court to enter an order, however, is not a matter to be addressed on an appeal from that inaction, but instead is to be addressed through a writ of mandamus filed with this Court. *See* N.C.R. App. P. 22(a); N.C.R. App. P. 22 drafting committee note, para. 2, *reprinted in* 287 N.C. 730, 732 (1975) (writ of mandamus is appropriate method to "compel a judicial action erroneously refused"). Accordingly, Plaintiff's appeals on these issues are dismissed.

Dismissed.

Judges MARTIN and EDMUNDS concur.

30, 37 (1989) (panel of the Court of Appeals is bound by a prior decision of another panel of the Court of Appeals).

4. Additionally, Plaintiff made an oral motion for judgment notwithstanding the verdict and, in the alternative, for a new trial subsequent to the rendering of judgment on the jury's verdict. Because the running of the time period for filing a notice of appeal may only be tolled by the *filing* of a motion and not by an oral motion, N.C.R. App. P. 3(c), Plaintiff's oral motions are not relevant to the issue of whether Plaintiff's notice of appeal was timely filed in this case.

5. Additionally, we note Plaintiff's notice of appeal to the trial court's 29 April 1999 order, requiring Plaintiff to pay costs to Defendant in the amount of $1,086.28, was timely filed under Rule 3 of the North Carolina Rules of Appellate Procedure. Plaintiff's sole argument in her brief to this Court regarding this order is that it should be reversed on the ground Plaintiff is entitled to a new trial. Because we have dismissed Plaintiff's appeal of the judgment in this case, Plaintiff's argument that the 29 April 1999 order should be reversed is without merit.

THOMAS PROCTER, PETITIONER v. CITY OF RALEIGH BOARD OF ADJUSTMENT, RESPONDENT, AND ANTHONY JOHNSON AND WIFE, KATHY JOHNSON, INTERVENORS

No. COA00-17

(Filed 5 December 2000)

Zoning— minimum setback—construction of ordinance—plain language—no maximum stated

A city ordinance establishing a minimum front yard setback of 15 feet did not require all structures to be built 15 feet from the street right-of-way where there were no structures fronting the street on the block in question and there was no ambiguity in the ordinance. The superior court is to apply a de novo standard of review in reviewing a decision of a board of adjustment, and the courts are required to use fundamental principles of statutory construction in construing a zoning ordinance. This ordinance is silent on the maximum distance the structure may be built from the right-of-way and the court is not permitted to read such language into the ordinance.

Appeal by intervenors, Anthony Johnson and wife, Kathy Johnson, from order filed 30 April 1998 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 17 October 2000.

John F. Oates, Jr. for petitioner-appellee.

Satisky & Silverstein, by John N. Silverstein, for respondent-appellee.

Hatch, Little & Bunn, L.L.P., by David H. Permar and Tina L. Frazier, for intervenor-appellants.

GREENE, Judge.

Anthony Johnson and Kathy Johnson (Intervenors) appeal a 30 April 1998 order (the Order) of the Wake County Superior Court (trial court) interpreting § 10-2024(d)(2) of the Raleigh Zoning Ordinance (the Ordinance) as setting only a *minimum* building setback line. The Order reversed the Raleigh Board of Adjustment's (the Board of Adjustment) 10 November 1997 decision holding the Ordinance establishes a 15 feet "minimum and maximum" front yard setback when "there are no houses on the block face."

Petitioner is the owner of a tract of land located between Cole Street and Wade Avenue in Raleigh, North Carolina (the Property) and desires to construct several duplexes on the Property with varying front yard setbacks. The minimum front yard setback to be 15 feet. The duplexes are designed to face Wade Avenue and would constitute the only structures within this block to face Wade Avenue. The Ordinance provides in pertinent part:

> The minimum district yard setbacks, unless otherwise required by this Code, are:
>
> front yard — The greater of either 15 feet or within ten (10) per cent of the median *front yard* setback established by *buildings* on the same side of the *block face* of the proposed *building*[1]

The trial court concluded "the [O]rdinance provision in question is unambiguous, and . . . establishes only **minimum** setback requirements, and does not establish any maximum setback requirements, at least under the facts of this case." The trial court held "any buildings proposed for construction on Petitioner's property shall be deemed in compliance with [the Ordinance] so long as those buildings are set back at least 15 feet from the right-of-way line of Wade Avenue."

The issue is whether language in an ordinance establishing a minimum front yard setback of "15 feet" requires all structures be constructed "15 feet" from the street right-of-way.

In reviewing a decision of a board of adjustment with respect to the application of a zoning ordinance, the superior court is to apply a *de novo* standard of review. *Ayers v. Bd. of Adjust. for Town of Robersonville*, 113 N.C. App. 528, 530, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994). Similarly, this Court's review of the superior court requires us to apply a *de novo* review of the board of adjustment. *Id.*

In construing a zoning ordinance, the courts are required to use the fundamental principles of statutory construction and interpretation. *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385. When statutory language is clear and unambiguous, "[w]ords in a statute must be construed in accordance with their

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1. We note that the Ordinance has been modified since this case was before the trial court, however, this case is governed by the terms of the Ordinance as enacted at the time of the Order of the trial court.

plain meaning unless the statute provides an alternative meaning." *Kirkpatrick v. Village Council*, 138 N.C. App. 79, 86, 530 S.E.2d 338, 343 (2000). The plain meaning of "minimum" is the "lowest possible amount," the "lower limit permitted by law or other authority." *American Heritage College Dictionary* 868 (3d ed. 1993).

In this case, because there are no structures fronting on Wade Avenue in the block in question, and because there is no ambiguity in the Ordinance, any structures on this block facing Wade Avenue must be constructed no closer than 15 feet from the Wade Avenue right-of-way. This 15 feet is the "lowest possible" or minimum distance between the structure and the right-of-way and thus constitutes the required front yard setback. The Ordinance is silent on the maximum distance the structure may be constructed from the Wade Avenue right-of-way and this Court is not permitted, under the guise of judicial construction, to read such language into the Ordinance. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990).

In so holding, we reject the argument of the Intervenors that the Ordinance was intended, as evidenced by testimony in the record, to require "the same block face through the neighborhood" and we should therefore construe the Ordinance to mandate a common front yard setback. The courts, when construing an ordinance, are permitted to look beyond the language of that ordinance only when it contains some ambiguity. *Id.* In this case, however, there is no ambiguity. Furthermore, we reject Intervenors' argument we are bound by the interpretation placed on the Ordinance by the Board of Adjustment. As we have held, that interpretation is affected by an error of law and this Court is not therefore bound by it. *Whiteco Outdoor Adver. v. Johnston County Bd. Of Adjust.*, 132 N.C. App. 465, 470, 513 S.E.2d 70, 74 (1999).

Affirmed.

Judges MARTIN and EDMUNDS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 DECEMBER 2000

BLUE SKY ASSOCS. v. BANK OF ESSEX No. 99-1424	Wake (98CVS12903)	Reversed and remanded
BOLING v. AUSTIN No. 99-1423	Wake (95CVD2267)	Affirmed
BUCKLAND v. REMOTE SOURCE LIGHTING INT'L, INC. No. 99-1295	Durham (98CVS05039)	Vacated in part and remanded
BULLARD v. WELLS No. 99-1189	Sampson (94CVS935)	Appeal dismissed
C&C ENTERS. OF WARREN CTY. v. BAILEY No. 00-275	Durham (98CVS2622)	Affirmed
GRIFFIN v. SAM'S MART TEXACO No. 99-1492	Mecklenburg (97CVS15457)	Affirmed
HOLT v. HARBOR SPECIALTY INS. CO. No. 99-1609	Guilford (99CVS7037)	Affirmed
IN RE CLARK No 99-1584	Union (98J003) (98J004)	Affirmed
IN RE GOYENS No. 00-336	Edgecombe (96J122)	Affirmed
IN RE HUFF No. 99-1547	Brunswick (96J83)	Affirmed
IN RE PERRY No. 00-463	Durham (97J226) (97J227) (97J228)	Affirmed
IN RE WILL OF BROWN No. 99-1320	Currituck (98E41)	Affirmed
KELMAN v. LAURELWOOD ASSOCS. No. 99-1231	Guilford (98CVS7370)	Affirmed
LANDSBERGER v. LANDSBERGER No. 00-125	Guilford (98CVD8697)	Dismissed
PARKS v. HALL No. 99-1610	Guilford (98CVS4019)	Affirmed

PUROFIRST OF CAPE FEAR, INC. v. TYLER No. 00-273	Brunswick (99CVD394)	Reversed and remanded
ROGERS v. ROGERS No. 99-1210	Haywood (97CVD1045)	Reversed and remanded
SHAVER v. HUNT MFG. CO. No. 00-121	Ind. Comm. (515285)	Affirmed
STATE v. BROWN No. 99-1135	New Hanover (97CRS103) (97CRS15442)	No Error
STATE v. BRUTON No. 99-1313	Wilson (98CRS14997)	No Error
STATE v. CATHEY No. 99-1341	Mecklenburg (98CRS102843) (98CRS102844) (98CRS102845)	No Error
STATE v. COBB No. 99-1506	Lenoir (98CRS12506) (98CRS12507) (98CRS12508) (98CRS12509) (98CRS12510) (98CRS12569)	No Error
STATE v. DUNCAN No. 00-359	Mecklenburg (98CRS26873) (98CRS26874)	No Error
STATE v. GASKEY No. 99-1270	Rowan (97CRS16598)	No Error
STATE v. HARVEY No. 99-1566	Guilford (99CRS23416) (98CRS99483)	No Error
STATE v. HOPKINS No. 99-1543	Mecklenburg (98CRS33465)	No Error
STATE v. JACKSON No. 00-66	Forsyth (99CRS2863) (99CRS2864)	No Error
STATE v. JOHNSON No. 00-207	Forsyth (99CRS2243) (99CRS42054)	Remanded
STATE v. JOHNSON No. 00-355	Lee (98CRS2255) (98CRS2257) (98CRS2258)	No Error

STATE v. JONES No. 99-1354	Stokes (98CRS5695) (98CRS5696) (98CRS5697) (98CRS5698)	No Error
STATE v. JONES No. 00-225	Guilford (98CRS10466) (98CRS10467)	No Error
STATE v. LAMKIN No. 99-1410	Forsyth (98CRS37960)	Remanded to correct judgment
STATE v. LEE No. 00-385	Forsyth (99CRS3177)	No Error
STATE v. LOUIS No. 99-1167	Wake (98CRS90052)	No Error
STATE v. LOVE No. 99-1301	Cabarrus (97CRS1932) (97CRS1933) (97CRS3204)	As to 97CRS3204, remanded resentencing, Defendant's conviction in 97CRS1932 is reversed and remanded. Defendant's conviction in 97CRS1933 is reversed.
STATE v. LOWERY No. 99-1542	Mecklenburg (98CRS27060)	No Error
STATE v. MAULTSBY No. 99-1311	Forsyth (99CRS17608) (99CRS26110)	No Error
STATE v. McCALLUM No. 00-226	Guilford (99CRS23560) (99CRS36350)	No Error
STATE v. McNAIR No. 99-1140	Wayne (98CRS14543) (98CRS14544) (98CRS19640)	No Error
STATE v. McNEILL No. 99-1550	Cumberland (99CRS1542)	No Error
STATE v. MURPHY No. 00-528	Onslow (97CRS11837)	No Error

STATE v. PARSON No. 99-1260	Alexander (99CRS427) (99CRS428)	Affirmed
STATE v. PIERCE No. 99-1538	Randolph (98CRS7092)	No Error
STATE v. PRICE No. 00-373	Pasquotank (83CRS3036) (83CRS3037)	Appeal dismissed
STATE v. REESE No. 00-586	Buncombe (98CRS3755) (98CRS52661) (98CRS58953) (99CRS0016) (99CRS0017) (99CRS0018) (99CRS0019)	No Error
STATE v. REYNOLDS No. 99-1281	Richmond (98CRS2441) (98CRS2442) (98CRS2443) (98CRS2444) (98CRS2445) (99CRS1740)	No error in trial; remanded for arrest of judgment and resentencing
STATE v. SHARROCK No. 00-362	Wilson (99CRS51530)	No Error
STATE v. SIMS No. 99-1416	Cabarrus (97CRS019215) (97CRS019216)	No Error
STATE v. TAYLOR No. 00-52	Forsyth (98CRS41621) (98CRS53421)	No Error. Remanded for entry of corrected order of dismissal in 98CRS41621.
STATE v. THOMAS No. 99-1252	Forsyth (98CRS24403) (98CRS24404) (98CRS41654)	No Error
STATE v. TRULL No. 00-380	Union (97CRS17353) (97CRS17355)	Affirmed
STATE v. TUCKER No. 00-369	Forsyth (99CRS14291) (99CRS36774)	No Error. Petition for writ of certiorari: Denied. Motion to dismiss grand jury indictment: Denied. Miscellaneous paper writings: Denied.

STATE v. WALKER No. 99-1511	Iredell (98CRS9925) (98CRS9926) (98CRS9927) (98CRS9928) (94CRS8323) (94CRS8324)	No Error
STATE v. WILDER No. 99-1463	Durham (95CRS634)	Remanded for new sentencing hearing
STATE v. WOOTEN No. 99-1316	Guilford (98CRS60141)	No Error
VITTITOE v. VITTITOE No. 99-1363	Guilford (98CVD834)	Affirmed

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

CONFESSIONS AND INCRIMINATING STATEMENTS

Accomplice's redacted confession—failure to give limiting instruction—The trial court did not violate defendant's rights under the Confrontation Clause in a double first-degree murder case by failing to instruct the jury that it could use an accomplice's statement against the accomplice only. **State v. McKeithan, 422.**

Voluntariness—juvenile—The trial court did not err in a double first-degree murder case by denying defendant juvenile's motion to suppress his confession where warnings given to defendant were sufficient to comply with Miranda and former N.C.G.S. § 7A-595. **State v. McKeithan, 422.**

CONSPIRACY

Civil—statement of claim—alternate pleading—A complaint alleged facts sufficient to state a derivative claim by minority shareholders for civil conspiracy where it was replete with allegations of conspiracy, acts in furtherance of the alleged conspiracy, and injury to the company and to plaintiffs. **Norman v. Nash Johnson & Sons' Farms, Inc., 390.**

One guilty verdict—judgment on two counts error—The trial court erred by entering judgment on two counts of conspiracy to commit murder when the jury only returned one guilty verdict as to conspiracy. **State v. McKeithan, 422.**

CONSTITUTIONAL LAW

Adequate state remedies—Summary judgment was properly granted for defendant-city on state constitutional claims arising from a confrontation between an off-duty police officer and a school bus driver where plaintiff brought a free speech claim, but nothing indicates that plaintiff's right to free speech was violated in any way, and adequate state remedies existed on the other claims. **Glenn-Robinson v. Acker, 606.**

Confrontation clause—witness refusing to testify—prior testimony—The introduction of prior trial testimony from defendant's brother who refused to testify in the present trial did not violate the confrontation clauses of either the state or federal constitutions. **State v. McNeill, 450.**

Double jeopardy—pretrial home detention—not multiple punishments—Defendant's pretrial home detention was not punishment for purposes of double jeopardy analysis. **State v. Jarman, 198.**

Registration of sex offenders—defendant adjudicated incompetent—N.C.G.S. § 14-208.11, which requires sex offenders to register their address, is unconstitutional as applied to an adjudicated incompetent defendant because it fails to afford sufficient notice under the Fifth and Fourteenth Amendments. **State v. Young, 1.**

Res judicata—no privity—interests not legally represented—The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict even though defendant asserted res judicata barred plaintiff from asserting a claim for medical expenses after the United States' prior case and dismissal with prejudice. **Kaminsky v. Sebile, 71.**

DIVORCE—Continued

tended that the award exceeded what he was able to pay, but overlooked clear statutory language which stated that income encompasses both earned and unearned income, including employment benefits. Taking into account all the statutory factors, defendant's income-expenses surplus is well in excess of that which the court actually ordered defendant to pay. **Barrett v. Barrett, 369.**

Alimony—attorney fees—The trial court properly exercised its discretion in awarding attorney fees in an alimony action where it was previously determined in this opinion that plaintiff is a dependent spouse and entitled to receive alimony; the trial court's findings suggest that plaintiff was forced to deplete her equitable distribution award to pay her debts and expenses; the amount awarded was within the range sought; and the court found that the hourly rates charged were reasonable and customary for that type of work. **Barrett v. Barrett, 369.**

Alimony—attorney fees—failure to make sufficient findings of fact and conclusions of law—The trial court erred by awarding defendant wife permanent alimony and attorney fees without making sufficient findings of fact and conclusions of law to support its order. **Williamson v. Williamson, 362.**

Alimony—classification as supporting spouse—The trial court's classification of defendant as a supporting spouse for alimony purposes was more than adequately supported by findings that defendant earns $7,250 per month and has expenses in the amount of $6,216.66 per month, with a resulting income-expenses surplus. **Barrett v. Barrett, 369.**

Alimony—dependent spouse classification—findings—The trial court correctly classified plaintiff as a dependent spouse in an alimony determination where the court found that plaintiff earns $2,666.50 in gross monthly income but has $3,450 in monthly expenses and considered the marital standard of living, plaintiff's relative earning capacity, and her relative estate. **Barrett v. Barrett, 369.**

Equitable distribution—delay between close of evidence and entry of order—19 months—New evidence and a new equitable distribution order were required where there was a delay of 19 months from the date of the trial to the entry of judgment. **Wall v. Wall, 303.**

Equitable distribution—distributional factors—discretion of trial court—The trial court did not abuse its discretion in an equitable distribution case asserted prior to the divisible property amendments in 1997 by failing to classify and distribute as marital debt the sales cost and income taxes incurred in connection with the sale of the parties' Georgia real estate. **Khajanchi v. Khajanchi, 552.**

Equitable distribution—evidence not considered—defendant's health—The trial court in an equitable distribution proceeding should have made findings to indicate that it had considered defendant's testimony about his health situation, even if the court rejected the testimony or gave it little weight. Once evidence as to the parties' health or other matters is presented, the trial court must consider the evidence and make sufficient findings. **Wall v. Wall, 303.**

Equitable distribution—marital debts—The trial court did not err in an equitable distribution case asserted prior to the divisible property amendments in 1997 by its distribution of the assets and debts of the parties' Hallmark stores

DIVORCE—Continued

even though defendant-husband contends the trial court should have used the same method it used for the division of a Wachovia Bank checking account when it distributed the stores' debts owed to Hallmark, Enesco, and Lefton. **Khajanchi v. Khajanchi, 552.**

Equitable distribution—marital debts—The question of whether debts incurred by a husband following the date of separation were marital debts was moot because it concerned equitable distribution, and a valid premarital agreement existed. **Huntley v. Huntley, 749.**

Equitable distribution—marital home—order to sell—The trial court did not abuse its discretion in an equitable distribution proceeding by ordering that the marital home be sold and the proceeds divided between the parties where the court classified and valued the residence before selling it. **Wall v. Wall, 303.**

Equitable distribution—marital home—value—There was no prejudicial error in an equitable distribution proceeding in the trial court's failure to set out its calculations regarding the net value of the marital dwelling where the net value could be made certain from the facts found by the court. **Wall v. Wall, 303.**

Equitable distribution—military pension—no abuse of discretion—The trial court did not abuse its discretion when it chose to apply Illinois law using the "reserved jurisdiction approach" rather than the "immediate offset approach" to determine that plaintiff wife was entitled to 30% of defendant husband's military pension. **Torres v. McClain, 238.**

Equitable distribution—military pension—unincorporated separation agreement—The trial court did not err by awarding plaintiff wife a portion of defendant husband's military pension when the parties' Japanese divorce judgment does not incorporate the parties' separation agreement providing for the division of defendant's military pension. **Torres v. McClain, 238.**

***Equitable distribution*—premarital agreement**—The trial court erred by granting equitable distribution when a premarital agreement remained valid and enforceable. **Huntley v. Huntley, 749.**

Equitable distribution—pre-1997 action—debts paid after separation—The trial court did not abuse its discretion in a pre-1997 equitable distribution action in its treatment of debts paid by defendant after separation. **Wall v. Wall, 303.**

Equitable distribution—pre-1997 action—value of profit-sharing plan—stipulation—The trial court did not err in an equitable distribution action in finding the value of a profit-sharing plan as of the date of separation, but erred by dividing the post-separation increases between the parties. **Wall v. Wall, 303.**

Equitable distribution—separation agreement—created more rights than statute provides—no public policy violation—The trial court did not err by awarding plaintiff wife a portion of defendant husband's military pension because the parties' separation agreement with an Illinois choice of law provision does not violate the public policy of North Carolina. **Torres v. McClain, 238.**

Equitable distribution—tax consequences—not considered—No error was found in an equitable distribution action from the trial court's failure to consider the tax consequences of its equitable distribution order where defendant did not

EVIDENCE—Continued

accomplice's plea agreement and plea transcript under N.C.G.S. § 8C-1, Rule 401. **State v. McCord, 634.**

Allegations of prior insurance fraud—probative of truthfulness—The trial court did not abuse its discretion in a first-degree murder case by allowing the State to question defendant regarding allegations that his brother and his parents had committed insurance fraud. **State v. Kimble, 153.**

Cross-examination of defendant—collateral matter—no prejudicial error—The trial court did not commit prejudicial error in a first-degree murder case even though it allowed the State to question defendant during cross-examination on a collateral matter regarding three photographs of a woman found in defendant's cell to contradict defendant's statement that he holds nothing secret from his wife. **State v. Kimble, 153.**

Cross-examination of witness—prior unrelated charge—The trial court did not err in a first-degree murder and assault prosecution by limiting defendant's examination of a State's witness regarding a prior unrelated conviction where there was no evidence of any pending criminal charges against the witness or that he was on probation, and nothing to indicate that the prosecutor's office was in any position to intimidate the witness or influence his testimony. **State v. Ferguson, 699.**

Direct examination—leading questions—The trial court did not abuse its discretion in a first-degree murder case by sustaining the State's objections to various questions put to defendant on direct examination on the grounds that the questions were leading. **State v. Kimble, 153.**

Eminent domain—value of land—basis of expert opinion—The testimony of an expert in a condemnation action as to the value of timber on the property sufficiently reflected the fair market value at the time of the taking in April where the numbers composing his estimate were in part derived from a September 1996 appraisal, but he sufficiently updated the estimate by considering the timber market between the appraisal and the taking. **City of Hillsborough v. Hughes, 714.**

Eminent domain—value of land—expert testimony—reasonable degree of certainty—The opinion of an appraiser in a condemnation action was to a reasonable degree of certainty where there was no indication of a problem with regard to testimony concerning his report, but the Town injected new considerations into the valuation methodology on cross-examination. **City of Hillsborough v. Hughes, 714.**

Exclusion—not preserved for review—objectionable questions—The trial court did not commit prejudicial error in a first-degree murder case by sustaining the State's objections to various questions during defendant's cross-examination of a detective. **State v. Kimble, 153.**

Exhibition of gun—gun not introduced—no relationship established with gun used in crime—The State's exhibition of a gun and use of the gun to illustrate defendant's testimony in a prosecution for murder and assault was erroneous but not prejudicial where the evidence did not establish any relationship between the gun used in the exhibition and defendant's gun and the gun was never introduced into evidence, but the exhibition did not establish that defend-

EVIDENCE—Continued

EVIDENCE—Continued

drugs and a lot of money, was not inadmissible hearsay or inadmissible under N.C.G.S. § 8C-1, Rule 403. **State v. McCord, 634.**

Hearsay—state of mind exception—Even though the victim's statements contained descriptions of factual events, the trial court did not err in a first-degree murder case by admitting her statements under N.C.G.S. § 8C-1, Rule 803(3) that the victim's husband took out a life insurance policy without her knowledge, that her husband was not the man she married and had been acting differently, and that she was afraid she would not wake up in the morning since her husband slept with a gun underneath his pillow. **State v. Kimble, 153.**

Hearsay—statements against interest—accomplice's self-inculpatory statements—statements implicating defendant already admitted—The trial court did not err in a first-degree murder case by allowing into evidence under N.C.G.S. § 8C-1, Rule 804(b)(3) a nontestifying accomplice's statements against the accomplice's penal interest, and statements both against the accomplice's penal interest and inculpating defendant. **State v. Kimble, 153.**

Hearsay—victim's conversation with defendant—deceased witness's statement—The trial court did not err in a first-degree murder prosecution (and any error was harmless) in the admission of an officer's testimony relating the statement of an unavailable witness concerning a conversation between the victim and defendant before the murder. The victim's initial statement was admissible under N.C.G.S. § 8C-1, Rule 803(3) as showing the victim's state of mind and the statement to the officer was admissible under N.C.G.S. § 8C-1, Rule 804(b)(5), the residual exception, because the witness was dead and the trial court properly considered each of the trustworthiness elements. There was no prejudice even if the witness's statement was inadmissible because it was nearly identical to prior testimony. **State v. Parker, 169.**

Hearsay—victim's statements to psychologist—The trial court erred in an indecent liberties case by admitting a psychologist's testimony recounting an alleged child sexual abuse victim's out-of-court statements without a limiting instruction. **State v. Bates, 743.**

Identification of defendant by officer—prior investigation—The trial court did not err by admitting evidence concerning a second-degree murder defendant's involvement with narcotics where a narcotics detective testified before the jury that she had seen defendant at an address behind the murder scene and had found papers there bearing his name. **State v. Hanton, 679.**

Judicial notice—police department regulations—North Carolina courts may not take judicial notice of municipal ordinances, much less police department regulations, and the remaining "facts" requested here are best characterized as legal conclusions, which are not a proper subject for judicial notice. N.C.G.S. § 8C-1, Rule 201. **Glenn-Robinson v. Acker, 606.**

Opinion testimony—doctor—sexual abuse—improper foundation—The trial court erred in an indecent liberties case by admitting the opinion testimony of a doctor that the child had been abused where the opinion was based upon what a psychologist said happened to the child. **State v. Bates, 743.**

Other acts of misconduct—admissible—Admission of other acts of misconduct was not erroneous in a first-degree murder prosecution where the evidence

WORKERS' COMPENSATION—Continued

Condition of employment—required shoes—In a workers' compensation action brought by a driver's license examiner who had RSD in her feet and who alleged that her required work shoes aggravated her condition, the Industrial Commission erred by concluding that the shoes issued by defendant were not a condition of employment where the evidence showed that plaintiff was required to wear her DMV uniform, including the shoes, that she was not allowed to purchase and wear her own shoes, and that defendant usually granted a physician's request that an employee be permitted to wear another style of shoe. There was no evidence that plaintiff knew that such an exemption could be had. **Meadows v. N.C. Dep't of Transp., 183.**

Employer-employee relationship—jurisdiction—The Industrial Commission erred by concluding that plaintiff roofer was an employee rather than an independent contractor at the time of his accident and by awarding plaintiff permanent and total disability compensation under the Workers' Compensation Act. **McCown v. Hines, 440.**

Industrial accident—civil action against employer—substantial certainty of injury—insufficient evidence—The trial court did not err by granting summary judgment for defendant Concept Fabrics in an action arising from an industrial accident which resulted in the amputation of plaintiff's arm. An employee is allowed to pursue a civil action against her employer rather than a Workers' Compensation action where the employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death; here, substantial certainty of injury was not established. **Bruno v. Concept Fabrics, Inc., 81.**

Industrial accident—supervisor's actions not willful—contributory negligence by plaintiff—The trial court did not err by granting defendant Gleissner's motion for summary judgment in a negligence action arising from an industrial accident which resulted in the amputation of plaintiff's arm because the evidence failed to show that defendant's conduct was willful, wanton and reckless where plaintiff was given prescription medication and advised not to operate heavy machinery; she went to work and reported to defendant, her supervisor and the plant manager, that she had taken prescription medication; defendant testified in his deposition that plaintiff was offered the chance to return home and not work; and plaintiff began operating the picker machine. Furthermore, plaintiff was contributorily negligence on a matter of law. **Bruno v. Concept Fabrics, Inc., 81.**

Injury by accident—delivery driver found dead—heart attack—presumption that death work related—rebuttal—The findings of fact in a workers' compensation action arising from the death of a delivery driver support the conclusions that decedent did not sustain an injury by accident and that defendant-employer successfully rebutted the presumption that death within the course of employment was work related. **Bason v. Kraft Food Serv., Inc., 124.**

Injury by accident—multiple events—The Industrial Commission erred in a workers' compensation action by concluding that plaintiff sustained an injury by accident where plaintiff, an attorney, suffered an acute cardiac incident and underwent coronary artery bypass surgery as a result of stressful events in the preceding months. Multiple events over a period of time do not constitute an accident, which must result from an event. **Lovekin v. Lovekin & Ingle, 244.**

WORKERS' COMPENSATION—Continued

Lodging furnished with job—value—There was sufficient evidence in a workers' compensation action arising from the shooting of a motel night auditor to support the Industrial Commission's finding that the value of the lodging furnished to plaintiff at the business was $100 per week and that plaintiff received lodging in lieu of additional wages. **Shah v. Howard Johnson, 58.**

Payment of compensation without prejudice to right to contest—improper—The Industrial Commission did not act arbitrarily or abuse its discretion in a workers' compensation action arising from the shooting of a motel night auditor by finding that defendant improperly used Form 63 and improperly stopped payments. **Shah v. Howard Johnson, 58.**

Refusal of suitable job offer—all compensation suspended—The Industrial Commission in a workers' compensation action correctly suspended plaintiff's right to compensation from the date a suitable job offer was rejected. Although plaintiff argued that the job offer included only salary and not lodging, as had his former job, and that he should therefore receive an amount based on the value of the lodging even after he refused the job offer, the express terms of N.C.G.S. § 97-32 prohibit an employee from receiving any compensation during the continuance of his refusal to accept employment suitable to his capacity. **Shah v. Howard Johnson, 58.**

Refusal of suitable job offer—change of location—fears for safety—The conclusion of the Industrial Commission in a workers' compensation action that the employment offered by defendant-employer was suitable and unjustifiably refused by plaintiff was supported by the findings. Plaintiff contended that the Commission failed to consider his change of residence from North Carolina to California and his fear of returning to his former employment, but it is clear from plaintiff's testimony that he based his rejection of the job offer on his perceived physical limitations rather than his fears for his safety or his distance from his former job location. **Shah v. Howard Johnson, 58.**

Timeliness of claim—plaintiff not informed that she had an occupational disease—In a workers' compensation action brought by a driver's license examiner who had RSD in her feet and who alleged that her required work shoes aggravated her condition, the Industrial Commission erred by concluding that the claim was barred for untimeliness where the opinion and award did not contain any finding as to when any treating physician informed plaintiff clearly, simply, and directly that she had an occupational disease and that the illness was work-related. **Meadows v. N.C. Dep't of Transp., 183.**

Witnesses—right to cross-examine—The Industrial Commission abused its discretion in a workers' compensation case by allowing significant new evidence to be admitted from a doctor's report but denying defendants an opportunity to question the witness doctor. **Goff v. Foster Forbes Glass Div., 130.**

ZONING

Conditional use ordinance—de novo review—prohibiting installation of gates in fence serving as buffer between subdivisions—The trial court erred in its de novo review of the Cary Board of Adjustment's (Board) interpretation of a conditional use ordinance by concluding the Board's construction of the con-

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina