NORTH CAROLINA COURT OF APPEALS REPORTS

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141 N.C. APP.

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This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

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ROBERT C. HUNTER
ROBERT H. EDMUNDS, JR.
JAMES D. FULLER[1]

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JOSEPH R. JOHN, SR.[2]

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GERALD ARNOLD

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Administrative Counsel

FRANCIS E. DAIL

Clerk

JOHN H. CONNELL

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1. Appointed by Governor James B. Hunt, Jr. and sworn in 7 September 2000 to replace Joseph R. John, Sr. who retired 1 September 2000.
2. Appointed Emergency Recalled Judge by Governor James B. Hunt, Jr. and sworn in 2 October 2000.

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1. Appointed and sworn in 29 December 2001.
2. Retired 31 January 2002.
3. Appointed and sworn in 17 December 2001.
4. Retired 1 February 2002.
5. Appointed and sworn in 17 December 2001.
6. Appointed and sworn in 29 October 2001.
7. Currently assigned to Court of Appeals.

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SAMUEL M. TATE	Morganton

1. Appointed and sworn in 30 November 2001.
2. Deceased 21 November 2001.
3. Appointed Chief Judge effective 16 November 2001 to replace Anna Mills Wagner who resigned 16 November 2001.
4. Appointed and sworn in 11 December 2001.
5. Appointed and sworn in 28 November 2001.

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

WENDELL JUSTIN WILLIAMSON, PLAINTIFF v. MYRON B. LIPTZIN, M.D., DEFENDANT

No. COA99-813

(Filed 19 December 2000)

Negligence— psychiatrist—patient care—no proximate cause—injuries too remote in time

The trial court erred by failing to grant defendant psychiatrist's motion for a directed verdict and thereafter his motion for judgment notwithstanding the verdict in an action where plaintiff, a twenty-four-year-old law student and defendant's patient, sought damages based on defendant's alleged negligent treatment of plaintiff's mental illness which allegedly caused plaintiff to randomly shoot and kill two people eight months after plaintiff's last session with defendant despite never expressing any intent to do so, because: (1) there was no showing of proximate cause of plaintiff's injuries when there was no evidence that plaintiff posed a threat of violence to others which would in turn lead to injury, plaintiff's own expert stated he was not sure that he would go so far as to conclude that plaintiff's dangerousness to himself or others was foreseeable, another of plaintiff's experts also testified that it was not foreseeable that plaintiff would kill others, and plaintiff's own behavior prior to or at the time of defendant's retirement in no way indicated that he would become violent; (2) plaintiff's injuries were too remote in time and the chain of events which led to plaintiff's injuries was too attenuated for defendant's actions to be the proximate cause of plaintiff's injuries of being wounded during a shootout, being

tried for capital murder, being committed to a mental institution, and not being able to continue his legal studies or pursue a possible career; (3) North Carolina courts are reluctant to hold a person liable where the chain of events which led to the resulting injuries is unforeseeable, remote, and attenuated, even though some injury to plaintiff was possible; (4) evidence of risk factors for potential violence such as gun ownership, being under a certain age, or being of a certain gender, implicates a large portion of the population and is insufficient in and of itself to prove foreseeability; (5) the uncertainties in diagnosing diseases of the human mind and predicting future behavior were further hampered by the setting in which defendant observed plaintiff, which was an outpatient student health care facility intended for short-term treatment; and (6) public policy concerns show that imposing liability on a psychiatrist in an outpatient short-term care setting for the actions of a patient that are at most based on risk factors and not foreseeability would have adverse affects on psychiatric care when North Carolina's policy on the mentally ill promotes less restrictive methods of treatment and more patient autonomy.

Appeal by defendant from order entered 4 September 1998 by Judge Wade Barber in Superior Court, Orange County, and from judgment entered 7 October 1998 and order entered 31 March 1999 by Judge James C. Spencer, Jr. in Superior Court, Orange County. Heard in the Court of Appeals 17 April 2000.

Smith, James, Rowlett & Cohen, L.L.P., by Seth R. Cohen, and Gordon & Nesbit, P.L.L.C., by L. G. Gordon, Jr., for plaintiff-appellee.

Pipkin, Knott, Clark & Berger, L.L.P., by Bruce W. Berger, and Smith, Helms, Mulliss & Moore, L.L.P., by James G. Exum, Jr., Matthew W. Sawchak and Hampton Y. Dellinger, for defendant-appellant.

Kilpatrick Stockton, L.L.P., by Noah H. Huffstetler, III, for North Carolina Psychiatric Association, American Psychiatric Association, American Medical Association, North Carolina Medical Society, North Carolina Psychological Association, North Carolina Hospital Association and American Psychological Association, amici curiae.

TIMMONS-GOODSON, Judge.

This case arises out of the tragic events of 26 January 1995, when Wendell Williamson ("plaintiff") shot and killed two people in downtown Chapel Hill, North Carolina. Plaintiff brought suit against Myron B. Liptzin ("defendant"), a psychiatrist at Student Psychological Services of the University of North Carolina at Chapel Hill ("Student Services") who treated plaintiff, on the grounds that he was damaged by the negligence of defendant.

The evidence presented at trial tended to show the following. Student Services operates only on a voluntary, outpatient basis. In May 1990, as an undergraduate student, plaintiff visited Student Services as a "walk-in," and received counseling for relationship issues and academic problems. The doctor who reviewed plaintiff's intake form concluded that plaintiff's problems were "fairly normative."

In September 1992, when plaintiff was a twenty-four-year-old law student at the University of North Carolina at Chapel Hill ("UNC"), he screamed at students on campus and struck himself about the face. Plaintiff was referred to Student Services. As a result, Student Services further referred him to the UNC Hospitals, where he was involuntarily committed. During his stay, plaintiff disclosed that he had been hearing a voice talking to him for eight months and that he believed he was telepathic. The hospital staff recorded that plaintiff possessed a gun in his apartment.

Plaintiff refused to voluntarily remain at the hospital and also refused medication. A court petition was filed to have plaintiff involuntarily committed. Following a commitment hearing, the presiding judge denied the petition and recommended that plaintiff seek outpatient psychiatric counseling. The final primary diagnosis was "rule/out schizophrenia." One of plaintiff's expert psychiatrists explained at trial that the term "rule/out schizophrenia" means that either: (a) "it's [schizophrenia] until proven otherwise, but we haven't had enough time to prove otherwise yet[,]" or (b) "you should keep [schizophrenia] first and foremost in your mind until a less serious condition is shown to be causing the problem."

On 2 March 1994, plaintiff was again referred to Student Services after he disrupted class at the law school by announcing that he was a "telepath." Plaintiff completed an intake form on which he denied any urge "to hit, injure or harm someone" or any "[s]uicidal thoughts or concerns." Intake psychologists assessed that involuntary hospi-

talization was "not appropriate as student denies danger to self or others." Plaintiff was again diagnosed with "rule/o[ut] schizophrenia." The staff recommended treatment and medication, which plaintiff refused. However, after a law school dean informed plaintiff that he might not be recommended as a candidate for the bar exam unless he received counseling, plaintiff agreed to seek treatment.

During a ten-week period beginning on 8 March 1994, plaintiff had six counseling sessions with defendant at Student Services, each of which lasted between twenty minutes and one hour. Defendant prepared for the treatment by reviewing plaintiff's chart from Student Services, which included an intake form from plaintiff's May 1990 visit to Student Services and a "discharge summary" from his 1992 hospital stay. However, defendant did not review the complete medical records from plaintiff's 1992 treatment. During the first session with defendant, plaintiff stated that he had believed he was a "telepath" for two years, he consumed approximately six beers each night, and he used marijuana occasionally. Defendant suggested that plaintiff begin taking an antipsychotic drug, Navane, and diagnosed plaintiff with "delusional disorder grandiose." While defendant recognized that plaintiff exhibited some symptoms of schizophrenia, he decided to record the more "generous" diagnosis, so as not to deprive plaintiff of the opportunity to practice law.

On 5 April 1994, during the fourth counseling session, defendant informed plaintiff that defendant would be leaving Student Services in June, and suggested that plaintiff "consider the possibility of seeing somebody on a regular basis in therapy, and that [defendant] would be happy to make a referral for him; that it would probably make sense to do this sooner rather than later."

The last counseling session between plaintiff and defendant occurred on 25 May 1994. Plaintiff informed defendant that he was not sure whether he would stay in Chapel Hill for the summer or whether he would stay with his family in Clyde, North Carolina. Defendant recorded in plaintiff's medical chart that plaintiff knew defendant would be leaving Student Services and that plaintiff would be seeing his replacement in the fall semester. Defendant told plaintiff that he needed to contact defendant's replacement so that he could have his prescriptions filled.

During plaintiff's final counseling session, defendant supplied plaintiff with a prescription for thirty Navane capsules. Defendant recorded that plaintiff was "content to stay on [Navane]." As plain-

tiff's plans for the summer were uncertain, defendant instructed plaintiff that if he returned to Clyde, he was to visit the community health center or see his family doctor. If, on the other hand, plaintiff remained in Chapel Hill, he was to return to Student Services for counseling with defendant's replacement.

During the course of his treatment, plaintiff followed virtually all of defendant's instructions concerning the regularity with which he was to take his medication. Plaintiff testified that he did on one occasion "voluntarily [go] off his medication," but reported it to defendant. Plaintiff reported that he was no longer hearing voices, his "telepathy" and delusions were completely gone, and his hallucinations were either completely gone or virtually gone. Although he still used alcohol and recreational drugs, his usage had decreased. Plaintiff attended all of his classes without incident, sat for his law school exams, improved his grades, and took part in a law school writing competition. Friends reported that plaintiff was "more 'like his old self.' " While he was under defendant's care, plaintiff had no thoughts of harming or killing himself or anyone else. His first thoughts of harming others occurred "much later" or "some number of months" after he last saw defendant.

Plaintiff believed that his mental illness was temporary and that the medication was a short-term measure. According to plaintiff, defendant told him "that in his opinion, [plaintiff] was probably not really schizophrenic or psychotic." Plaintiff further stated that defendant told him that "if someday [he] wanted to go off the medication, that [he] could do that if [he] told someone [he] trust[ed]."

Plaintiff spent the summer at his parents' home in Clyde. He did not visit the community health center or Student Services. Plaintiff decided to stop taking Navane for a few days, as the drug made him susceptible to the sun and he had become sunburned. After he discontinued his medication, plaintiff felt physically better. He determined that he would stop taking his medication indefinitely and informed his parents of that decision.

Plaintiff returned to Chapel Hill in August 1994 for the fall semester. He attended virtually all of his classes and did not disrupt any of them. He passed all of his courses, managed his finances, and took care of his day-to-day needs, such as grooming, eating, and shopping. He took trips alone in his car, including trips to Connecticut and New York City over Christmas break.

In January 1995, plaintiff returned to Chapel Hill and began living out of his car. He stopped attending classes and purchased guns and ammunition. In addition, plaintiff returned to Clyde to retrieve a M-1 rifle, the gun UNC Hospital staff noted he possessed. This weapon had been in Clyde since plaintiff's hospital stay in 1992. On 26 January 1995, eight months after his last session with defendant, plaintiff randomly fired the M-1 rifle at unarmed people in downtown Chapel Hill, killing two of them. In an effort to stop plaintiff, police officers shot him in the legs. Plaintiff required surgery for the leg wounds. Plaintiff was charged with two counts of first-degree murder. In November 1995, he was found not guilty by reason of insanity.

Psychiatrist Stephen Kramer ("Dr. Kramer") testified as an expert witness on behalf of plaintiff. Dr. Kramer stated that defendant violated the standard of care for a psychiatrist with similar training and experience practicing in Chapel Hill, North Carolina, or similar communities, in 1994. Dr. Kramer specified that defendant failed "to pursue a proper diagnosis, including review of old records available and assessing risk for potential deterioration and violence[,]" failed "to develop a program for continuing care [for plaintiff] once [defendant] retired and left the Student Health Center," failed to address the issue of noncompliance, and failed to properly manage the use of antipsychotic medication. Dr. Kramer noted that the discharge summary from plaintiff's hospital stay indicated that he had no insight into his illness and that he had a history of noncompliance. Dr. Kramer stated that especially in this context, if defendant advised plaintiff that he could go off his medication if he told a responsible adult, such advice would have been improper and an "invitation to not comply with the recommended therapy."

According to Dr. Kramer, the correct diagnosis was chronic paranoid schizophrenia rather than delusional disorder grandiose, and defendant's failure to review the medical records from plaintiff's inpatient stay at UNC Hospitals in 1992 contributed to the misdiagnosis. Dr. Kramer further noted that there was a marked difference between plaintiff's diagnosis of delusional disorder and schizophrenia. Dr. Kramer explained that schizophrenia is a long-term, lifelong illness requiring long-term care, while delusional disorder was more intermittent in nature.

Dr. Kramer testified that it was "harder to answer" whether defendant could have reasonably foreseen that plaintiff would become violent to himself or others. Dr. Kramer further testified:

> First was, what's foreseeable is noncompliance with treatment, which would directly lead to exacerbation or increase in the psychotic symptoms, especially that of his thought processes. His insight and judgment would remain poor or get worse. He would continue abusing substances . . . . That access to a gun might not be cut off for him but might be reunited with him, and that dangerous behavior might occur.
>
> Those elements regarding dangerousness may come together at a point in time.

When asked whether he was "prepared to say . . . a part of foreseeability would be dangerousness . . . to himself or others[,]" Dr. Kramer answered, "I'm not sure that I can go that far with it. I can say that the foreseeable elements are those that when they come together in time would lead to dangerousness." Had plaintiff received a proper diagnosis and treatment, his delusions and acting out could have been kept under control, according to Dr. Kramer.

James Bellard ("Dr. Bellard"), a psychiatrist, also testified as an expert witness on behalf of plaintiff. Dr. Bellard agreed that defendant violated the applicable standard of care by misdiagnosing plaintiff and failing to ensure that plaintiff received ongoing care, especially given plaintiff's history of noncompliance. Dr. Bellard stated that it was foreseeable that plaintiff would again believe he was a "telepath." When asked where that would lead, Dr. Bellard answered, "If I may, that's not what's foreseeable. What's foreseeable is that he would believe [he was a "telepath"] again. But what he would do with that, I don't think—nobody's crystal ball is that good, that they could predict that." Dr. Bellard further stated that if defendant had given plaintiff the name of a specific doctor to visit during the summer of 1994, Dr. Bellard still could not predict what would have happened. Dr. Bellard stated that "it was foreseeable that [plaintiff] would deteriorate and eventually decompensate, that he would really fall apart mentally, eventually." Once he began to deteriorate, plaintiff would certainly become dangerous to himself, according to Dr. Bellard. Both Drs. Kramer and Bellard acknowledged that plaintiff improved under defendant's care and stated that plaintiff made no expressions of violence and was not committable at any point during his treatment.

Psychologist John Warren, III ("Dr. Warren") testified on behalf of plaintiff as an expert witness in psychology and the treatment of paranoid schizophrenia. Dr. Warren stated that plaintiff was not com-

petent to take charge of his medical treatment at the time his therapy with defendant ended. Dr. Warren testified that

> there's nothing in the record that suggests that [plaintiff] got that information that he needed in order to make decisions about whether or not he had a major mental illness, whether or not he needed to take medication on a long-term basis, what he needed to do in case the symptoms got worse.

Plaintiff reported to Dr. Warren on the day following the shootings that defendant had advised him that he could discontinue his medication if he told someone he trusted.

Concerning schizophrenia, Dr. Warren echoed the testimony of Dr. Kramer stating that it was a very serious, major mental disorder, requiring lifelong treatment. Dr. Warren also testified that "[a]s a group, people with schizophrenia, paranoid type, are among the most likely to hurt themselves or hurt other people." Dr. Warren believed that because plaintiff did not understand the seriousness of his illness, he could not make competent decisions concerning treatment.

When asked whether it was foreseeable that defendant "might" degenerate and become dangerous to himself or others, Dr. Warren responded by stating that plaintiff would become sicker, which "might" result in violence to himself or others. Both Drs. Kramer and Warren testified that plaintiff exhibited risk factors for dangerous behavior such as being a young male, living alone, and having access to a gun.

Holly Rogers ("Dr. Rogers"), a psychiatrist at Duke University's Student Counseling Center, testified as an expert on behalf of defendant. Dr. Rogers indicated that student mental health centers provide "short-term treatment." Dr. Rogers stated that "[m]ost psychotic people aren't dangerous." Similarly, Jeffrey Janofsky ("Dr. Janofsky"), a psychiatrist at Johns Hopkins University, stated that "because the base rate of violence is so low, and most schizophrenics aren't violent and most normal people aren't violent either, that demographic data does not get you anywhere in predicting dangerousness."

Bruce Berger ("Dr. Berger"), a psychiatrist who previously worked as a student health counselor at East Carolina University, testified on behalf of defendant. He stated that in the student health setting, psychiatrists are only able to work with students for a short time "before [the students] have to make plans with or without [the psy-

chiatrists'] assistance to get further treatment, or at least make choices in their life."

Plaintiff filed suit against defendant on 16 May 1997, alleging that defendant had been negligent and that the negligence caused him to be shot in the legs, endure a murder trial, and be confined indefinitely to a mental institution. Defendant moved for summary judgment. On 4 September 1998, the trial court entered an order denying defendant's motion, concluding that "a genuine issue of material facts exist[ed] to show that [defendant] breached the applicable standard of care and that [defendant's] treatment proximately caused injury to [plaintiff]." The court further found that defendant failed to prove that there was no triable issue concerning contributory negligence.

The case was tried in the Superior Court, Orange County, before a jury. Defendant moved for directed verdict at the close of plaintiff's evidence and at the close of all the evidence. The trial court denied the motions and submitted the case to the jury, which determined that plaintiff was damaged by the negligence of defendant and that plaintiff was not contributorily negligent. Based on the jury verdict, the trial court entered judgment ordering defendant to pay $500,000 with interest and the court costs of the action to plaintiff. Defendant moved for a new trial or judgment notwithstanding the verdict. On 31 March 1999, the trial court entered an order denying the motions. Defendant appeals.

Defendant argues that the trial court erred in denying his dispositive motions. Defendant first contends that the trial court erred in denying his motions for directed verdict and for judgment notwithstanding the verdict ("JNOV"). *See* N.C. Gen. Stat. § 1A-1, Rule 50 (1999). A motion for JNOV is a renewal of a motion for directed verdict made after the jury has returned its verdict. As such, a JNOV "shall be granted if it appears that the motion for directed verdict could properly have been granted." N.C.G.S. § 1A-1, Rule 50(b)(1).

In deciding whether to grant or deny either motion, the trial court must accept the non-movant's evidence as true and view all the evidence "in the light most favorable to [him], giving [him] the benefit of every reasonable inference which may be legitimately drawn therefrom, with conflicts, contradictions, and inconsistencies being resolved in the [non-movant's] favor." *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 6, 437 S.E.2d 519, 522 (1993) (citation omitted),

dismissal allowed and disc. review denied, 336 N.C. 71, 445 S.E.2d 29 (1994). "If there is more than a scintilla of evidence supporting each element of the non-movant's claim, the motion should be denied." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted). An appellate court's review of a denial of these motions is limited to a consideration of "whether the evidence viewed in the light most favorable to [the non-movant] 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).

To prevail on a claim of negligence, the plaintiff must establish that the defendant owed him a duty of reasonable care, "that [the defendant] was negligent in his care of [the plaintiff,] and that such negligence was the proximate cause of [the plaintiff's] injuries and damage." *Beaver v. Hancock*, 72 N.C. App. 306, 311, 324 S.E.2d 294, 298 (1985) (citation omitted). While we recognize that this case presents a variety of novel issues concerning virtually every facet of negligence, we have chosen to focus our discussion on the element of proximate cause. Defendant's main contention on appeal is, in fact, that his alleged negligence was not the proximate cause of plaintiff's injuries, and therefore he was entitled to a directed verdict and JNOV. With this, we must agree.

North Carolina appellate courts define proximate cause as

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (citations omitted). The element of foreseeability is a requisite of proximate cause. *Id.* To prove that an action is foreseeable, a plaintiff is required to prove that "in 'the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.' " *Hart v. Curry*, 238 N.C. 448, 449, 78 S.E.2d 170, 170 (1953) (citation omitted). Thus, the plaintiff does not have to prove that the defendant foresaw the injury in its precise form. *Hairston*, 310 N.C. at 233-34, 311 S.E.2d at 565; *see also Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) ("It does not matter that [the actual injuries]

are unusual, unexpected, unforeseen, and unforeseeable.") However, the law does not require that the defendant "foresee events which are *merely possible* but only those which are reasonably foreseeable." *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565 (emphasis added) (citations omitted).

> A man's responsibility for his negligence must end somewhere. If the connection between negligence and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered remote rather than a proximate cause. It imposes too heavy a responsibility for negligence to hold the [tort-feasor] responsible for what is unusual and unlikely to happen or for what was only remotely and slightly possible.

Phelps v. Winston-Salem, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967) (citation omitted); *accord Sutton v. Duke*, 277 N.C. 94, 108, 176 S.E.2d 161, 169 (1970) (quoting William L. Prosser, *Law of Torts* § 50, at 303 (3d ed. 1964)) ("it is 'inconceivable that any defendant should be held liable to infinity for all the consequences which flow from his act,' [thus] some boundary must be set").

Foreseeability is but one element of proximate cause. *Wyatt v. Gilmore*, 57 N.C. App. 57, 290 S.E.2d 790 (1982). Other "equally important considerations" include:

> whether the cause is, in the usual judgment of mankind, likely to produce the result; whether the relationship between cause and effect is too attenuated; whether there is a direct connection without intervening causes; whether the cause was a substantial factor in bringing about the result; and whether there was a natural and continuous sequence between the cause and the result.

Id. at 59, 290 S.E.2d at 791 (citation omitted).

Plaintiff alleged that he was injured as a result of defendant's actions, in that he was wounded during the 26 January 1995 shootout, tried for capital murder, and confined to a mental institution. An examination of the evidence, construed in the light most favorable to the plaintiff, reveals that defendant could not foresee plaintiff's injuries. There was absolutely no evidence that plaintiff posed a threat of violence to others which would in turn lead to injury. When asked whether dangerousness to others or to plaintiff himself was foreseeable, plaintiff's own expert, Dr. Kramer stated, "I'm not sure

that I can go that far with it." Another one of plaintiff's experts, Dr. Bellard, likewise testified that it was not foreseeable that plaintiff would kill others. In fact, in the most telling testimony at trial, Dr. Bellard further responded, "[N]obody's crystal ball is that good[.]"

Plaintiff's own behavior prior to or at the time of defendant's retirement in no way indicated that he would become violent. Other than striking himself about the face, plaintiff never exhibited violent behavior. On his 2 March 1994 intake form, plaintiff noted that he had no urge to harm others and that he had no suicidal thoughts.

Plaintiff even noticed an improvement in his condition. Plaintiff informed defendant that he no longer heard voices and his hallucinations were virtually gone. Plaintiff further noted that he had decreased his use of alcohol and recreational drugs, had attended his law school classes without incident, and had improved his grades. Furthermore, although plaintiff testified that he contemplated suicide in 1992, he admitted that he never seriously thought of harming himself between the 1992 hospitalization and 1994, including the period in which he saw defendant. Plaintiff further affirmed that thoughts of harming others only occurred "some number of months" after his last visit with defendant. In his notes from the last visit with plaintiff, defendant wrote that plaintiff stated "his friends have been giving him feedback that he's more 'like his old self, and the guy they used to know and like.' "

In addition to being unforeseeable, plaintiff's injuries were too remote in time, and the chain of events which lead to plaintiff's injuries was too attenuated for defendant's actions to be the proximate cause of plaintiff's injuries. It was eight months between plaintiff's last visit with defendant and the incident which led to his injuries. Plaintiff was, by all accounts, functioning normally when he last visited defendant in May 1994. Plaintiff spent the summer with his parents in Clyde, at which time he discontinued his medication and failed to visit a mental health center or to have his prescriptions refilled. In August 1994, plaintiff returned to law school and began his fall classes. Plaintiff testified that his hallucinations began to resurface gradually and achieved fruition sometime in August or September. However, plaintiff attended virtually all of his classes during the fall semester, without disruption, and passed every course. He maintained his daily needs, including eating, grooming, shopping, and managing his financial affairs. Furthermore, after completing the semester, plaintiff took two long trips alone, after which time he returned to his parents' home in Clyde.

In January 1995, plaintiff returned to Chapel Hill. Only at this time did plaintiff begin living out of his car, stop attending classes, and purchase guns and ammunition. Eight months after his last visit with defendant, plaintiff shot and killed two individuals in Chapel Hill, despite never expressing any intent to do so. Defendant simply could not have foreseen that as a result of this attenuated chain of events, eight months after his last appointment, plaintiff, who expressed no violent intentions or threats, would be wounded during a shoot-out, tried for capital murder, committed to a mental institution, and not able to continue his legal studies or pursue a possible career.

Despite this attenuated chain of events, plaintiff contends that the testimony of his experts was tantamount to the issue of foreseeability and was more than sufficient to establish that "some" injury was foreseeable. With this argument, we cannot agree.

In his testimony, Dr. Kramer expressed difficulty in concluding that plaintiff's dangerousness to others was foreseeable. Dr. Kramer then testified as follows:

> [W]hat's foreseeable is noncompliance with treatment, which would directly lead to exacerbation or increase in the psychotic symptoms, especially that of his thought processes. His insight and judgment would remain poor or get worse. He would continue abusing substances . . . . That access to a gun *might* not be cut off for him but *might* be reunited with him, and that dangerous behavior *might* occur.
>
> Those elements regarding dangerousness *may* come together at a point in time. (Emphasis added.)

Dr. Kramer later testified that although he could not go so far as to say that plaintiff's dangerousness was foreseeable, "[he could] say that the foreseeable elements are those that when they come together in time would lead to dangerousness."

Dr. Bellard testified that it was foreseeable that plaintiff would again believe he was a "telepath" and "it was foreseeable that [plaintiff] would deteriorate and eventually decompensate, that he would really fall apart mentally, eventually." Dr. Bellard further testified that no one could predict "what [plaintiff] would do with that." Dr. Bellard stated that certain "risk factors" such as plaintiff's "self-injurious behavior, a history of psychosis, a history of being resistant to treatment, and an ongoing history of substance abuse," would place plaintiff at a "[c]onsiderably greater risk" for violence against himself. Dr.

Bellard could not definitively say that being at risk for violence to oneself was a "risk factor" for violence to others. Both Drs. Kramer and Warren stated that plaintiff's age, gender, his living alone, and his owning a gun were "risk factors" for violence.

The experts' testimony does not establish foreseeability but evinces a situation similar to those in which our appellate courts hesitate to find an individual liable for a possible breach of duty. In *Westbrook v. Cobb*, 105 N.C. App. 64, 411 S.E.2d 651 (1992), for example, the defendant's vehicle struck a utility pole connected to a transformer, which serviced the plaintiff's house. As a result, the plaintiff's house caught on fire. The plaintiff, who was one and one-half miles from his house, was alerted to the fire and arrived on the scene to assist firefighters in controlling the blaze. The plaintiff went into his house to retrieve some items, and in the process, injured his back. This Court found that "the chain of events resulting in [the plaintiff's] injury [was not] reasonably foreseeable and within the contemplation of an ordinary prudent individual." *Id.* at 68, 411 S.E.2d at 653. Thus, the Court found that proximate cause did not exist. *Id.* at 68-69, 411 S.E.2d at 653-54.

In *Coltrane v. Hospital*, 35 N.C. App. 755, 242 S.E.2d 538 (1978), the Administratrix of the estate of a deceased patient brought an action against a hospital for the death of the patient, who fell from a second story ledge. The patient had been placed in restraints to prevent him from falling out of his bed. The patient wrestled free from the restraints and was seen standing on the second story ledge. The patient was later found dead. Our Court concluded that any negligence which could be imputed to the hospital was not the proximate cause of the patient's death because "there [was] no evidence that defendant hospital could have foreseen the fall from the ledge of the second floor." *Id.* at 758, 242 S.E.2d at 540. In so concluding, this Court relied on the testimony of the patient's doctor, who stated that the restraints were only to keep the patient from falling out of the bed and that he did not view the patient as suicidal. *Id.*

Although not completely analogous to the case at bar, these cases illustrate that North Carolina courts are reluctant to hold a person liable where the chain of events which led to the resulting injuries is unforeseeable, remote, and attenuated, even though "some" injury to plaintiff was "possible." *See Hairston*, 310 N.C. at 234, 311 S.E.2d at 565 (citations omitted). The contemplation of what "might" happen, which leads to what "might" or "may" potentially be the outcome, and

the consideration of "risk factors" for violence to oneself which may or may not lead to a risk of violence to others, is simply not sufficient as a matter of law to establish the foreseeability of plaintiff's injuries or the circumstances in which the alleged injuries arose. Furthermore, evidence of "risk factors" for potential violence, such as gun ownership, being under a certain age, or being of a certain gender, implicates a large portion of our population and is simply insufficient in and of itself to prove foreseeability. Given the lack of evidence of violence or any threats of violence on plaintiff's behalf, "the connection between negligence and the injury appears unnatural, unreasonable, and improbable." *Phelps*, 272 N.C. at 30, 157 S.E.2d at 723 (citation omitted). We therefore conclude that the expert testimony presented by plaintiff established what was merely possible and not what was reasonably foreseeable.

Plaintiff also argues that evidence of foreseeability in the instant case far surpasses the evidence presented in *Hairston*, 310 N.C. 227, 311 S.E.2d 559, and in other cases in which our appellate courts have deemed proximate cause an issue for the jury. Plaintiff contends that like the defendant in *Hairston*, defendant in the case *sub judice* should have foreseen an injury would result from his actions. We find *Hairston* distinguishable from the present case.

In *Hairston*, our Supreme Court examined the liability of a car dealership in a wrongful death suit by a deceased motorist's wife against the dealer and a truck driver. On the same day as the accident which led to the suit, the motorist purchased an automobile from defendant dealer. While the motorist waited, the dealer changed the tires on the vehicle, but failed to tighten the lug nuts on one of the wheels. The motorist drove the car out of the dealer's lot and within minutes, the loose wheel fell off. The motorist stopped the car, and a van pulled up behind the disabled vehicle. As the motorist stood between his car and the van, the defendant truck driver struck the van, killing the motorist.

Our Supreme Court held that proximate cause existed to hold the dealer liable for the motorist's death. *Id.* at 235, 311 S.E.2d at 566. The court found that the dealer could have foreseen the accident which led to plaintiff's injuries. *Id.* The Court noted that defendant dealer was on "notice of the exigencies of traffic, and he must take into account the prevalence of the 'occasional negligence which is one of the incidents of human life.' " *Id.* at 234, 311 S.E.2d at 565 (citations omitted).

In the case at bar, plaintiff's violent rampage occurred eight months after his final session with defendant, while the time between the dealer's negligence and the motorist's harm in *Hairston* was "barely six minutes." *Id.* at 238, 311 S.E.2d at 567. More importantly, treating plaintiff's mental illness and predicting future human behavior are vastly different than maintaining an automobile and predicting traffic. Indeed, this Court as well as courts in other jurisdictions have previously recognized the difficulties inherent in the treatment and diagnosis of mental illness. In *Pangburn v. Saad*, 73 N.C. App. 336, 326 S.E.2d 365 (1985), this Court stated:

> "The uncertainties inherent in analyzing and treating the human mind, let alone the decision of when a person is 'cured' and no longer a danger, renders the decisions of skilled doctors highly discretionary and subject to rebuke only for the most flagrant, capricious, and arbitrary abuse."

73 N.C. App. at 344-45, 326 S.E.2d at 371 (quoting *Leverett v. State*, 399 N.E.2d 106, 110 (Ohio Ct. App. 1978)); *see also Lee v. Corregedore*, 925 P.2d 324, 338 (Haw. 1996) (quoting *Seibel v. Kemble*, 631 P.2d 173, 176-77 (Haw. 1981) (footnote omitted)) (" 'There is much uncertainty in the diagnosis and treatment of mental illness and in the prediction of future behavior.' "); *Hicks v. United States*, 511 F.2d 407, 415 (D.C. Cir. 1975) ("A claim of negligence must be considered in light of the elusive qualities of mental disorders and the difficulty of analyzing and evaluating them."); *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334, 345 (Cal. 1976) ("We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence.")

The uncertainties in diagnosing diseases of the human mind and predicting future behavior were further hampered in the instant case by the setting in which defendant observed plaintiff. Defendant treated plaintiff not in a hospital or private out-patient facility, but in an out-patient student health care facility. Dr. Rogers, a university student counseling center psychiatrist, testified that student health centers provide only "short-term treatment." Dr. Berger, a former counselor at a university facility, likewise testified that a psychiatrist in a student health care setting provides short-term care "before [the student has] to make plans with or without [the psychiatrist's] assistance to get further treatment, or at least make choices in his life." There is no doubt that such a limited setting, coupled with the few number of times defendant observed plaintiff, impeded defendant's

ability to predict and foresee plaintiff's actions eight months after their last meeting.

Our conclusions concerning the foreseeability of plaintiff's injuries and the unpredictability of mental illness are further supported by public policy concerns. A court must "evaluate [the plaintiff's] allegations in light of the goal of treatment, recovery and rehabilitation of those afflicted with a mental disease, defect or disorder." *Seibel*, 631 P.2d at 176. Imposing liability on a psychiatrist in an outpatient, short-term care setting for the actions of a patient that were at most based on risk factors and not foreseeability would have adverse effects on psychiatric care. It would encourage psychiatrists and other mental health providers to return to paternalistic practices, such as involuntary commitment, to protect themselves against possible medical malpractice liability. Despite public perceptions to the contrary, the vast majority of the mentally ill are not violent or are no more violent than the general population and thus, such rigid measures as involuntary commitment are rarely a necessity. *See generally* John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 Am. Psychol. 511, 519 (1992) ("None of the data give any support to the sensationalized caricature of the mentally disordered served up by the media, the shunning of former patients by employers and neighbors in the community, or regressive 'lock 'em all up' laws [based on] public fears."); Linda A. Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 Am. J. Psychiatry 593, 598 (1985) ("stereotype[s] of the mentally ill as dangerous [are] not substantiated by our data"). "If a liability were imposed on the physician . . . each time the prediction of future course of mental disease was wrong, few releases would ever be made and the hope of recovery and rehabilitation of a vast number of patients would be impeded and frustrated." *Taig v. State*, 241 N.Y.S.2d 495, 496-97 (N.Y. App. Div. 1963).

In the instant case, plaintiff functioned well under defendant's less-restrictive outpatient care, despite having what his experts termed a very serious mental illness. He passed all of his law school courses, took his medication on a regular basis, and even noted his friends' positive comments on his improved behavior. This improvement came without the need for involuntary commitment. In fact, plaintiff's own experts' testimony established that at the time he was being treated by defendant, plaintiff, like the majority of the mentally ill, was not a candidate for involuntary commitment.

Furthermore, North Carolina's policy on the mentally ill promotes less restrictive methods of treatment and more patient autonomy.

> The policy of the State is to assist individuals with mental illness, development disabilities, and substance abuse problems in ways consistent with the dignity, rights, and responsibilities of all North Carolina citizens. Within available resources, [the State is to provide] services to eliminate, reduce, or prevent the disabling effects of mental illness . . . through a service delivery system designed to meet the needs of clients in the least restrictive available setting, if the least restrictive setting is therapeutically most appropriate, and to maximize their quality of life.

N.C. Gen. Stat. § 122C-2 (1999); *see also Cobo v. Raba*, 347 N.C. 541, 546, 495 S.E.2d 362, 366 (1998) (citation omitted) ("a patient has an active responsibility for his own care and well-being"). It would therefore be irrational to promote unnecessary, more restrictive practices in affirming the judgment below.

We recognize that our jurisprudence in the area of proximate cause is quite varied. *See generally Sutton*, 277 N.C. 94, 176 S.E.2d 161; David A. Logan & Wayne A. Logan, *North Carolina Torts*, § 7.30, at 169 (1996) ("Many of the [North Carolina proximate cause] cases could have been decided differently.") We further recognize that it is only in the rarest of cases that our appellate courts find proximate cause is lacking as a matter of law. *See Hairston*, 310 N.C. at 235, 311 S.E.2d at 566. However, the law of proximate cause " 'cannot be reduced to absolute rules.' " *Sutton*, 277 N.C. at 108, 176 S.E.2d at 169 (quoting Prosser, *supra*, § 50, at 288). This is one of those rare cases where "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting), quoted in *Wyatt*, 57 N.C. App. at 59, 290 S.E.2d at 791; *Westbrook*, 105 N.C. App. at 68, 411 S.E.2d at 654 (citation omitted) ("proximate cause is to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent").

We conclude that given the very specific and novel factual scenario presented by this case, defendant's alleged negligence was not the proximate cause of plaintiff's injuries. Therefore, the trial court should have granted defendant's directed verdict motion made at the close of all the evidence.

Having determined that the trial court erred in failing to grant a directed verdict in defendant's favor based on the issue of proximate cause, we need not address defendant's remaining assignments of error.

Because we find that the trial court erred in failing to grant defendant's directed verdict motion, we reverse the order of the trial court denying a JNOV and remand with directions for the trial court to enter judgment in defendant's favor.

Reversed and remanded.

Chief Judge EAGLES and Judge HUNTER concur.

SBA, INC., BELLSOUTH CAROLINA PCS, L.P. D/B/A BELLSOUTH MOBILITY, DCS AND PAUL TESCIONE, PETITIONERS v. CITY OF ASHEVILLE CITY COUNCIL, RESPONDENT

No. COA99-1344

(Filed 19 December 2000)

1. Zoning— denial of conditional use permit—review by superior court

A city council acted as a quasi-judicial body in denying an application for a conditional use permit; review by the superior court of that decision is as an appellate court rather than a fact finder. The provisions of the Administrative Procedure Act are highly pertinent to the superior court's review.

2. Zoning— conditional use permit—telecommunications tower—city code requirements

A city council's findings were sufficient to support its conclusions that petitioners failed to satisfy all of the general requirements of the city code for a conditional use permit, and the findings were squarely based on evidence presented at the hearing. There was no error in the council's interpretation and application of the code; under the city code, respondent must conduct a hearing and make findings with respect to general requirements as well as technical compliance in order to approve a conditional use permit.

3. Zoning— conditional use permit—telecommunications tower—sufficiency of evidence

Although petitioners who had been unsuccessful in obtaining a conditional use permit for a telecommunications tower argued that the vast amount and perceived quality of their evidence required the issuance of the permit, they failed to carry their burden of meeting all requirements for issuance of the permit under the City Code. The role of the Court of Appeals is not to sift and determine facts; the record as a whole in this case contains sufficient relevant evidence for a reasonable person to support the conclusion that petitioners failed to meet all the requirements.

4. Zoning— conditional use permit—telecommunications tower—federal act

The denial of a conditional use permit for a telecommunications tower did not violate the federal Telecommunications Act of 1996. Respondent-city council is the body empowered by law to determine whether to issue the permit and, upon review of the whole record, there is adequate evidence under federal or state law to support the conclusion that petitioners failed to satisfy all City Code requirements.

5. Zoning— conditional use permit—telecommunications tower—prohibition of wireless services—discrimination among providers

Respondent-city council's denial of a conditional use permit for a telecommunications tower did not violate the federal Telecommunications Act by prohibiting the provision of personal wireless services and unreasonably discriminating among providers of functionally equivalent services. Petitioners failed to cite any evidence, other than the denial of their permit, to support their contention, and their own evidence establishes that their intent was to fill a gap and improve existing coverage. Moreover, there was no evidence that denial of this conditional use permit operated to discriminate among functionally equivalent providers.

Appeal by petitioners, SBA, Inc. and Paul Tescione, from order entered 3 August 1999 by Judge Timothy L. Patti in Buncombe County Superior Court. Heard in the Court of Appeals 9 October 2000.

Lynch, Eatman & Twiddy, L.L.P., by Katherine B. Wilkerson and Jerome R. Eatman, Jr.; The Law Offices of Thomas R. Gladden, Jr., by Thomas R. Gladden, Jr. for petitioners-appellants.

City of Asheville, by City Attorney Robert W. Oast, for respondent-appellee.

FULLER, Judge.

Petitioners SBA, Inc. and Paul Tescione appeal an order affirming the decision of respondent City of Asheville City Council denying the issuance of a conditional use permit ("CUP") for the construction of a telecommunications tower. On 12 June 1998 petitioners filed with respondent an application for a CUP to construct a 175-foot telecommunications tower on property leased partially by petitioner SBA and partially by Tescione. Petitioners' application proposed the tower be constructed in a CB-II "Community Business" zoning district on Merrimon Avenue in Asheville.

Petitioners' application package was reviewed by the City's Planning Department and Technical Review Committee ("TRC"), which reviews plans for proposed uses to ensure compliance with applicable regulations. On 27 October 1998 the TRC recommended approval of petitioners' application, subject to several conditions. Petitioners submitted additional information in response to the recommendation, and a public hearing before respondent was scheduled for 10 November 1998. At the hearing, petitioners submitted their application package which included various reports and maps and other information requested by the Planning Department and TRC. In addition, petitioners presented expert testimony to support its position that respondent should issue the CUP.

The City submitted to respondent a Staff Report which incorporated the findings of the Planning Department and TRC regarding the proposal's technical compliance with regulations. Despite the TRC's recommendation for approval, the Staff Report indicated various concerns regarding the tower's construction, including: that petitioners' real estate appraisal information did not adequately address the effects of the proposed tower on the value of adjoining properties; that the average height of neighboring structures did not exceed 40 feet; that part of the required landscaping buffer would be located outside the boundary of the property covered by petitioner SBA's lease; and that the potential for alternative sites or the use of stealth

technology had not been adequately explored. In addition, twelve members of the public, many of whom reside in areas surrounding the proposed site, raised concerns regarding the proposed tower, and expressed uniform opposition to construction of the tower at the proposed location.

At the hearing's conclusion, respondent voted unanimously to deny petitioners' application, and an order was entered on 24 November 1998. Petitioners appealed, and on 3 August 1999 the superior court affirmed denial of the petition, finding respondent: (1) correctly interpreted and applied all relevant law; (2) followed all correct procedures; (3) based its findings on sufficient evidence which in turn supported its conclusions of law; and (4) did not act arbitrarily or capriciously. Petitioners appeal.

On appeal, petitioners assert five bases on which the superior court erred in upholding respondent's denial of petitioners' application for a CUP: (1) respondent committed errors of law in interpreting and applying various sections of the Asheville City Code; (2) respondent's findings were not supported by competent, material, and substantial evidence, its conclusions of law were erroneous, and its decision was arbitrary and capricious; (3) respondent failed to follow correct statutory and Asheville City Code procedures for consideration of petitioners' application; (4) respondent's denial of the CUP violated the Telecommunications Act of 1996 in that it was not based on substantial evidence; and (5) respondent's decision had the effect of prohibiting personal wireless services in violation of the Telecommunications Act of 1996, and unreasonably discriminated among providers of functionally equivalent services.

[1] Respondent, in its consideration of petitioners' application for a CUP, acted as a quasi-judicial body. *See Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (2000) (citation omitted). As such, respondent's denial of the CUP is subject to review by the superior court sitting as an appellate court and not a trier of fact. *Id.* (citing N.C. Gen. Stat. § 160A-381(c) 1999). The provisions of the Administrative Procedure Act are highly pertinent to the superior court's review of such a decision. *Id.* (citation omitted). Thus, the role of the superior court in reviewing a city council decision regarding an application for a CUP has been defined as follows:

"(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."

Clark v. City of Asheboro, 136 N.C. App. 114, 118, 524 S.E.2d 46, 49 (1999) (quoting *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980)).

This Court's task on review of the superior court's order is twofold: " '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Pisgah Oil Co. v. Western N.C. Reg'l Air Pollution Control Agency*, 139 N.C. App. 402, 405, 533 S.E.2d 290, 293 (2000) (quoting *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)).

I.

[2] By their first assignment of error, petitioners allege respondent committed errors of law in failing to properly interpret and apply relevant sections of the Asheville City Code ("City Code"). Petitioners allege respondent erred in its application of City Code § 7-16-2, which enumerates both general criteria for the issuance of a CUP and specific requirements regarding transmission towers, and § 7-5-5, which sets forth procedures for review of a CUP application. When a party alleges error of law in a city council's determination regarding a conditional or special use permit, the reviewing court conducts a *de novo* review. *C.C. & J. Enter. v. City of Asheville*, 132 N.C. App. 550, 552, 512 S.E.2d 766, 769 (citation omitted). Petitioners do not allege error in the superior court's application of the correct standard, and we therefore proceed to application of the *de novo* standard of review.

Petitioners argue they produced substantial and material evidence to satisfy all City Code requirements, and thus, respondent

erred in denying issuance of the CUP. In support of their argument, petitioners cite numerous documents submitted to the TRC which establish compliance with City Code technical requirements for transmission towers. Indeed, respondent concedes petitioners' evidence satisfies technical requirements for all telecommunications towers set forth in § 7-16-2(d)(3), and respondent's order contains findings to this effect. However, under § 7-5-5(e) of the City Code, respondent must conduct a hearing and make findings with respect to general requirements as well as technical compliance in order to approve a CUP.

Section 7-16-2(c) of the City Code sets forth seven general requirements for approval of a CUP. In order to approve the issuance of a CUP, § 7-16-2(c) requires that respondent determine all of the following issues based on the evidence received at a public hearing:

> (1) That the proposed use or development of the land will not materially endanger the public health or safety;
>
> (2) That the proposed use is reasonably necessary for the public health or general welfare, such as by enhancing the successful operation of the surrounding area in its basic community functions or by providing an essential service to the community or region;
>
> (3) That the proposed use or development of the land will not substantially injure the value of adjoining or abutting property;
>
> (4) That the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located;
>
> (5) That the proposed use or development of the land will generally conform with the comprehensive plan and other official plans adopted by the city;
>
> (6) That the proposed use is appropriately located with respect to transportation facilities, water supply, fire and police protection, waste disposal, and similar facilities; and
>
> (7) That the proposed use will not cause undue traffic congestion or create a traffic hazard.

City Code § 7-16-2(c).

In the present case, respondent heard evidence, pro and con, at the public hearing and considered the Staff Report. Respondent

found the vicinity around Merrimon Avenue to be a mixture of both community businesses, institutional and residential zoning; that "[t]here are substantial and well-established residential areas on either side of Merrimon Avenue in the vicinity of the Subject Property"; and that "[t]he proposed tower would be visible from many of the homes in these areas." Nearby residents testified in opposition to the proposed tower, and respondent found the tower's 175-foot height would more than quadruple the average height of buildings in the area.

Respondent further found part of the landscaping and buffering around the site would "be located outside of the property to be leased and occupied by the tower." Moreover, respondent determined that other than petitioners' contention of the financial difficulty of locating the tower elsewhere, there was no evidence regarding technical feasibility of other sites, or the use of stealth technology and other means of minimizing tower visibility by hiding antennas in or on other structures. Respondent also determined petitioners' computerized coverage models showed significant gaps in coverage would continue to exist even if the proposed tower were constructed.

Based on these findings, respondent concluded that petitioners' application failed to meet requirements set forth in subsections (2), (3), and (4) of § 7-16-2(c). Petitioners' lack of evidence as to whether the tower would adequately cover existing gaps, and as to the technical infeasibility or unavailability of other potential sites lead respondent to conclude petitioners did not show the proposed tower was reasonably necessary for the general welfare and would enhance successful operation of the surrounding area. Respondent further concluded petitioners had not carried their burden of showing the value of adjoining or abutting property would not be substantially injured, as required by subsection (3). Although petitioners presented evidence regarding the effect of telecommunications towers on the value of property in other parts of the city, petitioners did not produce evidence regarding properties adjacent to the proposed site, nor any evidence regarding the effects of any existing tower near or adjacent to one of the neighborhoods at issue.

In addition, respondent determined petitioners failed to show the proposed use of the land would be in harmony with the scale, bulk, and character of the area or neighborhood, as required by § 7-16-2(c)(4). Although the proposed location was zoned CB-II, respondent concluded the impact of the proposed tower would be felt primarily by surrounding residential areas; that the tower would

exceed by more than four times the maximum permitted height for a CB-II zone; and that the tower would far exceed the average 40-foot height of all existing structures along Merrimon Avenue and nearby residential areas.

Under the City Code, petitioners had to show that the general requirements of § 7-16-2(c) were met, as well as technical compliance. Respondent's findings of fact were squarely based on evidence presented at the hearing, and its findings are sufficient to support its conclusions of law that petitioners failed to satisfy all general requirements of § 7-16-2(c) for issuance of a CUP. We find no error of law in respondent's interpretation and application of this provision, and likewise discern no error in the interpretation and application of § 7-5-5. The record reflects the procedures of § 7-5-5 were followed. Petitioners have failed to allege any specific error in its interpretation or application. This assignment of error is overruled.

II.

[3] Petitioners next contend respondent's findings were not supported by competent, material, and substantial record evidence, its conclusions were in error, and its decision denying petitioners' application was arbitrary and capricious. Petitioners do not contend the superior court erred in applying the correct standard of review, and we therefore do not address this issue. Instead, petitioners argue at length that the vast amount and perceived quality of its evidence required issuance of the CUP. However, a correct analysis of these assignments of error does not turn upon the volume of evidence submitted by petitioners.

Rather, when sufficiency of the evidence is challenged or when a decision by a city council denying a CUP is alleged to have been arbitrary or capricious, the reviewing court must employ the whole record test. *C.C. & J. Enter.*, 132 N.C. App. at 552, 512 S.E.2d at 769 (citation omitted). " 'The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' ' " *Pisgah Oil*, 139 N.C. App. at 405, 533 S.E.2d at 292-93 (quoting *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118). Substantial evidence is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Dialysis Care of N.C. v. N.C. Dep't of Health & Human Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 (2000) (quoting *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998) (citations omit-

ted)). The reviewing court should not replace the council's judgment as between two reasonably conflicting views; "[w]hile the record may contain evidence contrary to the findings of the agency, this Court may not substitute its judgment for that of the agency." *Id.* (citation omitted).

Moreover, when an applicant for a special or conditional use permit produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made a *prima facie* showing of entitlement to a permit. *C.C. & J. Enter.*, 132 N.C. at 552, 512 at 769 (citations omitted). Thereafter, denial of the permit must be based upon contrary findings supported by competent, material, and substantial evidence appearing in the record. *Id.*

In the present case, as noted above, petitioners failed to carry their burden of meeting *all* requirements for issuance of a CUP under the City Code. Thus, petitioners did not establish a *prima facie* case of entitlement to the CUP, and the proper focus is simply whether the record as a whole contains such relevant evidence as a reasonable mind might find adequate to support the conclusion that petitioners' application was appropriately denied. Respondent's relevant findings and conclusions of law have been previously enumerated and we need not repeat them here. However, we elaborate briefly on evidence contained in the record supporting respondent's findings.

City Code § 7-16-2(c)(3) requires a showing that the value of properties adjoining or abutting the subject property would not be adversely affected by the proposed land use. The City's Staff Report submitted to respondent expressed concern that petitioners' Property Value Impact Study did not address properties in the vicinity of the subject property, but rather focused on towers and properties in other parts of the City. Petitioners' evidence was about other neighborhoods and other towers in the City. Their study did not even include information with respect to an existing cellular tower a short distance from the proposed site that potentially affected the same neighborhoods. Petitioners simply did not meet their burden of demonstrating the absence of harm to property adjoining or abutting the proposed tower as required by § 7-16-2(c)(3).

Moreover, respondent's findings regarding the nature of the area surrounding the proposed site are all supported by the record. This area, zoned CB-II, includes residential neighborhoods in close proximity to the proposed tower. Based on uncontroverted evidence,

respondent correctly found the proposed tower would rise four times above existing buildings in the area. Petitioners' own computerized photographs showed how the proposed tower would stand out in sharp contrast to other area buildings. Ironically, such evidence of the proposed tower's visibility and predominance over existing buildings corroborated testimony of twelve witnesses opining that the proposed tower would be an eyesore and adversely affect their property values.

In addition, City Code § 7-11-2(d)(2) requires that landscaping "bufferyards" be located on the property of the party seeking to develop the proposed land use. Respondent found, and the record clearly shows, that the proposed tower's landscaping buffer would be partially located on property not within the subject property leased by petitioner SBA, the party seeking to develop the tower. While petitioners submitted an "alternate landscaping plan" which the TRC ultimately approved, City staff recommended the issue be resolved in a manner that would bind SBA's lessor, thereby securing control of the landscaping bufferyard. Petitioners did not submit any document purporting to bind the lessor of the land containing a portion of the landscaping bufferyard, and thus, the record contains no guarantee that the bufferyard required by the City Code would be present.

The Staff Report further expressed concern that the use of alternative sites and stealth technology had not adequately been considered, as required by City Code § 7-16-2(d)(3). Petitioners merely asserted that existing towers were too low for their needs and that alternative sites would not be financially feasible. Petitioners did not carry their burden to affirmatively demonstrate that multiple shorter towers in compliance with CB-II zoning height requirements would be inadequate, that alternate locations were technically, as opposed to financially, infeasible, or that stealth technology was not a reasonable alternative.

In short, respondent's findings were amply supported by the evidence presented at the hearing. While petitioners correctly assert they produced competent evidence, this Court's role is not to sit as a "super city council" to sift and determine facts. *See Dialysis Care*, 137 N.C. App. at 646, 529 S.E.2d at 261; *JWL Invs., Inc. v. Guilford County Bd. Of Adjust.*, 133 N.C. App. 426, 432, 515 S.E.2d 715, 719, (" 'When the Court of Appeals applies the whole record test and reasonable but conflicting views emerge from the evidence, the Court cannot substitute its judgment for the administrative body's decision.' ") (quoting *CG&T Corp. v. Bd. Of Adjustment of*

Wilmington, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992)), *disc. review denied*, 351 N.C. 357, — S.E.2d — (1999).

We hold that the record as a whole contains sufficient relevant evidence as a reasonable person could find adequate to support the conclusion that petitioners failed to meet all requirements necessary for a CUP. On this record, respondent's denial of the CUP was certainly neither arbitrary nor capricious. *See JWL Invs.*, 133 N.C. App. at 432, 515 S.E.2d at 719 (where trial court properly concluded board's decision was based on substantial evidence, board decision not arbitrary or capricious).

III.

Third, petitioners argue respondent failed to follow correct City Code and state law procedures for review of an application for a CUP by failing to base its denial on sufficient competent record evidence. Having held respondent's findings of fact to be squarely supported by sufficient record evidence, and that such findings support respondent's conclusions of law and ultimate denial of the CUP, we find no merit in this assignment of error.

IV.

[4] Petitioners' fourth argument is, in essence, an additional challenge to respondent's denial of the CUP based on sufficiency of the evidence. Petitioners allege denial of the CUP was in violation of a provision of the federal Telecommunications Act of 1996 ("the Act") requiring that,

> [a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

47 U.S.C. § 332(c)(7)(B)(iii).

The United States Court of Appeals for the Fourth Circuit recently addressed an identical challenge to a county board denial of a special use permit for the construction of a wireless telecommunications tower. *See 360 degrees Communications Co. of Charlottesville v. Board of Sup'rs of Albemarle County*, 211 F.3d 79 (4th Cir. 2000). The court defined the term "substantial evidence" within the meaning of the Act as " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' "

requiring "more than a mere scintilla but less than a preponderance." *Id.* at 83 (quoting *AT & T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423, 430 (4th Cir. 1998)).

In applying this standard, the Fourth Circuit upheld denial of the special use permit, noting the local citizens' unanimous opposition to the proposed tower, that the tower would rise 40 to 50 feet above the existing tree canopy at the proposed site, and that the tower would be inconsistent with various county plans and ordinances. *Id.* at 84. The court noted the petitioner's argument that the proposed tower would be minimally visible, optimal for providing service, and that the petitioner would address all planning staff concerns. Yet, the court also noted the neighboring citizens' reasonable opposition. Such issues, "as to which conflicting evidence was presented, are of the type that zoning boards are typically qualified to resolve." *Id.* at 85.

Likewise, in the present case, respondent is precisely the body empowered by law to determine whether to issue the CUP. Upon conflicting evidence, the decision properly rests with respondent, not this Court. Upon our review of the whole record, there is adequate evidence, under federal or state law, to support the conclusion that petitioners failed to satisfy *all* City Code requirements for issuance of the CUP. This assignment of error is overruled.

V.

[5] Petitioners' final argument asserts respondent's decision violates the Telecommunications Act by prohibiting the provision of personal wireless services and unreasonably discriminating among providers of functionally equivalent services. Under the Act, "[t]he [local] regulation of the placement. . . of personal wireless service facilities. . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II).

The United States Court of Appeals for the Fourth Circuit recently addressed an identical challenge. *See 360 degrees Communications Co.*, 211 F.3d at 86. The exact issue before the court was whether "a single denial of a site permit could ever amount in effect to the prohibition of wireless services" in violation of § 332(c)(7)(B)(i)(II). *Id.* The court determined that, due to the nature of wireless services and its ability to be effected in numerous sites in various combinations, "the simple fact of denial with respect to a particular site is not enough, there must be something more, taken from the circumstances of the particular application or from

the procedure for processing the application, that produces the 'effect' of prohibiting wireless services." *Id.* at 86.

The court noted that conceptually, although unlikely in a "real world" application, a denial of such a permit could amount to a prohibition under § 332(c)(7)(B)(i)(II) if wireless service could only be provided from that particular site. *Id.* at 86-87. Determining that 100% coverage is not required by the Act, the court noted the difficulty in establishing a violation of the provision if such service is already provided in an area. *Id.* at 88 fN1. Thus, where the petitioner's own evidence acknowledged the existence of other towers in the area, it failed to carry the "heavy burden" of demonstrating that denial of the application for one particular site was tantamount to a prohibition of service. *Id.* at 88.

Applying such principles here, petitioners have likewise failed to establish respondent's denial of the CUP was tantamount to a complete prohibition on wireless service in the area. Petitioners fail to cite any evidence, other than the fact their permit was denied, to support such a contention. Rather, petitioners' own evidence establishes that their intent was to fill a gap and improve existing coverage. Indeed, petitioners' brief acknowledges the "several other existing towers in the general vicinity that belong to other wireless providers." Thus, as in *360 degrees Communications Co.*, petitioners have failed to carry their "heavy burden" of establishing a complete prohibition in service based on denial of the CUP.

We also find no substantial evidence, and consequently, no merit in petitioners' argument that, given the presence of other towers in the area, denial of the CUP operates to discriminate among functionally equivalent providers. Petitioners have not highlighted any evidence in the record tending to show the existing towers also failed to meet all general requirements under City Code § 7-16-2(c) but were nonetheless issued a CUP.

The order of the superior court upholding respondent's denial of petitioners' application for the CUP is hereby affirmed.

Affirmed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. CARL VINCENT CHOPPY, JR.

No. COA99-1200

(Filed 19 December 2000)

1. **Homicide— instructions—attempted second-degree murder—no prejudice when there is no such crime**

Although defendant contends the trial court erred in an action convicting defendant of four counts of attempted first-degree murder by instructing the jury that a specific intent to kill the victims was not an element of attempted second-degree murder, defendant was not prejudiced by this instruction under N.C.G.S. § 15A-1443(a) because: (1) there is no such crime as attempted second-degree murder; and (2) the jury found defendant guilty of attempted first-degree murder, and there is no reason to believe the jury would not have found defendant guilty if the trial court's instructions were correct.

2. **Appeal and Error— preservation of issues—failure to object—failure to assert plain error**

Although defendant contends the trial court failed to exercise its discretion when it denied the jury an opportunity to review the testimony of any witnesses in a prosecution for four counts of assault with a deadly weapon with intent to kill inflicting serious injury, four counts of attempted first-degree murder, two counts of conspiracy to commit first-degree murder, one count of discharging a firearm into occupied property, and one count of possession of a firearm by a felon, defendant did not preserve this issue for appeal under N.C. R. App. P. 10(b)(1) because: (1) defendant did not object to the trial court's statement that the jury would not be able to review the trial transcript; (2) defendant has not demonstrated that any rule or law has otherwise preserved the assignment of error; and (3) defendant did not allege that the trial court's comments constituted plain error.

3. **Conspiracy— first-degree murder—sufficiency of evidence**

The trial court did not err by denying defendant's motions to dismiss the two conspiracy to commit first-degree murder charges, because: (1) the State presented some evidence of an agreement between defendant and his accomplice to commit first-degree murder, including the accomplice's comment to defendant that they should go on a killing spree and defend-

ant's laughing agreement, and the fact that the two men thereafter proceeded with the attacks; and (2) the State presented evidence of repeated coordinated assaults by defendant and his accomplice.

4. Conspiracy— first-degree murder—number of charges

Although defendant contends he should only have been convicted at most of one charge of conspiracy to commit first-degree murder based on the fact that he entered into only one agreement, there was enough evidence to allow a jury to decide whether defendant engaged in two conspiracies because: (1) there were different objectives of the assaults when the first was for no apparent reason and the second was apparently racially motivated; (2) there was an agreement to go home after the first attack; and (3) a significant amount of time passed between the two attacks.

5. Homicide— attempted first-degree murder—short-form indictments—constitutional

A defendant's four convictions for attempted first-degree murder do not need to be reversed even though defendant alleges the short-form indictments unconstitutionally failed to allege all the elements of the offense including premeditation, deliberation, and specific intent to kill, because: (1) the bills of indictment complied with N.C.G.S. § 15-144; and (2) North Carolina appellate courts have already considered and rejected this argument.

6. Sentencing— aggravating factor—victim's race

The trial court did not err by finding that defendant committed the crimes of conspiring to murder, attempting to murder, and feloniously assaulting one victim under the aggravating factor that defendant committed these crimes based on the victim's race in violation of N.C.G.S. § 15A-1340.16(d)(17), because: (1) defendant's motivation, if any, for his attacks on the other four victims is irrelevant in determining whether the attack on this victim was racially motivated; and (2) the State introduced evidence of the accomplice's statement that this victim was singled out since he was black.

7. Sentencing— aggravating factor—especially heinous, atrocious, or cruel

The trial court did not err in aggravating defendant's sentences for felonious assault and attempted murder on the basis

that the offenses were especially heinous, atrocious, or cruel, because: (1) defendant assaulted five unsuspecting strangers in the dead of night and all of the victims were hit by more than one bullet; (2) two victims underwent surgery to remove bullets lodged in their bodies and they both suffered lasting nerve damage; (3) one victim has been treated for post-traumatic stress disorder, which made him retire from the Navy; (4) one victim needed surgery to remove one bullet from his body while the other bullet is still lodged in his leg and causes him constant pain; (5) one victim needed surgery to repair the artery severed by a bullet; and (6) the evidence reveals that defendant took pleasure in the assaults, including bragging to his girlfriend that he made the front page, entertaining friends with stories about the assaults, ridiculing the victim he attacked for racial reasons, and visiting the scene of the first assault while commenting upon how the area had good memories.

Appeal by defendant from judgment entered 30 October 1998 by Judge Beverly T. Beal in Superior Court, Buncombe County. Heard in the Court of Appeals 14 September 2000.

Michael F. Easley, Attorney General, by K. D. Sturgis, Assistant Attorney General, for the State.

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

WYNN, Judge.

On 29 August 1997, several people were at the home of the defendant and his girlfriend Sarah Roach in Franklin, North Carolina. The defendant told Roach that he was going to "jack" people, meaning commit armed robbery, and he left around 5:00 p.m. with his friend Dwain Surmiak, driving Roach's white Ford Fiesta.

The two men picked up Patty O'Connor, stopped at the home of a friend, went to a store, ate dinner at a fast food restaurant, then stopped at a newsstand so the defendant could buy some cigars. All three people were armed—the defendant had a 9 millimeter semiautomatic handgun, Surmiak had a .45 caliber handgun, and O'Connor had a stun gun. They drove to Asheville and picked up Surmiak's girlfriend, Christine Martin.

Surmiak suggested "Let's go on a killing spree" and the defendant laughed in agreement. The four people purchased some crack cocaine and an amphetamine called crank. At about 1:00 a.m., they used the drugs in the parking lot of a bar called Hairsprays, where the two men loaded their weapons. The foursome went into the bar and the defendant had two drinks. Later, Surmiak suggested they go to the Blue Ridge Parkway to have sex.

They drove to the Blue Ridge Parkway and stopped the car at the Haw Creek Overlook. Two other vehicles were already parked there—a van and a black car. The foursome got out of the Ford Fiesta and split into two pairs to have sex. The women then returned to the vehicle and went to sleep in the backseat. The defendant and Surmiak remained outside of the car.

The two men then turned their attention to the black car parked at the overlook. In that car slept three sailors who were on a weekend pass from their naval base duty station—Rocky Miller, Troy Gibson, and Jason Stevenson. The defendant and Surmiak knocked on the window of the sailors' car. Miller rolled down the window and talked to them for about ten minutes before saying that he was cold and wanted to go back to sleep. He rolled up the window, whereupon the defendant and Surmiak both started firing their weapons into the car.

When the shooting began, Miller raised his arms to protect his face. One bullet hit him in the wrist and one in the chest. He rolled onto Stevenson and pretended to be dead. Another bullet just missed Miller's head. Bullets hit Stevenson in the leg and knee, and Gibson was hit by four bullets. Shards of broken glass pierced Stevenson's and Miller's bodies.

The defendant and Surmiak jumped into their car and sped off. The defendant noted that he had only one round left in his handgun. Martin said she wanted to go home, so the defendant drove her home.

Meanwhile, Miller, Stevenson and Gibson remained still until the shooting stopped and the defendant drove away. Stevenson then managed to drive down the mountain, where they met a motorist who led them to a hospital.

After dropping off Martin, the defendant, Surmiak and O'Connor stopped at a gas station where defendant purchased cigarettes and food and commented to O'Connor that "something like that works up

an appetite." The three agreed to go home and left the gas station. While driving on Merrimon Avenue, they saw Kevin Brown walking on the sidewalk and Surmiak said "there's a nigger, turn around Choppy." The defendant drove past Brown four times. On the fifth pass, the defendant slowed down and stopped right behind Brown, at which point Surmiak shot him. Brown was hit in the hip and thigh. The three passengers watched Brown until they saw lights from an approaching vehicle.

The defendant then drove onto Interstate 40, where he was passed by a vehicle driven by Charles Bratu. The defendant sped up and caught up to Bratu's vehicle, hovering in his blind spot for a mile or two. He then pulled up next to Bratu, and Surmiak fired three to five shots at him. One bullet entered Bratu's arm and exited his body just above his heart, severing a main artery. Another bullet hit him in the head. He managed to exit the highway and met two police officers who called an ambulance.

The defendant and his companions returned to their homes in Franklin and the defendant went to sleep. When he woke up the next day, he showed Roach a newspaper headline that read, "Overnight Shooting Spree Rocks Western North Carolina" and boasted, "Look, I made front page." Soon after, Surmiak and some others arrived at the defendant's home. The defendant and Surmiak joked about shooting a black man in the back, and defendant mimicked how Brown looked when he got shot, saying "all black people [were] niggers." He also told the listeners about shooting three men at the overlook, and said he thought they were dead. Later that day, the defendant, Surmiak and three others drove to the overlook. The defendant commented that the place brought back "good memories."

Police investigations linked all five shootings to the defendant and Surmiak. At trial, the State offered the facts detailed above. The defendant contended that he was intoxicated during the shootings, denied seeing the newspaper headline about the shootings, and denied bragging about killing anyone.

A jury found the defendant guilty of four counts of assault with a deadly weapon with intent to kill inflicting serious injury, four counts of attempted first-degree murder, two counts of conspiracy to commit first-degree murder, one count of discharging a firearm into occupied property, and one count of possession of a firearm by a felon. The trial court found aggravating factors in eleven of the twelve charges and found no mitigating factors. The court arrested judgment on the

four counts of assault with a deadly weapon with intent to kill inflicting serious injury, finding that they merged with the four convictions of attempted murder. Based on the aggravating factors and the defendant's prior felony record, the trial court imposed eight consecutive terms of active imprisonment totaling a minimum of 1,411 months and a maximum of 1,758 months. The defendant appealed to this Court.

I.

[1] The defendant first argues that the trial court erred in instructing the jury that a specific intent to kill the victims was not an element of attempted second-degree murder. The trial court's instructions provided that to be guilty of attempted second-degree murder, the defendant needed the specific intent to commit second-degree murder, but that second-degree murder itself did not require intent. The jury found the defendant guilty of attempted first-degree murder.

Since the defendant filed this appeal, our Supreme Court held in *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000) that there is no such crime as attempted second-degree murder. Although the trial court erred by instructing the jury on this charge, since it is not a crime, the defendant was not prejudiced by the instruction. N.C. Gen. Stat. § 15A-1443(a) (1997) states that prejudice is shown only when the defendant can show a reasonable possibility that, absent the alleged error, the jury would have reached a different result.

In the case at bar, a correct instruction would have given the jury the choice of finding the defendant guilty of attempted first-degree murder or not guilty. The jury found the defendant guilty of attempted first-degree murder, and we have no reason to believe the jury would *not* have found the defendant guilty if the trial court's instructions were correct. The defendant cannot show that he was prejudiced under N.C. Gen. Stat. § 15A-1443(a), so this assignment of error is without merit.

II.

[2] The defendant next argues that the trial court erred by failing to exercise its discretion in denying the jury an opportunity to review the testimony of any witnesses. We disagree.

Before opening statements, the trial court told the jury that they would not be able to review the transcript of the trial during their deliberations. The defendant did not object to the trial court's com-

ment, and he therefore failed to preserve this issue for appeal. N.C. Gen. Stat. § 15A-1446(a) (1997); *State v. Reid*, 322 N.C. 309, 312, 367 S.E.2d 672,674 (1988).

Further, under N.C.R. App. P. 10(b)(1), before a defendant can raise an assignment of error on appeal, he must have objected to the error during trial. Where no action was taken by the defendant during the course of trial to preserve an issue for appeal, the burden is on him to establish his right to review. *See State v. Gardner*, 315 N.C. 444, 447, 340 S.E.2d 701, 705 (1986). This can be done by showing that an exception by rule or by law was deemed preserved or taken without any such action, or that the alleged error constituted plain error. *See State v. Oliver*, 309 N.C. 326, 335, 307 S.E.2d 304, 312 (1983).

In making an appeal where no objection was made at trial, the defendant must alert the appellate court to the fact that no action was taken at trial and then establish his right to review by showing how the exception was preserved although it was not brought to the attention of the trial court. *See Gardner*, 315 N.C. at 447-48, 340 S.E.2d at 705. If the defendant fails to comply with these requirements, he waives his right to appellate review. *See id.* at 448, 340 S.E.2d at 705.

In the case before us, the defendant did not object to the trial court's statement that the jury would not be able to review the trial transcript. On appeal, he does not demonstrate that any rule or law has otherwise preserved the assignment of error, nor does he allege that the court's comment constituted plain error. His right to review on this issue is therefore waived. *See State v. Degree*, 110 N.C. App. 638, 642, 430 S.E.2d 491, 494 (1993).

III.

[3] Third, the defendant argues that the trial court erred in denying his motions to dismiss the two conspiracy charges because the evidence was insufficient to convince a rational trier of fact beyond a reasonable doubt that he entered into an agreement to commit first-degree murder. We disagree.

The defendant was indicted on two charges of conspiracy to commit first-degree murder—one charge for the attack on Troy Gibson, Jason Stevenson and Rocky Miller, and one charge for the attack on Kevin Brown. At the close of all evidence, the trial court denied the defendant's motion to dismiss these charges. A trial court should dismiss a charge only when the evidence is insufficient to convince a

rational trier of fact that the defendant committed each element of the crime. *See State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987).

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act[.]" *State v. Massey*, 76 N.C. App. 660, 661, 334 S.E.2d 71, 72 (1985). A conspiracy may be shown by express agreement or an implied understanding. *See State v. Rozier*, 69 N.C. App. 38, 50, 316 S.E.2d 893, 901, *cert. denied*, 312 N.C. 88, 321 S.E.2d 905 (1984). A conspiracy may be shown by circumstantial evidence, *see State v. Gary*, 78 N.C. App. 29, 35, 337 S.E.2d 70, 74 (1985), *disc. review denied*, 316 N.C. 197, 341 S.E.2d 586 (1986), or by a defendant's behavior. *See State v. Larrimore*, 340 N.C. 119, 156, 546 S.E.2d 789, 809 (1995). The State cannot establish a conspiracy "by mere a suspicion, nor does a mere relationship between the parties or association show a conspiracy. . . . If the conspiracy is to be proved by inferences drawn from the evidence, such evidence must point unerringly to the existence of a conspiracy." *Massey*, 76 N.C. App. at 662, 334 S.E.2d at 72. To prove that the defendant committed conspiracy to commit first-degree murder, the State must prove that the defendant agreed to perform every element of the crime—i.e., that he agreed to the intentional killing of a victim after premeditation and deliberation. *See State v. Suggs*, 117 N.C. App. 654, 661, 435 S.E.2d 211, 215 (1995).

The defendant argues that the State failed to offer any evidence of an agreement between himself and Surmiak to kill anyone, or that the purpose of such an agreement was to kill either Miller, Gibson, Stevenson, or Brown. But the record shows the State presented some evidence of an agreement between the defendant and Surmiak to commit first-degree murder. Most striking is Surmiak's comment "Let's go on a killing spree," and the defendant's laughing agreement. The two men then proceeded with the attacks at issue. During their attack on the Blue Ridge Parkway, the two men approached the victims' vehicle and fired their weapons almost simultaneously. Later, the defendant followed Surmiak's instructions in turning around and driving past Kevin Brown four times, stopping right behind Brown so Surmiak could shoot him, then watching Brown until another vehicle approached.

The evidence of repeated coordinated assaults and the defendant's agreement to "go on a killing spree" clearly refutes his argument that the State did not offer sufficient evidence of one or more conspiracies to commit first-degree murder. The trial court properly

allowed the jury to consider the charges of conspiracy to commit first-degree murder.

IV.

[4] Fourth, the defendant argues that even if the evidence is sufficient to show an agreement to commit first-degree murder, he should only have been convicted of one charge of conspiracy because he entered into only one agreement. We disagree.

The question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury. *See State v. Rozier*, 69 N.C. App. at 54, 316 S.E.2d at 903. Where the evidence shows only one agreement between conspirators, a defendant may be convicted of only one conspiracy. *See id.* at 52, 316 S.E.2d at 902. When a series of agreements or acts constitute a single conspiracy, the constitutional guarantee against double jeopardy bars multiple indictments. *See id.* Several factors determine the number of conspiracies—the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings. *See State v. Dalton*, 122 N.C. App. 666, 673, 471 S.E.2d 657, 661-62 (1996). "Ordinarily, the conspiracy ends with the attainment of its criminal objectives, but precisely when this occurs may vary from case to case." *State v. Gary*, 78 N.C. App. at 37, 337 S.E.2d at 76.

In the case at bar, the most important evidence concerning the number of conspiracies was the different objectives of the assaults, the time interval between them, and the agreement to go home after the first attack. The first assaults occurred after Surmiak suggested "Let's go on a killing spree." The defendant himself admits in his brief that the first attack was "for no apparent reason." After leaving the Blue Ridge Parkway overlook, he and Surmiak took Christine Martin home, got some food, drove around for a while, and finally decided to go home. Only then did the defendant and Surmiak drive past Kevin Brown, and Surmiak said "there's a nigger, turn around." The defendant repeatedly drove the vehicle past Brown, finally stopping so Surmiak could shoot him.

A significant amount of time passed between the shooting at the Blue Ridge Parkway rest stop and the attack on Kevin Brown. Further, the defendant and Surmiak agreed to go home after the first attack, signaling the end of the first crime spree. Finally, the first attack was "for no apparent reason." The attack on Kevin Brown was apparently racially motivated. The State presented evidence about

the abandonment of the first attack, the time interval between the assaults, and the different motivations for the crimes. We hold that there was enough evidence to allow a jury to decide whether the defendant engaged in two conspiracies instead of one.

V.

[5] Next, the defendant argues that his convictions for attempted first-degree murder must be reversed because the indictments unconstitutionally failed to allege all the elements of the offense. We disagree.

> The four attempted murder bills of indictment all read:
>
> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously and of malice aforethought did attempt to kill and murder [the victim].

These bills of indictment complied with N.C. Gen. Stat. § 15-144 (1983), which sets forth the "short-form" requirements for first-degree murder indictments and which will support a conviction for either first-degree or second-degree murder. *See, e.g., State v. Avery*, 315 N.C. 1, 13-14, 337 S.E.2d 786, 793 (1985).

The defendant argues, however, that the insufficient allegations of the short-form indictment in this case resulted in an invalid indictment. He relies on *Jones v. United States*, 526 U.S. 227, —, 143 L. Ed. 2d 311, 319 (1999), in which the United States Supreme Court held that "elements [of the offense] must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." The defendant asserts that the indictments in this case are insufficient because they do not allege premeditation, deliberation, and specific intent to kill.

This Court recently considered and rejected this argument in *State v. Holder*, 138 N.C. App. —, 530 S.E.2d 562, *review denied*, 352 N.C. 359, — S.E.2d — (2000), which held that the *Jones* case *does not* invalidate North Carolina's short-form indictment for murder. *See also State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000) (holding that *Jones v. United States* does not change the requirements for North Carolina's short-form indictments). For the reasons put forth in *Holder* and *Wallace*, we reject the defendant's argument that his indictments were invalid.

VI.

[6] The defendant next argues that the trial court erred in finding that he committed the crimes against Kevin Brown because of Brown's race when the evidence failed to show that race was the motivating factor. We disagree.

The trial court imposed sentences in excess of the presumptive range for conspiring to murder, attempting to murder, and feloniously assaulting Kevin Brown by finding as an aggravating factor that the defendant committed these crimes because of Brown's race. N.C. Gen. Stat. § 15A-1340.16(d)(17) (1997). The defendant argues that the State failed to prove that he assaulted Brown because of his race, and that these convictions must be remanded for resentencing.

"When a defendant assigns error to the sentence imposed by the trial court, our standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996)).

N.C. Gen. Stat. § 15A-1340.16(d)(17) allows a trial court to aggravate a sentence if the "offence for which the defendant stands convicted was committed against a victim because of the victim's race . . . ." A finding of this factor "may be made any time the defendant targets a person for victimization because of his race or national origin." *State v. Hatcher*, 136 N.C. App. 524, 527, 524 S.E.2d 815, 817 (2000). While race must be the motivating factor, animus towards the victim's race is not necessary. *See id.*

The defendant argues that because four of his five victims on the night in question were not black, race was not a motivating factor in the attack on Brown. However, the defendant's motivation, if any, for his attacks on the other victims is irrelevant in determining whether the attack on Brown was racially motivated. Since the State introduced evidence that Brown was singled out because he was black (Surmiak's comment, "there's a nigger, turn around"), the trial court's sentence was proper.

VII.

[7] Lastly, the defendant argues that the trial court erred in aggravating his sentences for felonious assault and attempted murder on the basis that the offenses were especially heinous, atrocious or cruel

since that aggravating factor was not supported by the evidence or applicable legal authorities. We disagree.

The trial court imposed sentences exceeding the presumptive range for each conviction of felonious assault and attempted first-degree murder based in part on the finding that the offenses were especially heinous, atrocious or cruel under N.C. Gen. Stat. § 15A-1340.16(d)(7) (1997). Again, "our standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. at 540, 491 S.E.2d at 685. The focus under this factor "should be on whether the facts of the case disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense." *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983). Further, the "entire set of circumstances surrounding the offense must be considered in making this decision." *State v. Hager*, 320 N.C. 77, 88, 357 S.E.2d 615, 621 (1987).

The defendant compares the facts of his case with the facts of other cases in which this Court held that a trial court properly found that a crime was especially heinous, atrocious or cruel. *See, e.g.*, *State v. Hager*, *supra*; *State v. Vaught*, 318 N.C. 480, 349 S.E.2d 583 (1986); *State v. Flowers*, 100 N.C. App. 58, 394 S.E.2d 296 (1990). He argues that because the cruelty in *this* case was not quite as horrific as in those cases, the trial court should not have found that his actions were particularly heinous. We disagree, noting that these other cases merely show that the defendant's actions were not quite as heinous as they could have been.

In the case at bar, the defendant assaulted five unsuspecting strangers in the dead of night. All of the victims were hit by more than one bullet. Troy Gibson and Rocky Miller underwent surgery to remove bullets lodged in their bodies, and they both suffered lasting nerve damage. Miller has been treated for post-traumatic stress disorder, which made him retire from the Navy. Kevin Brown also needed surgery to remove one bullet from his body, and the other bullet is still lodged in his leg, causing him constant pain. Charles Bratu also needed surgery to repair the artery severed by a bullet. The defendant's assertion that none of his victims suffered lasting physical or psychological harm is insultingly without merit.

Moreover, the record is replete with evidence that the defendant took pleasure in the assaults—evidence that is highly probative of whether the crimes were especially heinous, atrocious or cruel. *See*

State v. Hager, 320 N.C. at 89, 357 S.E.2d at 622. For instance, the day after the shootings, he bragged to his girlfriend that he "made front page" and then later entertained his friends with stories about the assaults, especially ridiculing Kevin Brown. Finally, he visited the overlook that was the scene of the first assault and commented upon how the area had "good memories."

Considering all of these factors, we hold that the trial court did not err when it found that the defendant's crimes were especially heinous, atrocious or cruel.

Conclusion

Since we find no error in the trial court's instructions, the indictments, or the sentencing, we conclude the defendant received a fair trial that was free from error.

No error.

Judges McGEE and TIMMONS-GOODSON concur.

PATRICIA WARD, PLAINTIFF v. KRISTEN BEATON, DEFENDANT

No. COA99-1277

(Filed 19 December 2000)

1. Alienation of Affections— denial of directed verdict—sufficiency of evidence

The trial court did not err by denying defendant's motion for directed verdict on the claim for alienation of affections, because: (1) plaintiff presented evidence to show there was a marriage with love and affection and that defendant's conduct destroyed the marriage; (2) "luring" by defendant is not required to sustain this claim; (3) defendant need not be the initiator in such a relationship, but must be only a willing participant, making occasions for a relationship to develop; and (4) defendant's actions need not be the sole cause of the alienation as long as her conduct was a controlling or effective cause of the alienation.

2. Fraud— affirmative defense—fraud—failure to specially plead—waiver

Although defendant contends the trial court erred in an action for alienation of affections by denying defendant's N.C.G.S. § 1A-1, Rule 60(b) motion for relief from judgment based on an alleged fraud, this issue was not preserved for appeal, because: (1) fraud is an affirmative defense that must be specially pleaded as required by N.C.G.S. § 1A-1, Rule 8(c), and failure to plead an affirmative defense results in waiver unless the parties try the issue by express or implied consent, N.C.G.S. § 1A-1, Rule 15(b); and (2) defendant neither pled nor tried the case on this theory, but only made it an issue in her post-trial motion for relief from judgment.

3. Alienation of Affections— punitive damages—aggravating factors—sexual relationship—additional circumstances

The trial court did not err in an alienation of affections case by submitting the issue of punitive damages to the jury, because: (1) plaintiff complied with the requirement in N.C.G.S. § 1A-1, Rule 9(k) by averring both malice and willful and wanton conduct as the relevant aggravating factors under N.C.G.S. § 1D-15, and there is no requirement that the complaint state with particularity the circumstances underlying these factors; (2) evidence of "sexual relations" will allow a plaintiff to get to the jury on the issue of punitive damages in a claim for alienation of affections, and plaintiff presented evidence that defendant and plaintiff's husband had sex at least two times; and (3) there was evidence of other aggravating circumstances including that after forming a sexual relationship with plaintiff's husband, defendant accompanied plaintiff's husband when he returned his children to the custody of plaintiff, defendant appeared unannounced at the front door of the marital home asking plaintiff if they could be friends, and defendant arrived in the driveway of the marital home while plaintiff's husband was visiting his children and defendant blew her car horn for plaintiff's husband.

4. *Alienation of Affections*— jury instruction—punitive damages—consistent with pattern jury instruction

Although defendant contends the trial court's jury instruction on punitive damages in an alienation of affections case was confusing, defendant concedes it was consistent with the North Carolina Pattern Jury Instructions, a review of the trial court's

instruction reveals it was entirely consistent with the provisions of Chapter 1D of our general statutes, and any simplified or shortened instruction would violate the requirement that the judge instruct the jury on the law with respect to every substantial feature of the case.

5. Alienation of Affections— punitive damages—evidence of defendant's assets before determination of compensatory damages—failure to request bifurcated trial

The trial court did not err in an alienation of affections case by admitting evidence of defendant's assets before the trier of fact determined that compensatory damages were warranted when defendant did not request a bifurcated trial under N.C.G.S. § 1D-30, because: (1) evidence of a defendant's net worth may be considered by the jury in determining the amount of a punitive damages award, N.C.G.S. § 1D-35(i); and (2) defendant's failure to request a bifurcated trial on the issue of punitive damages under N.C.G.S. § 1D-30 rendered this evidence admissible at any time during plaintiff's case-in-chief.

6. Appeal and Error— preservation of issues—instruction—failure to object

Although defendant contends the trial court's instruction on future damages in an alienation of affections case was error, this issue is waived because defendant failed to object to this instruction at trial as required by N.C. R. App. P. 10(b)(2).

Judge WALKER dissenting.

Appeal by defendant from order entered 14 June 1999 and judgment entered 28 June 1999 by Judge John M. Gardner in Mitchell County Superior Court. Heard in the Court of Appeals 12 September 2000.

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

Ronald W. Howell, P.A., by Ronald W. Howell, for the defendant-appellant.

LEWIS, Judge.

Plaintiff Patricia Ward brought this action against defendant, Kristen Beaton, seeking compensatory and punitive damages for (1)

alienation of affections, (2) criminal conversation and (3) intentional infliction of emotional distress. At the close of plaintiff's evidence, the court granted defendant's motion for directed verdict as to the criminal conversation and intentional infliction of emotional distress claims. The jury returned a verdict in favor of plaintiff on the alienation of affections claim and awarded plaintiff $52,000 in compensatory damages and $43,000 in punitive damages. Defendant made several post-trial motions, including a motion for judgment notwithstanding the verdict pursuant to N.C.R. Civ. P. 50(b) and (c), a motion for new trial pursuant to N.C.R. Civ. P. 59(a)(9) and a motion for relief from the court's judgment pursuant to N.C.R. Civ. P. 60(b)(1), (2), (3) and (6). The trial court denied each of these motions. Defendant appeals from the court's final judgment and from the court's order denying relief pursuant to Rule 60(b).

[1] Defendant has assigned as error the trial court's denial of her motion for directed verdict on the issue of alienation of affections. On a defendant's motion for directed verdict, the trial court must determine whether the evidence, when considered in the light most favorable to the plaintiff, is sufficient to take the case to the jury. N.C.R. Civ. P. 50(a); *Hutelmyer v. Cox*, 133 N.C. App. 364, 369, 514 S.E.2d 554, 558 (1999), *appeal dismissed*, 351 N.C. 356, — S.E.2d — (2000). Where the trial court finds there is more than a scintilla of evidence supporting each element of the plaintiff's claim, the motion for directed verdict should be denied. *Norman Owen Trucking v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998).

To survive a motion for directed verdict on a claim for alienation of affections, the plaintiff must present evidence to show: (1) that there was a marriage with love and affection; (2) that the love and affection was alienated and destroyed; and (3) that the wrongful and malicious acts of defendant produced the loss of love and affection. *Hankins v. Hankins*, 202 N.C. 358, 361, 162 S.E. 766, 767 (1932). The "malicious acts" required have been defined as acts constituting " 'unjustifiable conduct causing the injury complained of.' " *Chappell v. Redding*, 67 N.C. App. 397, 400, 313 S.E.2d 239, 241 (quoting *Heist v. Heist*, 46 N.C. App. 521, 523, 265 S.E.2d 434, 436 (1980)), *disc. review denied*, 311 N.C. 399, 319 S.E.2d 268 (1984).

Plaintiff testified that prior to 1998, plaintiff thought she and her husband had "the perfect marriage." (Tr. at 15.) Plaintiff also testified Mr. Ward was a "good husband" to her and a "good father" to his children. (Tr. at 19.) *See, e.g., Litchfield v. Cox*, 266 N.C. 622, 623, 146

S.E.2d 641, 642 (1966) (holding plaintiff's own testimony that her marriage was a good one sufficient to establish a marriage with love and affection). Plaintiff's evidence also tended to show that the love and affection that once existed between her and her husband was alienated and destroyed by defendant's conduct. Plaintiff began to notice a change in her husband's affections in the late spring of 1998, around the time her husband met defendant. During this time, plaintiff's husband began to "draw away" from home and started missing evening meals with his family. (Tr. at 20-21.) As he was spending less time with plaintiff and his children, he began to spend an increasing amount of time with defendant.

Plaintiff's husband, who at the time was working as a captain at the Mitchell County Sheriff's Department, first met defendant in "early 1998," when he responded to several reports of domestic disputes at her home. (Tr. at 45-46.) In June 1998, defendant began inviting plaintiff's husband to her home, and did so on numerous occasions by contacting him at work. On one occasion she arrived at the police station asking to speak to plaintiff's husband. The officers noticed she emanated a strong odor of alcohol, but she refused to take an alkasensor test and insisted that plaintiff's husband drive her home. The increasing amount of time that defendant and plaintiff's husband were spending together culminated in plaintiff's husband moving into defendant's home on 4 July 1998, where he stayed for about two weeks. The evidence indicated that a sexual relationship developed between the defendant and plaintiff's husband during this time.

We conclude this evidence was sufficient to overcome defendant's motion for directed verdict. However, the defendant maintains that absent any evidence that defendant "lured" plaintiff's husband away, the evidence on the claim of alienation of affections could not be submitted to the jury. To the contrary, "luring" by the defendant is not required to sustain a claim for alienation of affections. *Scott v. Kiker*, 59 N.C. App. 458, 464, 297 S.E.2d 142, 146 (1982). A defendant need not even be the initiator in such a relationship, but must be only a willing participant, making occasions for a relationship to develop. *Heist*, 46 N.C. App. at 525, 265 S.E.2d at 437. In addition, the defendant maintains the Wards' marriage was strained before defendant entered the picture. Even so, the defendant's actions need not be the sole cause of the alienation. As long as her conduct was a "controlling" or "effective" cause of the alienation, plaintiff may prevail even in the face of other contributing factors. *Bishop v. Glazener*, 245 N.C.

592, 596, 96 S.E.2d 870, 873 (1957). We find the evidence sufficient to suggest that the defendant was the effective cause of the alienation in this case.

[2] In support of her Rule 60(b) motion for relief from judgment, the defendant submitted evidence of a consent order entering a divorce from bed and board between the plaintiff and her husband on 5 August 1998, the same day the complaint in this action was filed. This consent order relieved Mr. Ward of payment of alimony, post-separation support and child support. Defendant asserts on appeal that the findings in the consent order alleviating Mr. Ward of these responsibilities evidence a fraudulent scheme on the part of plaintiff and her husband in filing this claim for alienation of affections. Defendant contends the fraud indicated by the consent order required the trial court to direct a verdict in defendant's favor.

Fraud is an affirmative defense that must be specially pleaded. N.C.R. Civ. P. 8(c). Failure to plead an affirmative defense ordinarily results in waiver of the defense. *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 6, 312 S.E.2d 656, 660 (1984). The parties may, however, still try the issue by express or implied consent. N.C.R. Civ. P. 15(b). Defendant neither pled nor tried the case on this theory, but only made it an issue in her post-trial motion for relief from judgment. Accordingly, she cannot now present it on appeal.

[3] Defendant also contends the trial court erred in submitting the issue of punitive damages to the jury. Defendant first contends plaintiff's demand for punitive damages did not comply with the requirements set forth in Rule 9(k) of the North Carolina Rules of Civil Procedure. Rule 9(k) states, "A demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity." One of the following aggravating factors listed in N.C. Gen. Stat. § 1D-15 must be established to recover punitive damages: (1) fraud, (2) malice or (3) willful or wanton conduct. In accordance with Rule 9(k), plaintiff's complaint averred both malice and willful and wanton conduct as the relevant aggravating factors under G.S. 1D-15. Absent any additional requirement in the statute that the complaint state with particularity the circumstances underlying these factors, we find the pleadings in compliance with Rule 9(k).

Defendant also challenges the sufficiency of the evidence to support the award of punitive damages based on malice or willful or wanton conduct. It is well settled that punitive damages may be awarded

in an action for alienation of affections. *Heist*, 46 N.C. App. at 527, 265 S.E.2d at 438; *see also* N.C. Gen. Stat. § 1D-1 (1999) ("Punitive damages may be awarded, in an appropriate case . . . , to punish a defendant for egregiously wrongful acts."). In order for the question of punitive damages to be submitted to the jury, however, there must be evidence of circumstances of aggravation beyond the proof of malice necessary to satisfy the elements of the tort to sustain a recovery of compensatory damages. *Chappell v. Redding*, 67 N.C. App. 397, 403, 313 S.E.2d 239, 243 (1984). Specific circumstances of aggravation include "willful, wanton, aggravated or malicious conduct." *Heist*, 46 N.C. App. at 526-27, 265 S.E.2d at 438; *see also* N.C. Gen. Stat. § 1D-15 (1999).

Evidence of "sexual relations" will allow a plaintiff to get to the jury on the issue of punitive damages in a claim for alienation of affections. 1 Suzanne Reynolds, *Lee's North Carolina Family Law*, § 5.48(c) (5th ed. 1993); *see also Hutelmyer v. Cox*, 133 N.C. App. at 371, 514 S.E.2d at 560 (finding sufficient aggravating factors where defendant engaged in sexual relationship with plaintiff's husband, publically displayed the affair, welcomed him into her home numerous times and called plaintiff's home to determine his whereabouts); *Jennings v. Jessen*, 103 N.C. App. 739, 744, 407 S.E.2d 264, 267 (1991) (finding sufficient aggravating factors where defendant engaged in sexual intercourse with plaintiff's husband, as well as "cohabited for several weeks with [him] and was audacious enough to call plaintiff's home in an attempt to discover [his] whereabouts"); *Shaw v. Stringer*, 101 N.C. App. 513, 517, 400 S.E.2d 101, 103 (1991) (finding sufficient aggravating factors where defendant had sexual intercourse with plaintiff's wife, ignored plaintiff's request not to visit the marital home and laughed when plaintiff's wife told him that plaintiff knew of the relationship). On the other hand, plaintiffs who have failed to prove sexual relations have lost their claims for punitive damages. *Cottle v. Johnson*, 179 N.C. 426, 431, 102 S.E. 769, 771 (1920) (ordering new trial where plaintiff received punitive damages for alienation of affections in case in which plaintiff did not make out criminal conversation); *Chappell*, 67 N.C. App. at 403, 313 S.E.2d at 243 (ordering on remand the trial court submit only to compensatory damages; no evidence of sexual relations); *Heist*, 46 N.C. App. at 527, 265 S.E.2d at 438 (affirming trial court's refusal to enter judgment on punitive damages; no evidence of sexual relations); 1 Suzanne Reynolds, *Lee's North Carolina Family Law*, § 5.48(c) (5th ed. 1993).

We find sufficient evidence of additional circumstances of aggravation justifying punitive damages here. The plaintiff presented evidence that the defendant and plaintiff's husband "had sex" at least two times. (Tr. at 55.) In addition, there was evidence of other aggravating circumstances. Specifically, after forming a sexual relationship with plaintiff's husband, the defendant accompanied him when he returned his children to the custody of the plaintiff. On a later date, the defendant appeared unannounced at the front door of the marital home, asking plaintiff if they could be friends. Again, about a week later, defendant arrived in the driveway of the marital home while plaintiff's husband was visiting his children, blowing the car horn for plaintiff's husband. The plaintiff walked outside and recognized the defendant, who subsequently drove away without Mr. Ward. We find this evidence of additional circumstances of aggravation sufficient to warrant submission of the punitive damages issue to the jury on plaintiff's claim for alienation of affections.

[4] Defendant also contends the court's jury instruction on punitive damages was confusing, but concedes that it was consistent with the North Carolina Pattern Jury Instructions. Specifically, defendant argues the proper considerations to be made by the jury are set forth in a disorganized manner, and thus did not meet the requirement that the judge explain the law. We have reviewed the court's instruction on punitive damages and find it to be entirely consistent with the provisions of Chapter 1D of our general statutes, outlining the procedure for establishing and awarding punitive damages. Any simplified or shortened instruction would, in our opinion, violate the requirement that the judge instruct the jury on the law with respect to every substantial feature of the case. N.C.R. Civ. P. 51(a); *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 445, 361 S.E.2d 608, 612 (1987).

[5] Defendant next contends the court erred in admitting evidence of defendant's assets before the trier of fact determined that compensatory damages were warranted. Defendant argues this premature admission of evidence tainted the jury's verdict for compensatory damages. Plaintiff, on the other hand, maintains that defendant's failure to request a bifurcated trial on the issue of punitive damages under N.C. Gen. Stat. § 1D-30 rendered this evidence admissible at any time during plaintiff's case-in-chief. We agree.

It is clear that evidence of a defendant's net worth may be considered by the jury in determining the amount of a punitive damages

award. N.C. Gen. Stat. § 1D-35(i) (listing as a permissible factor to be considered "[t]he defendant's ability to pay punitive damages, as evidenced by its revenues or net worth") N.C. Gen. Stat. § 1D-30 sets forth the procedural safeguard of bifurcation, stating:

> *Upon the motion of a defendant*, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages.

(Emphasis added.) The language of G.S. 1D-30 makes clear that the defendant is not entitled to bifurcation until the defendant files such a motion. *See also* N.C.R. Civ. P. 42(b) ("The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue *upon timely motion* order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues.") (Emphasis added). Because the defendant here failed to move for a bifurcated trial under the provisions of G.S. 1D-30, evidence regarding her net worth was admissible at any time during plaintiff's case-in-chief.

[6] Defendant next contends the trial court's instruction on future damages was error. The defendant admits on appeal her failure to object to this instruction at trial. Accordingly, defendant is prohibited from raising this issue on appeal and we will not address it. N.C.R. App. P. 10(b)(2).

We have reviewed defendant's remaining assignment of error and find it to be without merit.

Affirmed.

Judge HUNTER concurs

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent from the majority opinion which affirms the judgment of the trial court.

In this case, Michael Ward was the "star" witness for the plaintiff, although he testified he had been subpoened. He was the only witness to testify that he and defendant engaged in a sexual relationship, that defendant showed affection toward him, that he lived with defendant for about two weeks, that defendant received alimony and that defendant's father set up "one or two million dollars" for her. All of this testimony was denied by the defendant.

At the close of plaintiff's evidence, defendant moved for a directed verdict on the claims of alienation of affections and criminal conversation. The trial court allowed the motion as to the claim for criminal conversation stating that the plaintiff failed to produce "legal and sufficient evidence the defendant committed the specific act of sexual intercourse required to show the existence of that tort."

Defendant's motion pursuant to Rule 60(b)(1)(2)(3) and (6) sets forth the following in part:

(1) On 23 July 1998, plaintiff filed an action against her husband, Michael Ward, alleging an adulterous relationship by Mr. Ward and that he abandoned plaintiff and the children (*Ward v. Ward*, 98 CVD 201).

(2) On 6 August 1998, plaintiff filed a consent order in which she waived alimony and post-separation support and Mr. Ward was ordered to pay child support.

(3) Immediately thereafter, on 6 August 1998, plaintiff filed this action (98 CVS 209).

(4) Following the consent order, Michael Ward did not pay specified child support; however, plaintiff filed an affidavit excusing and explaining Mr. Ward's failure to pay.

(5) Following the trial on 10 and 11 March 1999, defendant in this case discovered in the *Ward v. Ward* file plaintiff's statement releasing Michael Ward from paying $900.00 and a letter dated 26 March 1999 from plaintiff's counsel stating that plaintiff and Michael Ward had reconciled and plaintiff requested that her husband's child support obligation be terminated.

Defendant argues that under Rule 60(b)(6), the judgment should be set aside because (1) extraordinary circumstances exist, and (2) justice demands that relief be granted. In support of her argument, defendant points to the sequence of events beginning with the filing of the action in *Ward v. Ward* on 23 July 1998 and ending with the reconciliation on 26 March 1999, which raises a question of whether plaintiff and Mr. Ward "connived" or "colluded" in pursuing these claims against defendant. I agree the highly unusual events in this case demand that a new trial be ordered on plaintiff's claim of alienation of affections and her entitlement, if any, to compensatory damages.

After careful review, I conclude the evidence does not support an issue of punitive damages. In a similar case, this Court has held:

> It is incumbent on the plaintiff to show circumstances of aggravation in addition to the malice implied by law from the conduct of defendant in causing the separation of plaintiff and her husband which was necessary to sustain a recovery of compensatory damages. *Cottle v. Johnson*, 179 N.C. 426, 102 S.E. 769 (1920). In the present case, the wrongful conduct of defendant in permitting plaintiff's husband to visit her at her residence with knowledge of the marital discord which these visitations produced and over plaintiff's protests was sufficient to establish the tort. However, we are of the opinion that plaintiff has not shown such circumstances of aggravation in addition to the above conduct of defendant to justify the submission of the punitive damage issue to the jury.

Heist v. Heist, 46 N.C. App. 521, 527, 265 S.E.2d 434, 438 (1980).

In a later case, this Court further stated that punitive damages may be awarded where the defendant's conduct was willful, aggravated, malicious or of a wanton character. *See Chappell v. Redding*, 67 N.C. App. 397, 403, 313 S.E.2d 239, 243 (1984). There must be some circumstances of aggravation in addition to the malice implied by law from the conduct of a defendant in alienating the affection between the spouses, which is necessary to sustain compensatory damages. *Id.* Here, it is apparent that the jury was influenced by the prejudicial evidence from the Register of Deeds and Mr. Ward concerning the wealth of the defendant.

There is no evidence of aggravated conduct on the part of the defendant. The only aggravated conduct in this case was on the part

of Mr. Ward when he admitted to having consumed alcoholic beverages before and during his visits at defendant's residence in July of 1998.

In sum, for the reasons stated, the judgment should be vacated and a new trial ordered on the plaintiff's claim of alienation of affections and her entitlement, if any, to compensatory damages.

SONJA EVETTE PRICE, PLAINTIFF v. CITY OF WINSTON-SALEM, DEFENDANT

No. COA99-1266

(Filed 19 December 2000)

1. Cities and Towns— fall on sidewalk—expansion joint—notice of defect—negligence

The trial court erred by granting summary judgment for defendant-city based on the absence of negligence in an action arising from plaintiff falling on a wooden stake after her heel lodged in an expansion joint in a sidewalk. The dispositive issue is whether there is sufficient evidence from which a jury could find that defendant was in such proximity to the site as to be on constructive notice of the alleged defect and it cannot be held that the facts on the issue were clearly established or admitted.

2. Cities and Towns— fall on sidewalk—contributory negligence

The trial court erred by granting summary judgment for defendant-city based upon contributory negligence in an action arising from a fall by plaintiff after her heel lodged in an expansion joint in a sidewalk. The evidence did not so clearly establish plaintiff's negligence that a jury could not reasonably reach a differing conclusion.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 24 May 1999 by Judge Richard L. Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 12 September 2000.

Kennedy, Kennedy, Kennedy & Kennedy, LLP, by Harold L. Kennedy, III and Harvey L. Kennedy for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, PLLC, by Gusti W. Frankel and Alison R. Bost for defendant-appellee.

FULLER, Judge.

Plaintiff Sonja Evette Price ("plaintiff") appeals the entry of summary judgment in favor of defendant City of Winston-Salem ("defendant"). Evidence presented on the motion tended to show that on 11 August 1995 plaintiff was walking among a group of pedestrians on Church Street in Winston-Salem when her right heel lodged in a space in the sidewalk. Plaintiff lost her balance and fell on a wooden stake protruding from the ground at the edge of the sidewalk. Plaintiff sustained injuries which included a fractured foot. As a result, on 11 August 1998 plaintiff initiated this suit alleging defendant's negligence in failing to warn of and remedy a dangerous condition. On 7 May 1999 defendant moved for summary judgment, and the motion was heard on 24 May 1999.

Plaintiff offered evidence that she fell on the sidewalk located on the west side of the 100 block of North Church Street near the corner of North Church and Second Streets and in front of City Hall. Plaintiff submitted the affidavit of Frank Evans, a Senior Coordinator for defendant, who stated that the portion of sidewalk on which plaintiff fell was an "expansion joint" where a piece of felt is placed in the sidewalk to prevent buckling. The length of the expansion joint was approximately 5½ feet long, 1½ inches wide, and zero to ½ inch deep. Plaintiff submitted her own affidavit wherein she testified the black felt material normally used to fill such an expansion joint had eroded, leaving a surface the same color as the surrounding sidewalk. Plaintiff testified the expansion joint "was not an obvious defect" and the gap was "not easy to see because its surface was the same color as the sidewalk." Plaintiff testified the wooden stake was also "camouflaged" because it blended with surrounding "numerous landscaping wood chips."

Defendant proffered evidence that although it had engaged in construction surveying work involving the placing of stakes on Church Street at the relevant time, any such staking work was performed in the 100 block of South Church Street and not the 100 block of North Church Street in front of City Hall and near the intersection of Second Street. Defendant offered the affidavit of City Engineer

Jack Anderson Leonard who testified that all survey staking work for the City is performed by City surveyors in the Engineering Division, and that diligent review of all Engineering Division records revealed that in 1995 no City Engineering Division employee, nor anyone contracted by the Engineering Division, performed survey staking on the west side of North Church Street in front of City Hall. Rather, Engineering Division records showed that in 1995 defendant engaged in engineering and construction work around the old City employee parking lot, bounded by First Street, South Chestnut Street, Belews and Main Street. The stakes were removed from the site before the sidewalks were reopened to pedestrians.

In addition, defendant offered evidence that a private construction company engaged in construction work on North Church Street in 1995. Mr. Leonard testified in his affidavit that a private company employed to construct the Wachovia Bank parking deck removed and replaced portions of sidewalk on the west side of North Church Street adjoining City Hall while constructing an underground tunnel. Defendant submitted therewith a copy of an Easement Agreement signed 2 May 1994 wherein defendant granted Wachovia Bank a temporary easement over portions of the sidewalk in the 100 block of North Church Street for purposes of constructing the tunnel.

In response, plaintiff submitted deposition testimony of City surveyor John Spainhour to the effect that he performed staking work on Second Street and on Church Street south of City Hall between First Street and Salem Avenue. Mr. Spainhour testified he spent five hours on Second Street doing construction staking work the week plaintiff fell, and six hours on Church Street staking around the city parking lot south of City Hall. Plaintiff also offered the deposition testimony of Steve Fleming, a claims adjuster for defendant, who testified he believed defendant had performed construction staking work on Church Street. Further deposition testimony offered by plaintiff tended to establish defendant conducted construction staking work in the "100 block of Church Street," and that subsequent to plaintiff's accident barricades were placed in the 100 block of North Church Street where plaintiff fell.

At the hearing's conclusion the trial court entered an order granting summary judgment in favor of defendant, finding "there is no genuine issue as to any material fact and the defendant is entitled to a judgment as a matter of law." Plaintiff appeals.

[1] Plaintiff assigns error to the trial court's entry of summary judgment in favor of defendant, arguing there existed genuine issues of material fact sufficient to survive defendant's motion. It is well-established that our review of the grant of a motion for summary judgment requires the 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, 784, 534 S.E.2d 660, 664 (2000) (citations omitted). Summary judgment is rarely appropriate in a negligence action, *Cucina v. City of Jacksonville*, 138 N.C. App. 99, 102, 530 S.E.2d 353, 355, *disc. review denied*, 353 N.C. 588, — S.E.2d — (2000) (citation omitted), and should only be granted after the facts are clearly established or admitted, and the issue of negligence has been reduced to a mere question of law. *Osborne v. Annie Penn Memorial Hospital*, 95 N.C. App. 96, 99-100, 381 S.E.2d 794, 796, *disc. review denied*, 325 N.C. 547, 385 S.E.2d 500 (1989) (citation omitted).

In order to establish a city's negligence in the maintenance of its sidewalks, a plaintiff must introduce evidence sufficient to support jury findings that the plaintiff, (1) fell and sustained injuries, (2) the proximate cause of the injuries was a defect in the sidewalk, (3) the defect was such that a reasonable person knowing of its existence should have foreseen the likelihood of the injury, and (4) the city had actual or constructive notice of the defect for a sufficient time prior to the plaintiff's fall such that the condition could have been remedied. *See Cook v. Burke County*, 272 N.C. 94, 97, 157 S.E.2d 611, 613 (1967) (citation omitted). In a summary judgment proceeding, defendant carries the burden of establishing that no genuine issue as to any of these necessary elements exists and that plaintiff cannot produce evidence sufficient to support an essential element of the claim. *See Cucina*, 138 N.C. App. at —, 530 S.E.2d at 355. All evidence must be considered in the light most favorable to the nonmovant. *Lynn v. Burnette*, 134 N.C. 731, 531 S.E.2d 275 (2000).

As a preliminary matter, we are unpersuaded that the stake upon which plaintiff fell is relevant to the outcome of this appeal. Plaintiff repeatedly argues defendant was actively negligent in placing the stake in close proximity to the sidewalk. Defendant argues that the stake likely was placed there by a private contractor. Regardless of who placed the stake, the evidence does not reveal that the stake in any way caused plaintiff's fall, and indeed, there is no forecast of evi-

dence tending to show plaintiff's injuries were any more significant than had the stake not been present. Plaintiff has not argued a theory of enhanced injury based on the placement of the stake, and we will not reach out to address this unbriefed issue.

Moreover, we note that the first three elements of plaintiff's claim are not in dispute. Defendant does not dispute that plaintiff fell and injured herself on the expansion joint. Despite defendant's evidence that the expansion joint was "standard," defendant has also not produced evidence to counter plaintiff's affidavit testimony that the black felt material normally used to fill such a joint had eroded, and therefore the unevenness in the sidewalk created by the expansion joint was hidden. Nor has defendant proffered any evidence in support of its motion tending to show that a reasonable person, knowing the condition of the expansion joint and adjacent stake, would not have foreseen the likelihood of plaintiff's injury.

Rather, the dispositive issue on appeal is whether there is sufficient evidence from which a jury could find that defendant was in such proximity to the expansion joint that defendant was on constructive notice of its alleged defect. Defendant's evidence focuses on testimony from City officials that although defendant was engaged in staking work on Church Street at the relevant time, defendant did not perform work in the 100 block of North Church Street where plaintiff allegedly fell. Therefore, defendant argues plaintiff failed to establish that defendant created a dangerous condition or had actual or constructive notice of any such condition.

However, plaintiff presented deposition testimony tending to show City employees performed staking work on Second Street and in the "100 block of Church Street" during the week plaintiff fell. In *Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 488 S.E.2d 608 (1997), *affirmed*, 347 N.C. 666, 496 S.E.2d 379 (1998), this Court held the entry of summary judgment in favor of the defendant-store improper where the plaintiff's evidence raised an inference that the defendant had constructive notice of the presence of a grape and water on its floor. While the defendant presented evidence to show none of its employees was aware of the water or grape on the floor, the plaintiff presented evidence that the grape was brown, giving inference that it had been on the floor for some time, and that the water likely resulted from ice that had fallen from the grape display and had been on the floor long enough to melt. *Id.* at 241, 488 S.E.2d at 612. This court held such an inference was sufficient to create a genuine issue as to

whether the defendant had constructive notice of the condition which caused the plaintiff's fall. *Id.*

Likewise, in the present case, plaintiff's evidence is sufficient to create an inference from which a jury might conlcude that defendant's agents were working in the vicinity of plaintiff's accident, and thus, should have had either actual or constructive knowledge of the condition of the expansion joint. We cannot hold the facts of what occurred and whether defendant created or should have known of the condition leading to plaintiff's injuries were clearly established or admitted and that "the issue of negligence has been reduced to a mere question of law." *See Osborne*, 95 N.C. App. at 99-100, 381 S.E.2d at 796. In fact, a most careful review of the entire record now before this Court leaves the reader unclear about precisely where the various events took place. Where such questions exist, it is the jury's proper role to answer them. The entry of summary judgment was therefore improper.

[2] Moreover, defendant argues summary judgment was also appropriately granted on grounds that plaintiff was contributorily negligent as a matter of law. While the trial court's order is not clear as to whether contributory negligence was a factor in the entry of summary judgment, " '[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.' " *Harter v. Vernon*, 139 N.C. App. 85, 95, 532 S.E.2d 836, 842 (2000) (quoting *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)).

Here, however, the trial court's entry of summary judgment cannot be supported by plaintiff's alleged contributory negligence. "Issues of contributory negligence, like those of ordinary negligence, are ordinarily questions for the jury and are rarely appropriate for summary judgment. Only where the evidence establishes the plaintiff's own negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted." *Blue v. Canela*, 139 N.C. App. 191, 195, 532 S.E.2d 830, 833, *disc. review denied*, 352 N.C. 672, —— S.E.2d —— (2000) (citation omitted). Plaintiff testified that both the expansion joint and wooden stake were not readily visible; that because she was walking in a group of pedestrians she was "keeping a proper lookout" by looking straight ahead; that the sunlight was in her face; and that distractions such as pedestrian and vehicle traffic and loud construction on Church Street were occurring

prior to her fall. The evidence does not so clearly establish plaintiff's negligence that a jury could not reasonably reach a differing conclusion.

The trial court's entry of summary judgment in favor of defendant was error.

Reversed and remanded.

Judge EDMUNDS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority that a genuine issue of material fact exists regarding whether defendant was negligent. I, therefore, would affirm the order of the trial court granting summary judgment in favor of defendant.

Active negligence

Plaintiff argues defendant was actively negligent when it placed a stake at the edge of the sidewalk where plaintiff was injured.

"Active negligence 'denotes some positive act or some failure in duty of operation which is equivalent of a positive act.' " *Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 238 n.1, 488 S.E.2d 608, 611 n.1 (1997) (quoting *Black's Law Dictionary* 33 (6th ed. 1990)), *aff'd per curiam*, 347 N.C. 666, 496 S.E.2d 379 (1998).

In this case, plaintiff presented evidence that a stake had been placed in the ground adjacent to the area of the sidewalk containing the alleged defective expansion joint, which was located on the 100 block of North Church Street. Plaintiff, however, did not present any evidence that defendant actually placed the stake in the ground or performed any work in the area surrounding the stake. Rather, the only evidence is that defendant did not perform any work on the 100 block of North Church Street in 1995. Terry Cornett (Cornett), the street superintendent for defendant, testified at his deposition that defendant did not perform any work in the 100 block of North Church Street in 1995. Instead, Cornett testified the work performed by defendant on Church Street in 1995 was done in the 100 block of South Church Street. Additionally, Frank Evans, a senior coordinator whose division is responsible for pouring concrete for defendant, tes-

tified in his deposition that he did not perform any repair work on the 100 block of North Church Street in 1995. Finally, Joe Owens (Owens), an employee with defendant's street division, testified in his deposition that he inspected repaving work done in the 100 block of South Church Street in 1995. Plaintiff, however, contends the deposition testimony of Steve Fleming that Ronnie Swicegood and Owens both told him repair work was done in "the 100 block of Church Street" in 1995 is evidence defendant performed work in the 100 block of North Church Street during this time. Because Fleming did not specify in his testimony whether work was done on the north or south "100 block of Church Street," his testimony does not raise a genuine issue of material fact regarding whether defendant performed work in the area where plaintiff was injured on North Church Street.[1] Accordingly, there is no genuine issue of material fact regarding whether defendant was actively negligent.

Passive negligence

Plaintiff also argues defendant was passively negligent because defendant had actual and constructive notice of the alleged defect in the sidewalk that caused plaintiff's injury.

"Passive negligence 'is negligence which permits defects, obstacles, or pitfalls to exist on premises.' " *Id.* (quoting *Black's Law Dictionary* 1034). In order to show a city was passively negligent in allowing a defect to exist on a sidewalk, plaintiff must present evidence, in pertinent part, that "the city had actual or constructive notice of the existence of the condition for a sufficient time prior to the plaintiff's fall to remedy the defect or guard against injury therefrom." *Waters v. Roanoke Rapids*, 270 N.C. 43, 48, 153 S.E.2d 783, 788 (1967).

1. actual notice

Plaintiff argues in her brief to this Court that defendant had actual notice of the alleged defect in the sidewalk because defendant "placed [in the ground] the stake adjacent to the defective expansion joint." As noted above, plaintiff did not present evidence that defendant placed a stake in the ground in the 100 block of North Church Street or that defendant even performed any work in the 100 block of

1. Plaintiff also argues John Spainhour (Spainhour) testified in his deposition that defendant was "planting stakes on Church and Second streets" in 1995. Spainhour's testimony, however, makes no reference to North Church Street. Rather, Spainhour testified he performed work on Second Street during this time period.

North Church Street in 1995. Accordingly, there is no genuine issue of material fact regarding whether defendant had actual notice of the alleged defect in the sidewalk.

2. constructive notice

Plaintiff also argues defendant had constructive notice of the alleged defect in the sidewalk because "if [defendant] had reasonably inspected the sidewalk, it would have known of the complete deterioration of the expansion joint."

"Constructive [notice] of a dangerous condition can be established in two ways: the plaintiff can present direct evidence of the duration of the dangerous condition, or the plaintiff can present circumstantial evidence from which the fact finder could infer that the dangerous condition existed for some time." *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 536 S.E.2d 662, (2000). Further, "[t]he duty of a municipality to keep its streets and sidewalks in a reasonably safe condition implies the duty of reasonable inspection from time to time." *Rogers v. City of Asheville*, 14 N.C. App. 514, 517, 188 S.E.2d 656, 658 (1972). Evidence that a dangerous condition existed for a time period during which defendant would have had a duty "of reasonable inspection" and evidence a "reasonable inspection" would have revealed the dangerous condition is, therefore, evidence of constructive notice.

In this case, plaintiff did not present any direct evidence regarding how long the alleged defective condition in the sidewalk existed prior to her injury. Additionally, Plaintiff did not present any circumstantial evidence that the alleged defective condition existed for a period of time sufficient to show a "reasonable inspection" by defendant would have revealed the alleged defect. Plaintiff, therefore, did not present evidence defendant had constructive notice of the alleged defective condition. Accordingly, because plaintiff did not present sufficient evidence to raise a genuine issue of material fact regarding whether defendant was actively or passively negligent, I would affirm the trial court's order granting summary judgment in favor of defendant.

ADAMS v. TESSENER

[141 N.C. App. 64 (2000)]

ANN ADAMS AND HUSBAND, DEXTER ADAMS, PLAINTIFFS V. ERIN CHRISTINA TESSENER, DEFENDANT V. EDWARD SCOTT LACKEY, INTERVENOR

No. COA99-1353

(Filed 19 December 2000)

1. Child Support, Custody, and Visitation— custody—natural parent unfit—review

A trial court's legal conclusion that a parent is unfit is reviewed de novo on appeal by examining the totality of the circumstances, and, even though error is not specifically assigned to any of the trial court's findings of fact, all of the evidence adduced at the hearing is reviewed. Furthermore, in determining whether the evidence supports the findings, the appellate court examines whether the findings failed to treat any important issues raised by the evidence as well as whether the findings are supported by competent evidence.

2. Child Support, Custody, and Visitation— custody—natural parent and third party—test

In a custody dispute between two natural parents, or between two parties who are not natural parents, custody is to be given to the person or entity that will best promote the interest and welfare of the child, but between a natural parent and a third party, the natural parent has a constitutionally protected paramount interest and will be awarded custody unless it can be shown that the natural parent has either engaged in conduct inconsistent with the presumption that he or she will act in the best interest of the child, or has failed to shoulder the responsibilities attendant to raising a child. The court then turns to the "best interest" test only where such conduct by the natural parent is shown.

3. Child Support, Custody, and Visitation— custody—awarded to grandparents rather than father

The trial court erred in a custody contest between the maternal grandparents, the natural mother, and the natural father by concluding that the father was unfit to have custody of the child. The father had not had custody of the child before the hearing, so that there could be no allegation that he had failed to shoulder the responsibilities attendant to raising a child. As to whether he engaged in conduct inconsistent with the presumption that he will act in the best interest of the child, he is not required to show

that he is without shortcomings, or that he has never made mistakes. Considering the totality of the circumstances, the findings did not support the conclusion that the natural father was unfit to have custody, and did not address a substantial body of evidence that he was fit to have custody.

Appeal by intervenor from judgment and order entered 3 June 1999 by Judge L. Suzanne Owsley in Burke County District Court. Heard in the Court of Appeals 18 September 2000.

LeCroy, Ayers & Willcox, by M. Alan LeCroy, for plaintiffs-appellees.

Wayne O. Clontz, for defendant-appellee.

Crowe & Davis, P.A., by H. Kent Crowe; and J. Steven Brackett, for intervenor-appellant.

FULLER, Judge.

The case at bar involves a custody dispute between the natural mother, the natural father, and the maternal grandparents of a minor child. Custody was awarded to the grandparents and the father appeals from that order. We begin with a summary of the pertinent facts and procedural history.

Evidence presented at the 2 February 1999 hearing tended to show the following. The father of the child, Edward Scott Lackey, is thirty-one years old, and lives in a three bedroom house in Hickory, North Carolina which he owns. He has been separated from his second wife for two years, and has been dating his current girlfriend, Sherry Letterman, for approximately one year. He has worked at Holland Alignment Service for thirteen years, and currently works 40 hours a week as an assistant manager earning $28,640 a year. Lackey's employer testified that Lackey is dependable, responsible, and a very hard worker. Lackey also works as a volunteer firefighter, which entails two to three hours of training each week. The chief of the fire department testified that he has known Lackey for 12 to 15 years and that Lackey is honest and is one of the more dependable firefighters in the department.

Letterman, who is thirty-four years old, and her two children, ages seven and eight, often stay overnight at Lackey's house, and Lackey regularly feeds the children, bathes them, helps them with homework, and puts them to bed. Letterman testified that Lackey is

wonderful with her children, that he loves them, that they think the world of him, and that they would give anything for him to be their father. Lackey has also been involved in helping to raise his sister's three sons, feeding them and changing their diapers during visits. In addition, Lackey helped raise his second wife's daughter during the year they were married and living together.

Lackey has been convicted of speeding (1986), operating an unregistered vehicle with no insurance (1986), reckless driving (1996), driving while licensed revoked (two convictions in 1997), appearing intoxicated and disruptive in public (1997), and reckless driving and resisting an officer (1997). Lackey's brother, Bobby Lackey (Bobby), has a significant criminal history. Bobby visits Lackey approximately once a month and stays overnight at Lackey's house from time to time, the longest visits lasting two or three nights.

The mother of the child, Erin Christina Tessener, met Lackey at a bar in July 1997. The two went home together that night and engaged in unprotected sexual intercourse while intoxicated. Approximately two months later, Tessener learned that she was pregnant. Tessener had ended a six-month relationship with another man shortly before meeting Lackey in July 1997. As a result, she did not know which one of the two men was the father of her unborn child. Tessener located Lackey in September 1997 and informed him of her pregnancy. She told him she believed she was already at least 12 weeks pregnant at that time, and for this reason Lackey believed it was unlikely that he was the father of the child, since their encounter had occurred approximately two months earlier. Tessener admitted to Lackey that it was possible that another man might be the father.

The child in question was born prematurely on 15 February 1998. After giving birth, Tessener came to live with her parents, Ann and Dexter Adams, while the child remained in the hospital due to health problems. When the child was released from the hospital he came to live with the Adamses as well. Tessener decided to leave the Adamses' residence and, on 7 April 1998, entered into a Consent Custody Agreement transferring permanent custody of the child to the Adamses. In this agreement, Tessener consented to the trial court's findings that she is incapable of providing proper care and support for the child as a result of certain diagnosed mental limitations, and that it was in the best interests of the child for him to be placed in the custody of the Adamses.

In June 1998, Tessener located Lackey again and told him that the Adamses were going to attempt to collect child support from him. Lackey continued to believe he was not the father based on the time frame Tessener had earlier provided. Lackey was subsequently contacted by the Burke County Department of Social Services (DSS) and was informed that Tessener claimed that he was the father of the child. Lackey voluntarily requested a DNA test, and the results, which he received on 27 September 1998, indicated a 99.98 percent chance that he was the father of the child.

Letterman testified that Lackey was "almost in tears he was so happy" when he discovered he was the father of the child. She also testified that he immediately went out and started preparing for having a child, including purchasing a crib, diapers, a diaper pail, and clothes for the child. Lackey's mother similarly testified that Lackey was overjoyed when he discovered he was a father. Both Letterman and Lackey's mother testified that Lackey has wanted a child for a long time, and that Lackey's second wife was unable to become pregnant.

Lackey voluntarily signed a support agreement, and pursuant to that agreement he has paid $88.39 each week to date. Lackey contacted the Adamses by phone in late October 1998 and expressed his desire to spend time with his son. As of the 2 February 1999 hearing, Lackey had visited with the child approximately seven times. Each visit occurred in the Adamses' home except for one visit during which Lackey took the child to his own home from 9:00 a.m. until 4:30 p.m. During this visit, Lackey changed the child's diapers, and Lackey's girlfriend, mother, and sister took pictures of him with the child. The Adamses testified that during the visits at their home Lackey appeared to be a very affectionate father.

On 30 October 1998, Tessener filed a motion for modification of the custody order, seeking increased visitation rights and joint custody of the child. On 23 November 1998, Lackey filed a motion to intervene, seeking custody of the child. While these motions were pending, the trial court entered a temporary custody order on 4 January 1999 allowing Tessener and Lackey to visit the child at the Adamses' home on successive Sundays, and both parents fully exercised these visitation rights.

On 3 June 1999, the trial court entered an order placing the child in the permanent custody of the Adamses, and granting limited visitation privileges to Tessener and Lackey. In its order, the trial court

set forth sixty-eight factual findings. The trial court concluded as a matter of law that Lackey's conduct has proven him to be unfit to have custody of the child, and that the best interests of the child would be served by placing him in the custody of the Adamses. From this order Lackey appeals. Tessener has not appealed.

[1] On appeal, Lackey assigns error to the trial court's second conclusion of law, which states:

> The actions and conduct of the Intervenor have been inconsistent with his protected interest in the minor child. Specifically, the conduct of Intervenor as found above proves that he is unfit to have the primary and legal care, custody and control of the minor child. Therefore . . . the court must look to the best interests of the child.

In short, Lackey contends the trial court committed reversible error in concluding that he is unfit to have custody of the child. We agree.

In a custody proceeding, a trial court's legal conclusion that a parent is unfit is reviewed de novo on appeal by examining the totality of the circumstances. *Raynor v. Odom*, 124 N.C. App. 724, 731, 478 S.E.2d 655, 659 (1996). Therefore, although Lackey has not specifically assigned error to any of the trial court's findings of fact, we review all of the evidence adduced at the hearing, as well as the trial court's factual and legal findings, in order to determine "whether the evidence adduced supports the findings of fact by the trial court and whether those findings form a valid base for the conclusion of law." *Green v. Green*, 54 N.C. App. 571, 573, 284 S.E.2d 171, 173 (1981). Furthermore, in determining whether the evidence adduced supports the factual findings, we examine not only whether the factual findings are supported by competent evidence, but also whether the factual findings fail to treat any important issues raised by the evidence. *Dixon v. Dixon*, 67 N.C. App. 73, 77, 312 S.E.2d 669, 672 (1984).

[2] In a custody dispute between two natural parents, or between two parties who are not natural parents, custody is to be given to "such person, agency, organization or institution as will best promote the interest and welfare of the child." N.C.G.S. § 50-13.2(a) (1999). However, in a custody dispute between a natural parent and a third party who is not a natural parent, the natural parent has a "constitu-

tionally protected paramount interest in the companionship, custody, care, and control of his or her child." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). Pursuant to this protected interest, the natural parent will be awarded custody unless it can be shown that the natural parent has either engaged in conduct that is inconsistent with the presumption that he or she will act in the best interest of the child, or has failed to shoulder the responsibilities that are attendant to rearing a child. *Id.* Where such conduct on the part of the natural parent is shown, the trial court only then turns to the "best interest of the child" test to determine to whom custody should be awarded. *Id.* Conduct by the natural parent warranting application of the "best interest of the child" test includes neglect, unfitness, and abandonment. *Id.* "Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents." *Id.* at 79, 484 S.E.2d at 534-35.

[3] Thus, our analysis in the case *sub judice* begins with Lackey's constitutionally protected paramount interest in the companionship, custody, care, and control of the child, and the presumption that Lackey is entitled to custody of the child. Since Lackey has not had custody of the child to date, there can be no allegation that he has failed to shoulder the responsibilities that are attendant to rearing a child. Thus, Lackey's paramount interest in custody of the child can only be overcome by a showing that he has engaged in prior conduct that is inconsistent with the presumption that he will, in the future, act in the best interest of the child. *Id.* at 79, 484 S.E.2d at 534 (A "natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child . . . is based on a presumption that he or she will act in the best interest of the child," and this interest may be overcome only "if his or her conduct is inconsistent with this presumption, or if he or she fails to shoulder the responsibilities that are attendant to rearing a child."). On this record such a showing has not been made.

The trial court's legal conclusion appears to have been influenced by three categories of evidence. The first category is Lackey's brother Bobby's history of criminal activity, including a conviction for taking indecent liberties with a minor child. However, there is no evidence that Bobby's untoward tendencies are likely to have any adverse impact on the welfare of the child if custody is awarded to Lackey. Bobby does not live with Lackey, nor does he keep any belongings at Lackey's home. Bobby testified that he has not gone out with Lackey

socially for two years. Although Bobby has visited Lackey approximately once a month in the past, Lackey testified that if he were awarded custody of the child he would be willing to prohibit Bobby from staying at his house and interacting with the child. The trial court has authority to include provisions in its custody order instructing Lackey to prohibit Bobby from interacting with the child, and we presume that Lackey would comply with such instructions absent evidence to the contrary. The trial court may also order periodic review of the case to ensure that such instructions are being followed. In sum, the factual findings pertaining to Lackey's brother Bobby's criminal history do not support the legal conclusion that Lackey himself is unfit to have custody of the child.

Second, the trial court's findings evince concern about Lackey's failure to become involved in Tessener's pregnancy and childbirth. We are not persuaded that under the present circumstances these factual findings should have been considered by the trial court in reaching its legal conclusion. Lackey testified that up until he received the DNA test results in September 1997, he believed he could not possibly be the father of the child because of the time frame of the pregnancy provided by Tessener. In fact, the evidence tended to show that Tessener and the Adamses believed it was more likely that Tessener's ex-boyfriend, whom Tessener had dated for six months, was the father. This view is buttressed by the fact that Tessener first sought to have her ex-boyfriend tested, and Lackey was not tested until after it was determined that Tessener's ex-boyfriend was not the father. In sum, the evidence tended to show that up until Lackey received the DNA test results, it was reasonable for him to believe he was not the father of Tessener's child, and to act in accordance with that belief. Thus, we are not persuaded that these findings are supported by the evidence, nor are we persuaded that they support a determination of parental unfitness.

Third, the trial court properly considered the fact that Lackey has been involved in six separate incidents of misconduct that have resulted in convictions. This is an appropriate area of inquiry in determining an individual's fitness as a parent. *See Raynor*, 124 N.C. App. at 731, 478 S.E.2d at 659 (holding that it was not error to consider plaintiff's DWI convictions in determining plaintiff's fitness as a parent). However, we believe that under the present circumstances, these factual findings are insufficient to support the trial court's legal conclusion that Lackey is unfit to have custody of the child.

Two of the incidents occurred thirteen years before the 2 February 1999 hearing, when Lackey was approximately eighteen years old, and are far too remote to bear on Lackey's current fitness as a parent. The remaining convictions occurred within a one-and-a-half-year period which, according to the testimony of Lackey's mother, coincided with the end of Lackey's relationship with his second wife. The most recent incident occurred in October 1997, approximately one year before Lackey learned he is a father, and there was no evidence adduced at the hearing that Lackey has engaged in any similar conduct since that time.

Lackey's testimony acknowledged the responsibility that comes with being a parent, and he pledged not to engage in similar conduct in the future. Lackey's mother testified that she has seen a change in her son's behavior for the better since his criminal convictions in 1997. Furthermore, none of the incidents involved actual or threatened physical violence, illegal substances, or weapons. In sum, we do not believe the factual findings pertaining to these incidents overcome the constitutional presumption that Lackey, as the natural parent, will act in the best interest of the child.

Moreover, the factual findings fail adequately to address a substantial body of evidence adduced at the hearing indicating that Lackey is fit to have custody of the child. The evidence tended to show that Lackey already has considerable experience in taking care of children. He has helped to raise Letterman's children, his sister's children, and his second wife's child. Letterman testified that Lackey is wonderful with her children and that her children think the world of him. Furthermore, although only four months elapsed between the time Lackey received the DNA test results and the date of the hearing, Lackey's conduct toward the child indicates a likelihood that he will be a responsible and loving father to the child. Lackey voluntarily agreed to pay child support, and has paid each month without fail. Lackey actively sought to spend time with the child, and visited with him on seven separate occasions in four months, each visit lasting anywhere from four to seven and a half hours. The Adamses testified that Lackey was loving and affectionate with the child during these visits. Lackey testified that if he is awarded custody, either his mother, who lives across the street from him, or a nearby day care program would provide care for the child during the day while Lackey is at work. We also take note of the fact that Lackey has now been actively engaged in these legal proceedings for approximately two years, evidencing a long-term commitment to attaining custody of the

child. In sum, all of the evidence adduced at the hearing indicated that Lackey is likely to be a caring, compassionate, and responsible father.

In addition, the totality of the evidence tended to show that Lackey is responsible and reliable in both the professional and financial areas of his life. Lackey has been employed by the same company for 13 years, and has held the position of assistant manager for seven years. His employer, who has known Lackey for 12 to 15 years, described him as dependable, reliable, and a hard worker. Lackey owns his home and there is no indication that he is in financial difficulty. Lackey volunteers as a firefighter and the chief of the fire department described Lackey as hard-working and trustworthy. The fact that Lackey volunteers as a firefighter in his spare time without compensation indicates that he is an active and responsible member of his community.

Lackey is not required to show that he is without shortcomings, or that he has never made mistakes in the past. Lackey is the natural father of the child, and as against third parties who are not natural parents of the child, Lackey enjoys a constitutionally protected paramount interest in custody of the child. Thus, Lackey must be awarded custody unless it is shown that Lackey has engaged in conduct that is inconsistent with the presumption that he will act in the best interest of the child. After careful consideration of the totality of the circumstances, we do not believe such a showing has been made in this case. We believe the factual findings do not support the legal conclusion that Lackey is unfit to have custody of the child. Furthermore, we believe the factual findings fail adequately to address a substantial body of evidence adduced at trial indicating that Lackey is indeed fit to have custody of the child. We reverse the order of the trial court, and remand with instructions to award custody of the child to Lackey, and to set such provisions as may be deemed appropriate.

Reversed and remanded.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

JESSE C. FISHER, JR. AND WIFE, GAYE S. FISHER, PLAINTIFFS v. CAROLINA SOUTHERN RAILROAD AND DAVID G. BUNN AND WIFE, DULCIE GARRELL BUNN, DEFENDANTS

No. COA99-1579

(Filed 19 December 2000)

1. Easements— railroad—no evidence easement extinguished

An 1847 deed granted to the Railroad an easement rather than a fee simple title in the property described therein, and the trial court properly concluded as a matter of law that the Railroad continues to own the easement granted pursuant to the deed because the record does not contain any evidence that the easement has been extinguished.

2. Deeds— railroad—failure to show property located outside easement owned by another

In an action where plaintiffs sought to establish that they are the successors in interest of the property where the Whiteville depot is located based on allegations that the Railroad had ceased to use the property in the manner described in an 1882 deed, the trial court property granted summary judgment for defendants based on plaintiffs' failure to meet their burden of showing a genuine issue of material fact exists as to whether the Whiteville depot is located outside the boundaries of the easement owned by the Railroad and created by an 1847 deed, because: (1) Exhibit #3 itself does not depict the location of the Whiteville depot in relation to the 1847 easement since it is not a plat, but instead a document that is a personal sketch drawn for the purpose of depicting the relationship between two tracts of property; (2) plaintiffs' argument is based on an assumption that the easement granted pursuant to the 1847 deed consists solely of a one hundred thirty foot right of way, when the 1847 deed in fact grants the Railroad an easement consisting of land contiguous to said Railroad not to exceed five acres in any one parcel as well as the one hundred thirty foot right of way; and (3) plaintiffs have not presented any evidence and do not argue in their brief that the Whiteville depot is located outside the boundaries of the total area of property described in the 1847 deed.

Appeal by plaintiffs from order filed 29 July 1999 by Judge William C. Gore, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 7 November 2000.

McGougan, Wright, Worley, Harper & Bullard, L.L.P., by Dennis T. Worley and Paul J. Ekster, for plaintiff-appellants.

Rice & MacDonald, P.A., by Bret H. Davis, for defendant-appellees.

GREENE, Judge.

Jesse C. Fisher, Jr. (Fisher) and Gaye S. Fisher (collectively, Plaintiffs) appeal an order filed 29 July 1999, granting summary judgment in favor of Carolina Southern Railroad, David G. Bunn, and Dulcie Garrell Bunn (collectively, Defendants).

The record shows that Plaintiffs' claim relates to two deeds describing property situated in Whiteville, North Carolina. In the first deed, executed in 1847 (the 1847 deed), a group of grantors, including Josiah Maultsby (Maultsby) and James Powell (Powell), granted an interest to Carolina Southern Railroad's predecessor in interest, the Wilmington and Manchester Railroad Company (collectively, the Railroad). The 1847 deed provided:

> Whereas it is contemplated to construct a Railroad from the Town of Wilmington in the State of North Carolina or from some point near that place to the village of Manchester in the state of South Carolina or to some point near said last mentioned place and it being supposed that said Railroad will pass through the counties of Brunswick and Columbus in the state of North Carolina and through the Districts of Horry, Marion, Darlington, and Sumter in the state of South Carolina. And whereas the benefits and advantages of the establishment of said Railroad, to the several and respective owners and proprietors of the lands through which the same will pass will greatly exceed . . . damages which will be severally sustained by them by the construction of said Railroad through their respective lands and being desirous to promote the building and establishment of said Road.
>
> Now therefore, know all men by these present[] that we the undersigned of the County of Columbus in the state of North Carolina for and in consideration of the premises and in further consideration of the sum of one dollar to us in hand paid by the [Railroad] at and before the sealing and delivering of

these present[], the receipt of which is hereby acknowledged, have given, granted and surrendered and by these present[] do give, grant and surrender to the said [Railroad], the Right and privilege by their agents and servants to enter upon each and every tract or parcel of land belonging to or held by us wheresoever the same may be situated through which they may desire to construct their railroad to lay out and construct their said Railroad on such lands, according to their pleasure. And to lay out, use, occupy and possess such portions of said lands, contiguous to said Railroad as they may desire for sites, for depots, toll houses, warehouses, water stations, engine sheds, wood sheds, work shops, or other buildings for the necessary accommodation of[] said Company or for the protection of their property or the property of others entrusted to their care.

Provided however, the said Company shall not enter upon any portion of said Land which may be occupied by any dwelling house, yard, garden, or graveyard, and that the lands laid out, on the line of said Railroad shall not exceed, except at the deep cuts and fillings, one hundred and thirty feet in width and at such deep cuts and fillings shall not exceed a width sufficient for the construction of the embankments and deposits of waste earth and that the land contiguous to said Railroad which may be used for the sites of buildings, shall not exceed five acres in any one parcel.

To have and to hold the before granted lands with the rights and privileges aforesaid unto the said [Railroad] and their assigns for the uses and purposes aforesaid forever.

Subsequent to the execution of the 1847 deed, the Railroad constructed railroad tracks on property described in the 1847 deed. The Railroad also constructed a structure (the Whiteville depot[1]) on property adjacent to the railroad tracks.

In 1882, several grantors, including Powell, executed a second deed (the 1882 deed), which named the Railroad as the grantee. The 1882 deed provided the Railroad would be permitted to construct "a new warehouse at Whiteville [d]epot," and contained the following language:

1. In their pleadings and affidavits, Plaintiffs refer interchangeably to the property that is subject to their lawsuit as the "railroad depot," "railroad station," "warehouse," and "Whiteville depot." We refer to this property as the "Whiteville depot."

> Witnesseth that for and in consideration of the sum of one dollar to them in hand paid the parties of the first part do give, grant, bargain, sell, convey[,] and confirm unto the [Railroad] the use, right, title[,] and privilege to build and construct a new warehouse at Whiteville [d]epot on said rail road in said county on a plot of land located 153 [feet] from the east end of the bridge of the county road where it crosses the rail road east of the old warehouse at Whiteville [d]epot. Said new warehouse to begin at the end of the said 153 feet and stand along side rail road not to exceed 136 feet in length and to be of a width not exceeding 70 feet and we further covenant and agree with said rail road that the said rail road shall have[,] hold[,] use[,] occupy[,] and enjoy the use of 100 feet of land open[,] free[,] and unobstructed in any direction from said ware house and we further covenant and agree with said rail road that we will not ourselves convey, or assign to any one else the right to build[,] put up[,] or construct any buildings[,] obstructions[,] or combustible material within 100 feet of said new warehouse and that we will at all times keep so far as our title extends the said lands open[,] free[,] and clear within 100 feet of said warehouse. And this deed is upon the express condition that when ever the said rail road shall cease to use the said ground for rail road warehouse privileges and to keep said warehouse in order and use for said rail road then all the rights, titles, uses[,] and privileges conveyed by this deed shall revert to the grantors, the parties of the first part[,] their heirs and assigns. To have and to hold to the said rail road and its successors under the privileges of its corporate powers according to law and their assigns forever subject to the conditions above expressed and the said parties of the first part do covenant and agree with said rail road that they will warrant and defend the title[,] uses[,] and privileges herein conveyed free and clear from any and all claims or persons claiming under[,] by[,] or through them. . . .

In a complaint filed 18 February 1997, Plaintiffs alleged they are "the successor[s] in interest of . . . Powell[,] who owned the property wherein the [Whiteville] depot was located." Plaintiffs alleged the Railroad had ceased to use the property described in the 1882 deed "for railroad warehouse privileges in that there has been no storage and/or use of said privileges for a substantial period of time and the facility has not been utilized for the purposes intended by the original parties to [the 1882] deed for a substantial period of time." Plaintiffs also alleged the Railroad "has neglected to maintain the property in a

reasonable state of repair and the same has become unsightly and is in need of renovation and repair." Plaintiffs, therefore, requested pursuant to the terms of the 1882 deed that the Railroad "be ordered to adhere to the requirements of said Deed regarding maintaining the same in a reasonable state of repair and use for the [R]ailroad." In the alternative, Plaintiffs requested "Plaintiff[s] be declared the owner of said property."

On 26 September 1997, the Railroad filed a motion for summary judgment on the ground "there is no genuine issue as to any material fact and that Defendant is entitled to judgment as a matter of law." In support of its motion, the Railroad filed affidavits from three of its employees, who stated the Railroad continued to use the Whiteville depot in the operation of its business. In response to the Railroad's motion for summary judgment, Plaintiffs filed an affidavit stating, in pertinent part, that the Whiteville depot was not used by the Railroad for "railroad purposes" and the Railroad has "failed to keep [the Whiteville depot] in order and use." Additionally, Plaintiffs moved for summary judgment against Defendant on 20 January 1999. In an order filed 7 April 1999, the trial court denied the motions for summary judgment made by Plaintiffs and the Railroad.

On 6 July 1999, the Railroad deposed Robert D. Inman (Inman), a land surveyor employed by Plaintiffs to research the ownership of the Whiteville depot. Inman testified the 1847 deed was a "blanket easement" that "allowed the [R]ailroad additional areas to construct buildings [and] warehouses." He stated the easement granted in the 1847 deed included the property where the Whiteville depot is located. Inman stated the grantor of "this particular spot [where the Whiteville depot is located]" was Maultsby. In Inman's opinion, Maultsby "would've owned the fee" after he granted the easement in the property described in the 1847 deed. Maultsby, however, subsequently gave up his fee interest by "sell[ing] lots on either side of th[e] [easement]." The owners of the fee interest and any reversionary interest were therefore "the current owners" of the property previously owned by Maultsby. During Inman's deposition, defense counsel asked Inman to identify a document marked for identification as "Defendants' Exhibit #3." Inman identified the exhibit as a "personal sketch" that he drew for the purpose of depicting the relationship between two tracts of property: a tract granted from "David Gore to A.E. and J.L. Powell, . . . dated 1 November 1879," and a tract granted "from H.C. Rockwell, Mortgagee to A.E. and J.L. Powell[,] . . . dated 1 July 1880." Inman did not indicate on exhibit #3 the location of the

Whiteville depot or the boundaries of the 1847 easement. Plaintiffs also filed an affidavit by Inman.

In response to Inman's affidavit, the Railroad filed an affidavit of Staurt Gooden (Gooden), a licensed professional land surveyor. Gooden stated that pursuant to the 1847 deed, "the Railroad already had an interest in the property where the Whiteville [d]epot structure is located." Additionally, Gooden stated the property interest created by the 1847 deed "includes the land where the Whiteville [d]epot is situated."

On 9 July 1999, Defendants filed a motion to dismiss Plaintiffs' claim. On 13 July 1999, the trial court held a hearing on Defendants' motion. In an order filed 29 July 1999, the trial court made the following pertinent findings of fact and conclusions of law:

> After careful review of [the 1847 deed and the 1882 deed] it appears to the Court as a matter of law that the grantors in the 1882 [deed] granted, and the [Railroad] was granted, an easement for right-of-way to hold, use, occupy, and enjoy the use of one-hundred feet of land in any direction of the Whiteville [d]epot structure.
>
> The clear language of [the 1882 deed] . . . indicates that prior to its execution the [R]ailroad . . . already had an interest in the property where the Whiteville [d]epot structure is located. It further appears to the Court that based upon the language of the easement granted by [the 1847 deed] . . . that . . . [Defendants'] predecessor in interest had, and [D]efendant[s] still do[] have, a right-of-way one hundred thirty feet in width running through the area where the Whiteville [d]epot is located. Such right-of-way includes the land where the Whiteville [d]epot is situated.
>
> . . . .
>
> It follows therefore, that since none of the grantors in the [1882 deed] had any interest in the property where the Whiteville [d]epot is situated, inasmuch as their interest had already been conveyed to the [R]ailroad, that none of them could have conveyed any interest in such property at that time[.] . . . Therefore, the Court, Ex mero motu, and pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, finds that . . . [Plaintiffs'] . . . forecast of evidence as set forth in [their] affidavits, and other discovery materials, including the depositions which have been

provided to the Court, finds that there has been no forecast of evidence upon which . . . [P]laintiff[s] could prevail on [their] claim to have the property whereupon [the Whiteville depot] is now situated revert, and the Court orders that Summary Judgment be granted in favor of [Defendants].

The issues are whether: (I) the interest granted to the Railroad in the 1847 deed was an easement and, if so, whether the easement has been extinguished; and (II) the evidence in the record raises a genuine issue of material fact regarding whether the Whiteville depot is located on the property described in and subject to the grant contained in the 1847 deed.

I

[1] Plaintiffs argue the 1847 deed granted the Railroad an easement rather than fee simple title in the property described therein. We agree.

"An easement is a right to make some use of land owned by another without taking a part thereof." *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972). "An easement may be created by an express grant." 1 Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 15-9, at 696 (5th ed. 1999) [hereinafter *Real Estate Law*]; *International Paper Co. v. Hufham*, 81 N.C. App. 606, 609, 345 S.E.2d 231, 233, *disc. review denied*, 318 N.C. 506, 349 S.E.2d 860 (1986). Whether a deed conveys an easement or fee simple title is a question of law. *International*, 81 N.C. App. at 609, 345 S.E.2d at 233.

In this case, the 1847 deed used language mirroring language previously construed by this Court in *International*. *See id.* at 609-11, 345 S.E.2d at 233-34. The court in *International* held the language granted an easement rather than fee simple title. *Id.* at 609, 345 S.E.2d at 233. Accordingly, the 1847 deed granted the Railroad an easement in the property described in the deed. Further, because the record does not contain any evidence that the easement granted by the 1847 deed has been extinguished,[2] the trial court properly concluded as a

2. Plaintiffs argue in their brief to this Court that the Railroad abandoned its interest in the easement granted by the 1847 deed and, therefore, this easement has been extinguished. Although an easement "may be extinguished through its abandonment by its owner," *Real Estate Law* § 15-30, at 744, Plaintiffs did not raise the issue of abandonment before the trial court. Accordingly, this issue is not properly before this Court. *See* N.C.R. App. P. 10(b)(1).

matter of law that the Railroad continues to own the easement granted pursuant to the 1847 deed.[3]

II

[2] Plaintiffs argue, assuming the easement created by the 1847 deed has not been extinguished, the trial court improperly found that this easement "include[d] the land where the Whiteville [d]epot is situated." We disagree.

A party moving for summary judgment has the burden of showing no genuine issue of material fact exists, and this burden may be met by showing the nonmovant cannot produce essential evidence to support an element of his claim. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974). Once a movant meets this burden, the burden shifts to the nonmovant to set forth specific facts showing a genuine issue of material fact does exist. *Id.*; N.C.G.S. § 1A-1, Rule 56(e) (1999).

In this case, the Railroad filed an affidavit by Gooden, a licensed professional land surveyor. Gooden stated that pursuant to the 1847 deed, "the Railroad already had an interest in the property where the Whiteville [d]epot structure is located." Additionally, Gooden stated the property interest created by the 1847 deed "includes the land where the Whiteville [d]epot is situated." Plaintiffs did not present any evidence to contradict the Railroad's showing that the Whiteville depot is located within the boundaries of the 1847 easement. Rather, Plaintiffs' own expert testified in his deposition that the "blanket easement" granted in the 1847 deed included the property where the Whiteville depot is located.

Plaintiffs state in their brief to this Court that Defendants' exhibit #3, "Inman's plat," shows the Whiteville depot is located outside the boundaries of the "one hundred thirty-foot right of way" described in the 1847 deed. Inman testified, however, that the document labeled "exhibit #3" is not a plat; rather, the document is a "personal sketch" he drew for the purpose of depicting the relationship between two tracts of property. Exhibit #3 itself does not depict the location of the

3. Plaintiffs state in their brief to this Court, and we agree, that the trial court's 29 July 1999 order does not clearly state whether the 1847 deed granted the Railroad an easement or fee simple title. Nevertheless, because the interpretation of a deed is a question of law that this Court reviews *de novo*, *see International*, 81 N.C. App. at 609, 345 S.E.2d at 233, Plaintiffs are not prejudiced by the lack of clarity in the trial court's 29 July 1999 order.

Whiteville depot in relation to the 1847 easement; therefore, exhibit #3 does not raise a genuine issue of material fact regarding the location of the Whiteville depot. Moreover, Plaintiffs' argument is based on an assumption that the easement granted pursuant to the 1847 deed consists solely of a "one hundred thirty-foot right of way." The 1847 deed, however, grants the Railroad an easement consisting of "land contiguous to said Railroad which may be used for the sites of buildings . . . not [to] exceed five acres in any one parcel," as well as the "one hundred thirty-foot right of way." Plaintiffs have not presented any evidence and do not argue in their brief to this Court that the Whiteville depot is located outside the boundaries of the total area of property described in the 1847 deed. Plaintiffs, therefore, have not meet their burden of showing a genuine issue of material fact exists as to whether the Whiteville depot is located outside the boundaries of the easement created by the 1847 deed. Accordingly, the trial court properly granted summary judgment for Defendants.[4]

Affirmed.

Judges WYNN and FULLER concur.

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4. Plaintiffs argue in their brief to this Court that there is a genuine issue of material fact regarding whether they have "a reversionary interest in the land where the [Whiteville depot] sits based upon the 1882 [deed]." Because the trial court properly concluded the Railroad owns an easement in the property upon which the Whiteville depot is located pursuant to the 1847 deed, the 1882 deed is a nullity and we need not address its construction.

We note, however, that Plaintiffs do not argue in their brief to this Court that the 1847 deed was in some way modified by the 1882 deed; rather, Plaintiffs state that if the Whiteville depot is found to be within the boundaries of the 1847 easement, then "the easement from 1847 still exists." We, therefore, do not address the issue of whether, under some circumstances, an easement may be implicitly modified by the terms of a subsequent easement involving the same property and the same grantor/grantee or their successors in interest.

WILLIAM BRUCE COLLINS, PLAINTIFF v. ST. GEORGE PHYSICAL THERAPY, DEFENDANT

No. COA99-1421

(Filed 19 December 2000)

1. **Negligence— permanent injury—sufficiency of evidence**

The trial court did not err by refusing to submit the issue of permanent injury to the jury in a negligence action arising from an injury suffered when a cable on a weight machine broke during physical therapy. A permanency instruction is proper if there is sufficient evidence of the permanent nature of any injuries and proximate cause; in this case, the medical witnesses were certain in their responses but the evidence did not fully address permanency as it left open the question of whether plaintiff's symptoms could abate with treatment. Plaintiff also pointed to non-expert testimony, but an expert witness must testify with reasonable medical certainty from personal examination, knowledge of the history of the case, or a hypothetical question where injuries are subjective, as with pain.

2. **Damages— punitive—willful or wanton conduct—sufficiency of evidence**

The trial court did not err by directing a verdict for defendant on a punitive damages claim arising from an injury suffered when a cable on a weight machine broke while plaintiff was undergoing physical therapy. While the evidence indicates that defendant may have been negligent in deviating from customary standards in caring for the machine, it does not rise to the level of willful or wanton conduct.

3. **Appeal and Error— denial of Rule 60 motion—absence of final order**

The Court of Appeals was without authority to address plaintiff's contention that the court erred by denying his Rule 60 motion for relief from judgment where the record did not contain a final order denying plaintiff's motion for relief from judgment. A judgment is properly entered through composition of an order, which must be reduced to writing, signed by the judge, and filed with the clerk of court. N.C.G.S. § 1A-1, Rule 58.

4. Appeal and Error— cross-appeal—assignments of error—statement of legal basis

A cross-appeal was dismissed where the assignments of error did not state a legal basis upon which error was assigned. N.C. R. App. P. 10(c)(1).

Appeal by plaintiff and cross-appeal by defendant from order entered 16 April 1999 by Judge Marcus Johnson and orders entered 30 April 1999, 20 May 1999 and judgment entered 5 May 1999 by Judge Charles C. Lamm, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 October 2000.

Robinson, Bradshaw & Hinson, P.A., by Edward F. Hennessey, IV, for the plaintiff-appellant.

Waggoner, Hamrick, Hasty, Monteith and Kratt, P.L.L.C., by S. Dean Hamrick and John W. Bowers, for the defendant-cross appellant.

LEWIS, Judge.

On 15 February 1996, plaintiff was injured while using a multiple use high pulley machine manufactured by Universal Gym Equipment, Inc. ("Universal"). The injury occurred at St. George Physical Therapy, where plaintiff was a patient. Plaintiff was undergoing a course of physical therapy at St. George Physical Therapy to relieve problems with his right shoulder associated with rotator cuff surgery plaintiff underwent in December 1995. Plaintiff was injured while pulling down on a bar which was attached by a metal cable running through pulleys and attached to weights at the other end. The cable was covered in a plastic sheath. As plaintiff pulled down on the bar to lift the eighty pounds of weight at the other end, the metal cable broke through the plastic coating and the bar came loose from the cable, striking plaintiff on the top and back side of his head. After applying ice to his head and undergoing an examination by Rick E. St. George ("St. George"), plaintiff's physical therapist, plaintiff continued his therapy for that day.

On 16 October 1996, plaintiff instituted an action against St. George Physical Therapy, alleging pain and permanent physical injuries including limited mobility in his neck and shoulder and numbness with tingling in his hand and arm proximately caused by the incident on 15 February 1996. From a jury verdict for plaintiff in the amount of $26,333, plaintiff appeals.

[1] The plaintiff in this case filed a written request that the jury be instructed as to damages for permanent injury, future pain and suffering, future medical expenses and lost future earnings, which the trial court denied. Plaintiff contends on appeal that the evidence warranted an instruction as to the permanency of plaintiff's injuries.

The trial court is required to instruct on a claim or defense if the evidence, viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense. *Matthews v. Food Lion, Inc.*, 135 N.C. App. 784, 785, 522 S.E.2d 587, 588 (1999). Before a jury may consider permanence of injuries as an element of damages, there must be evidence tending to show

> the permanency of the injury and that it proximately resulted from the wrongful act with reasonable certainty. While absolute certainty of the permanency of the injury and that it proximately resulted from the wrongful act need not be shown to support an instruction thereon, no such instruction should be given where the evidence respecting permanency and that it proximately resulted from the wrongful act is purely speculative or conjectural.

Short v. Chapman, 261 N.C. 674, 682, 136 S.E.2d 40, 47 (1964). Thus, a permanency instruction is proper if there is sufficient evidence both as to (1) the permanent nature of any injuries and (2) proximate cause. *Matthews*, 135 N.C. App. at 785, 522 S.E.2d at 588.

As to the first requirement of permanency, deposition testimony of Dr. Ronald C. Demas, M.D. was admitted as follows:

> Q. Doctor, you mentioned that you were aware [plaintiff] had had a microdiscetomy following this accident?
>
> A. Yes.
>
> Q. That was a surgery to remove some ruptured material, herniated material from the disc?
>
> A. That's correct.
>
> Q. Assuming his symptoms are as he reported them to you, why would his symptoms continue after that surgery?
>
> A. That's a common occurrence, frankly, and there is, at best, speculation. I don't think anyone knows the exact answer . . . .

Q. Based on [plaintiff's] history and your own experience, in your opinion, are his symptoms likely to simply go away? That is, whatever mechanism is producing these symptoms, is that likely to stop operating *of itself*?

A. No. In terms of going away, I wouldn't say that . . . . And we say at some point a patient reaches maximum medical improvement, MMI. That means that at some point he's probably not going to get substantially better, but he may continue to get better over the years by as much as three percent a year . . . . There's a potential, I think, for this patient eventually to be minimally or negligibly bothered by this problem. But whether it will take another year or six years, no one can guess.

(Demas Depo. at 11-14) (emphasis added). Plaintiff also contends the testimony of John Jacob Priester, D.C., fulfills the requirement of permanency:

Q. Well, do you believe, based on your experience and your evaluation of [plaintiff] that his symptoms are likely to abate on their own *without treatment*?

A. No, I don't think his symptoms are going to go away *on their own*.

(Priester Depo. at 21).

We find this evidence equivocal as to the permanency of plaintiff's injury. Though each witnesses was certain in his response, the question asked elicited evidence only as to whether plaintiff's "symptoms" or the "mechanism producing those symptoms" would go away "*of itself*" or "*on their own without treatment.*" (Demas Depo. at 14; Priester Depo. at 21). This evidence does not fully address the question of permanency, as it leaves open the question of whether plaintiff's symptoms could potentially abate *with* treatment. In addition, Dr. Demas stated there was a mere "potential" that plaintiff would be "negligibly bothered" by the problem in the future. (Demas Depo. at 14). Without more, this evidence indicates that permanency of plaintiff's injuries could possibly occur. *See, e.g., Gillikin v. Burbage*, 263 N.C. 317, 326, 139 S.E.2d 753, 761 (1965) (holding doctor's testimony that plaintiff's injuries *could* reoccur fell short of establishing permanent injury) (emphasis added); *Garland v. Shull*, 41 N.C. App. 143, 147, 254 S.E.2d 221, 223 (1979) ("Testimony tending to indicate that an event *may* occur is an indication that the occurrence of the event is possible, but it is not an indication that the occurrence of the event

is certain or probable.") (emphasis added). We find this evidence speculative as to the lasting duration of plaintiff's symptoms and thus, insufficient to establish with reasonable certainty that plaintiff's injuries were permanent. *Cf. Matthews*, 135 N.C. App. at 786, 522 S.E.2d at 589 (holding evidence that it was reasonably certain that plaintiff would continue "to experience pain . . . for the rest of her life" sufficient to warrant instruction as to permanent injury).

Plaintiff also points to certain non-expert testimony, including his own and that of his wife, in support of an instruction on permanent injury. We will not consider this evidence. Where injuries are subjective, as in the case of pain, an expert witness must testify with reasonable medical certainty, from personal examination, knowledge of the history of the case, or from a hypothetical question, that plaintiff may be expected to experience future pain and suffering as a result of the injury proven. *Gillikin*, 263 N.C. at 326, 139 S.E.2d at 760-61. Accordingly, we conclude the trial court in this case did not err in refusing to submit the issue of permanent injury to the jury.

[2] Plaintiff next contends the trial court erred in granting the motion for directed verdict for defendant St. George Physical Therapy as to the punitive damages claim based on willful or wanton negligence. Under Chapter 1D of our General Statutes, the plaintiff is entitled to recover punitive damages upon a showing of willful or wanton conduct. N.C. Gen. Stat. § 1D-15. N.C. Gen. Stat. § 1D-5 defines "willful or wanton conduct" as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." The punitive damages issue is properly submitted to the jury "[i]f there is sufficient evidence from which the jury may reasonably infer that the wrongdoer's . . . acts were aggravated by . . . a wanton and reckless disregard of plaintiff's rights." *Mazza v. Huffaker*, 61 N.C. App. 170, 188, 300 S.E.2d 833, 844, *disc. review denied*, 309 N.C. 192, 305 S.E.2d 734 (1983).

Plaintiff's evidence tends to show that St. George purchased the Universal weight machine in 1985 from an outside dealer. The machine contained a warning which stated:

> Serious injury can occur if struck by falling weight or other moving parts. You assume a risk of injury using this type of equipment. The risk can be reduced by always following these simple rules . . . .

2. Before use, inspect equipment for loose, frayed or worn parts. If in doubt, do not use until these parts are replaced. If the fitting fails, you may be struck by a falling weight or a moving part.

From the date of purchase to the date of plaintiff's injury, St. George replaced the cable on this particular machine two times. In 1990, St. George purchased a replacement cable from the dealer from whom he purchased the machine and installed it himself. In 1994, he purchased a second replacement cable from Universal, the manufacturer of the machine and installed it himself. In approximately one year, this cable began to fray. St. George attempted to purchase another cable from both the dealer and Universal, but was unable to obtain one. As such, he purchased a replacement cable from Lowe's after consulting with a salesperson and installed it himself.

Although St. George had no official "training" in weight machine repair, he had used that type of equipment for several years, having been a licensed physical therapist since 1979 and having previously installed several replacement cables on his machines. On the user's end of this particular machine, however, St. George did not fasten the cable to the metal clamp in the same way the other replacement cables required. Instead of fastening the metal part of the cable to the metal clamp, St. George fastened the plastic sheath covering the metal cable to the metal clamp. Plaintiff contends this was critical in causing the accident in this case.

After installation in this manner, St. George inspected and tested the cable. In addition, he tested the machine before each use by putting the full weight load on it and pulling on the cable, clearing the weight stack by one or two inches. Although plaintiff presented evidence of a prior accident on this machine approximately one month earlier, it was not related to the stability of the replacement cable.

Plaintiff has pointed us to no case law authority addressing the propriety of punitive damages based on facts analogous to these. Although plaintiffs have cited several cases where evidence was sufficient to submit the issue of punitive damages to the jury, all of them involve far more egregious circumstances, including *Boyd v. L.G. Dewitt Trucking* Co., 103 N.C. App. 396, 405 S.E.2d 914, *disc. rev. denied*, 330 N.C. 193, 412 S.E.2d 53 (1991) (court properly submitted punitive damages issue to jury where evidence showed defendant driver was intoxicated at the time of the car accident in which plain-

tiff was killed, was traveling in excess of the speed limit with a fully-loaded rig and unauthorized passenger and no attempt made to avoid accident); *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 361 S.E.2d 909, *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1987) (issue of punitive damages properly submitted to jury where decedent was struck by defendant's train; evidence indicated defendant failed to take any safety precautions and failed to warn persons crossing unusually hazardous train track); *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 291 S.E.2d 897, *aff'd per curiam*, 307 N.C. 267, 297 S.E.2d 397 (1982) (issue of punitive damages based on *gross negligence* properly submitted to jury where decedent died by electrocution from wire attached to defendant's pole; evidence revealed deficient inspections, wire was neither grounded nor insulated, periodic arcing observed on nearby transformer days before incident, wire was slack, transformer located on congested corner of pole).

More analogous to this case, however, is *Butt v. Goforth Properties, Inc.*, 95 N.C. App. 615, 616, 383 S.E.2d 387, 387 (1989), where defendants failed to adequately secure a trailer before unhitching it from a truck. The trailer subsequently rolled down two hills and across a road before crashing into plaintiff's house. *Id.* The crash resulted from poor safety training and supervision by defendant company, deviation from customary practices in the industry and use of improper equipment. *Id.* at 619, 383 S.E.2d at 389. Yet, the Court concluded these facts did not rise to the level of willful or wanton conduct establishing entitlement to punitive damages. *Id.*; *see also Starkey v. Cimarron Apartments; Evans v. Cimarron Apartments*, 70 N.C. App. 772, 321 S.E.2d 229, *disc. review denied*, 312 N.C. 798, 325 S.E.2d 633 (1984) (evidence that defendant landlord knew apartment building did not have attic fire walls and failed to correct this condition insufficient evidence of willful or wanton conduct supporting punitive damages). Similar to *Butt*, while the evidence in this case indicates that defendant may have been negligent in deviating from customary standards in caring for the Universal machine, it does not rise to the level of willful or wanton conduct. Plaintiff's evidence falls short of creating a reasonable inference that defendant recklessly disregarded plaintiff's rights or safety. Thus, we conclude the trial court did not err in granting the motion for directed verdict for defendant St. George as to the punitive damages claim.

[3] Plaintiff next contends the trial court erred in denying his Rule 60 motion for relief from judgment. In that motion, plaintiff asserted the trial court's final judgment reflects an "oversight or omission regard-

ing the proper designation of defendant" by identifying defendant simply as "St. George Physical Therapy." Plaintiff asserts the proper designation of defendant for purposes of judgment is "Rick E. St. George d/b/a St. George Physical Therapy." The record in this case contains no copy of a final order denying plaintiff's motion for relief from judgment. Although the record contains an order denying plaintiff's motion for a new trial which appears to have initially mentioned plaintiff's Rule 60 motion, that portion of the order mentioning Rule 60 has been marked out. Although defendant's brief notes that a portion of the order is marked out, neither party sets forth any explanation, and plaintiff does not address it.

The appellant has the duty to see that the record on appeal is properly made up. *Tucker v. Telephone Co.*, 50 N.C. App. 112, 118, 272 S.E.2d 911, 915 (1980). This Court is without authority to entertain appeal on an issue which lacks entry of judgment. *Searles v. Searles*, 100 N.C. App. 723, 724-25, 398 S.E.2d 55, 56 (1990). A judgment is properly entered through composition of an order, which must be reduced to writing, signed by the judge and filed with the clerk of court. N.C.R. Civ. P. 58; *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (1997). Absent any entry of judgment on plaintiff's Rule 60 motion, we are without authority to address plaintiff's contention.

[4] Although defendant St. George Physical Therapy has filed a cross-appeal in this matter, we do not reach the merits of that appeal. The Rules of Appellate Procedure require that every assignment of error "shall state plainly, concisely and without argumentation the *legal basis* upon which error is assigned." N.C.R. App. P. Rule 10(c)(1) (emphasis added). Our courts have been clear to articulate that absent a specific legal basis, an assignment of error is deemed abandoned. *See, e.g., Rogers v. Colpitts*, 129 N.C. App. 421, 423, 499 S.E.2d 789, 790 (1998); *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988). The legal basis need not be particularly polished; it need only put the appellee and this Court on notice of the legal issues that will be contested on appeal. Examples of sufficient legal bases are even included within the Appellate Rules themselves. *See, e.g.*, N.C.R. App. P. app. C, tbl. 4 ("[Defendant] assigns as error . . . [t]he court's admission of the testimony of the witness E.F., *on the ground that* the testimony was hearsay." (emphasis added))

Defendant has alleged five assignments of error, none of which state a legal basis upon which the error is assigned (e.g., "Entry of the Trial Court of its Order dated April 30, 1999, denying the Motion of the

defendant for a directed verdict to dismiss the claim of the plaintiff for compensatory damages"). Thus, these assignments of error are deemed abandoned and defendant's cross-appeal is dismissed.

The ruling of the trial court is affirmed; defendant's cross-appeal is dismissed.

Judges WYNN and HUNTER concur.

STATE OF NORTH CAROLINA v. AURELIO R. MOCTEZUMA

No. COA99-1397

(Filed 19 December 2000)

1. Evidence— additional cocaine—insufficient link to defendant—irrelevant and prejudicial

The trial court erred in a cocaine trafficking prosecution by admitting evidence of two kilos seized from the trailer in which defendant lived with other men where the prosecution was based upon 136.69 grams seized in a van driven by defendant. There was no evidence to directly link defendant to the drugs seized at the trailer in which he occupied a bedroom, he was not charged with any offense in connection with those drugs, he consistently denied any knowledge of the drugs, and evidence introduced at trial tended to show that the two kilos seized at the trailer had been brought from Florida about 12 hours before defendant's arrest, that those drugs had been hidden under towels in a bathroom which did not belong to defendant, and that people with whom defendant was not acquainted had visited the trailer on the morning of defendant's arrest. Despite the court's limiting instruction, the jury could easily have concluded that defendant was a high level drug trafficker.

2. Discovery— criminal—identity of confidential informant—procedure

In a case reversed on other grounds, the Court of Appeals held that the trial court erred in a cocaine trafficking prosecution by excluding defendant and his counsel from a hearing on defendant's motion to reveal the identity of a confidential informant without hearing evidence and finding facts as to the necessity of

the exclusion. Upon a motion by defendant that the identity of a confidential informant be revealed, the trial court should first hold a hearing on the motion outside the presence of the jury at which defendant must present supporting evidence and at which the State may present opposing evidence. The court may then grant or deny the motion, making the necessary findings and conclusions, and if the court needs to know the identity of the informant, it may exclude defendant if it first makes appropriate findings and conclusions, taking into account the serious due process questions raised by the exclusion of defendant or his counsel. The court should take any action necessary to protect defendant's rights to a fair trial.

Appeal by defendant from judgment entered 12 January 1999 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 October 2000.

On 10 January 1998, a paid confidential informant told Charlotte-Mecklenburg police officers that a cocaine deal would occur that day at 1:00 p.m. in a Charlotte area Food Lion grocery store parking lot. The informant advised the officers that three Hispanic men would drive a white van with Tennessee tags to a house on Statesville Road in Charlotte where a large quantity of cocaine was located. According to the informant, the suspects would then drive the van to a Food Lion grocery store parking lot where the drug deal would take place. Pursuant to the tip, the police arranged for a surveillance operation. Officer Thomas Roddy followed the white van from Statesville Road to a trailer on Perkins Road where defendant and several other people lived. Upon arriving at the trailer, three Hispanic men, including defendant, exited the van, entered the trailer and re-emerged shortly afterwards. The men then drove to the Food Lion grocery store, where they parked the van. Thereafter, another man approached the parked van, opened the van's sliding door, talked to someone inside and started to walk away. At this point, police officers in the area surrounded the van in order to apprehend its suspects. Officer Roddy approached the passenger side of the van's front door and observed defendant in the driver's bucket seat. As Officer Roddy ordered the van occupants to get out, he noticed defendant "putting something on the right side of his seat, wrapped in white tissue." After arresting defendant and the other suspects, police officers searched the van and found 136.69 grams of cocaine in a plastic bag inside white wrappings on the right side of the driver's seat.

At trial, defendant testified that he lived in the trailer at Perkins Road with a man named Sergio Burroto and several other men with whom defendant was unacquainted. Although he lived with Burroto, defendant testified that he did not know Burroto well or see him much, as defendant was working most of the time in order to send money to his wife and children in Mexico. Defendant further testified that on the day of his arrest, Burroto told him to drive the white van to the Food Lion store. Defendant testified that he drove Burroto and another man to the Food Lion store and parked, whereupon the police approached the van and arrested them. Finally, defendant testified that he had no knowledge whatsoever of any cocaine in the van.

Over defendant's objections, the trial court allowed the State to cross-examine defendant about illegal drugs and drug paraphernalia found both in Burroto's bathroom and in the front room of the trailer in which defendant lived. Defendant was not charged with possession of these substances, but the trial court instructed the jury that they could consider the drug evidence for the purpose of showing defendant's awareness of cocaine in the van. At the close of the evidence, the trial court instructed the jury on the charges of trafficking in cocaine by possession and of the charge of trafficking in cocaine by transportation.

On 11 January 1999, the jury found defendant guilty of trafficking in cocaine by transporting more than twenty-eight grams but less than two hundred grams. The following day, the trial court imposed an active sentence of thirty-five to forty-two months' imprisonment with credit for prior confinement and fined defendant $50,000.00. Defendant appealed.

Attorney General Michael F. Easley, by Assistant Attorney General Jeffrey B. Parsons, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant appellant.

HORTON, Judge.

[1] Defendant argues that the trial court erred in admitting evidence of substantial amounts of drugs seized at the Perkins Road trailer. Defendant contends that, since he was not charged in connection with these drugs, the fact that drugs belonging to other people were found at defendant's residence was both irrelevant and prejudicial

to defendant's case. We agree with defendant and find that the admission of the irrelevant and prejudicial evidence requires a new trial.

Before trial, defendant filed a motion *in limine* to prohibit the State from asking questions and introducing evidence about drugs police found in the Perkins Road trailer after defendant's arrest. The trial court denied the motion and ruled that, if defendant testified he had no knowledge of the cocaine in the van, evidence about the presence of drugs inside the Perkins Road trailer would be admissible to show defendant's awareness that cocaine was in the van.

During trial, the State cross-examined defendant about the drugs found in the Perkins Road trailer, about which defendant repeatedly denied knowledge. The State also introduced and published to the jury evidence from the drug seizure at the Perkins Road trailer, including two kilos of cocaine and various drug paraphernalia. During final instructions, the trial court charged that the jury could consider the evidence about the Perkins Road drugs "to show the Defendant's awareness of cocaine seized by officers at the Food Lion parking lot."

Defendant maintains that, because he had no knowledge of the drugs seized from the trailer, such evidence is not proof that he was aware of the cocaine in the van and is therefore irrelevant and inadmissible. Further, defendant asserts that the admission of such evidence was prejudicial given both the high value of the drugs seized at the trailer and the extensive trial time consumed in the identification, viewing and discussion about the drugs found at the trailer.

Rule 401 of the Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1999). Thus, if the evidence of the drugs seized at defendant's residence increases the probability that defendant knew about the cocaine found in the van, the evidence will be relevant and properly admitted. If the evidence has no tendency to prove a fact in issue in the case, the evidence is irrelevant and will be excluded. *State v. Coen*, 78 N.C. App. 778, 780-81, 338 S.E.2d 784, 786, *disc. review denied, appeal dismissed*, 317 N.C. 709, 347 S.E.2d 444 (1986).

Irrelevant evidence is harmless unless defendant shows that he was so prejudiced by the erroneous admission that a different result

would have ensued if the evidence had been excluded. *State v. Harper*, 96 N.C. App. 36, 42, 384 S.E.2d 297, 300 (1989). Defendant has the burden of showing that he was prejudiced by the admission of evidence. In order to show prejudice, defendant must meet the statutory requirements of N.C. Gen. Stat. § 15A-1443(a). *State v. Melvin*, 86 N.C. App. 291, 297, 357 S.E.2d 379, 383 (1987). N.C. Gen. Stat. § 15A-1443(a) states:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

N.C. Gen. Stat. § 15A-1443(a) (1999). A trial court's ruling on relevant evidence is not discretionary and therefore is not reviewed under the abuse of discretion standard. *Sherrod v. Nash General Hospital*, 126 N.C. App. 755, 762, 487 S.E.2d 151, 155, *disc. review allowed*, 347 N.C. 403, 494 S.E.2d 403 (1997), *aff'd in part, rev'd in part and remanded*, 348 N.C. 526, 500 S.E.2d 708 (1998).

The State contends that the trial court properly admitted the evidence in question under Rule 404(b) of the Rules of Evidence, which states that:

> 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). The State argues that the evidence seized at the trailer is evidence of other wrongs that tends to show defendant's knowledge of the cocaine in the van. We disagree. Rule 404(b) speaks of "[e]vidence of other crimes, wrongs, or acts." Here, there are no crimes, wrongs or acts with which defendant is connected. There was no evidence introduced at trial to directly link defendant to the drugs seized at the trailer in which he occupied a bedroom. Defendant was not charged with any offense in connection

with the drugs seized at the trailer, and defendant consistently denied any knowledge of such drugs.

Further, the circumstantial evidence presented at trial—the fact that drugs belonging to other people were discovered at the trailer defendant shared with others—was too weak to support an inference of knowledge on his part. Evidence at trial tended to show that the drugs seized at the Perkins Road trailer had been brought from Florida approximately twelve hours before defendant's arrest. In addition, Officer Sidney Lackey testified that the two kilos of cocaine seized were hidden under some towels in a back bathroom belonging to Burroto, not defendant. Finally, there was evidence that other people with whom defendant was unacquainted visited the Perkins Road trailer the morning of defendant's arrest. Under these circumstances, we find that there was insufficient evidence to show that defendant knew about the drugs seized at the trailer.

Because there was insufficient evidence to connect defendant with the drugs seized at the trailer, evidence of such was improperly admitted to show defendant's knowledge of cocaine in the van. Despite the trial court's limiting instruction, the jury could have easily concluded, given the value and quantity of the seized drugs, as well as the time spent at trial examining such, that defendant was a high level drug trafficker. *See State v. Cuevas*, 121 N.C. App. 553, 557-58, 468 S.E.2d 425, 428, *disc. review denied*, 343 N.C. 309, 471 S.E.2d 77 (1996) (where defendant was charged with trafficking in cocaine, defendant's passport with a stamp indicating he had visited Colombia approximately two months earlier was prejudicial, as it tended to mislead the jury as to the level of defendant's involvement in drug trafficking). We find that the admitted evidence of drugs and drug paraphernalia seized at the Perkins Road trailer was irrelevant and prejudicial. Defendant must be given a new trial.

[2] Because of its importance to the trial bench and bar, we will address one of defendant's remaining assignments of error. Defendant argues that the trial court's *ex parte in camera* hearing in which the trial court excluded both defendant and defense counsel in order to consider a motion by defendant concerning the identity of the State's confidential informant was improper and violated his constitutional rights in that he was denied an open court and public trial, the right to confront witnesses, and due process. We agree that the trial court improperly closed the court before making the necessary findings of fact.

Several months before trial, defendant learned that an unidentified paid confidential informant (CI), working with police, had arranged the drug deal at which defendant was arrested. Defendant then filed a "Motion to Reveal the Name and Address of Confidential Informant" in which he contended that the CI was a necessary and material trial witness on the question of defendant's guilt. When the motion was called at trial, the trial court held an *ex parte in camera* hearing over defendant's objections out of the presence of defendant, defense counsel, and all other people except prosecutors, policemen and the court reporter, in order to determine the matter. After the hearing, the trial court stated in open court that it found no issue on which the CI's testimony would be relevant and that other witnesses were available to defendant to provide the same information "to the extent that the informant's testimony would be of any value since the confidential informant is not the only one that can shed light on this same subject matter that would be relevant." The trial court then denied defendant's motion to reveal and ordered the record of the hearing sealed.

Our Supreme Court has stated that "[t]he trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court." *In re Edens*, 290 N.C. 299, 306, 226 S.E.2d 5, 9 (1976); *accord* N.C. Const. art. I, § 18. Accordingly, before a trial court may close a courtroom to the public in a criminal case, "the trial court must determine if the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure." *State v. Jenkins*, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 752 (1994).

Here, the trial court made no findings of fact before closing the courtroom not only to the general public, but to defendant and defense counsel as well. While we recognize the importance of maintaining the confidentiality of informants, a trial court may not close a courtroom to both defendant and defense counsel without making findings as to the necessity of its action. To do so denies defendant an opportunity to fully defend. Our case law reveals that defendants and counsel are regularly allowed to be present at hearings on motions to reveal CI identities. *See, e.g., State v. Creason*, 313 N.C. 122, 126, 326 S.E.2d 24, 26 (1985); *State v. McEachern*, 114 N.C. App. 218, 219-20, 441 S.E.2d 574, 575 (1994).

Upon a motion by defendant that the identity of a confidential informant be revealed, the trial court should first hold a hearing outside the presence of the jury to consider the question. Defendant must present evidence supporting the necessity of having the identity of the confidential informant revealed, following which the State may present evidence in opposition to defendant's motion. Upon reviewing the evidence and arguments by defendant and the State, the trial court may then either grant or deny defendant's motion, making the necessary findings of fact and conclusions of law in support of its decision. If the trial court determines that it needs to know the identity of the confidential informant in order to properly rule on defendant's motion, it may then exclude defendant from the courtroom in order to protect the identity of the confidential informant, *provided* that the trial court first makes appropriate findings of fact and conclusions of law as to the necessity for defendant's exclusion. In taking such action, the trial court must consider that exclusion of a defendant or his counsel from a courtroom raises serious due process questions. If the exigencies of the situation require exclusion, the trial court should take any action necessary to protect defendant's rights to a fair trial.

Here, the trial court excluded defendant and his counsel from the hearing on defendant's motion without hearing evidence and finding facts as to the necessity for their exclusion. As defendant clearly had the right to offer evidence in support of his motion, we hold that the exclusion of defendant and his counsel from the courtroom was error.

Because the trial court admitted irrelevant evidence and improperly closed the courtroom to defendant and defense counsel, we find that defendant is entitled to a new trial. Accordingly, we need not address defendant's remaining assignments of error as they are not likely to recur on retrial.

New trial.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. DAVID McGILL, JR.

No. COA99-1454

(Filed 19 December 2000)

Discovery— child abuse—social services records

There was prejudicial error in a prosecution for first-degree sexual offense and indecent liberties where defendant was denied access to social services records concerning prior allegations of abuse. Upon review of the sealed records, the Court of Appeals determined that defendant was denied evidence favorable to him which could have been used to impeach the credibility of key witnesses for the State; that the evidence was material because there is a reasonable probability that the result would have been different had the records been disclosed; and that there was prejudice because a defendant charged with sexual abuse of a minor has a constitutional right to have the records of the child abuse agency pertaining to the prosecuting witness reviewed, with disclosure of favorable and material evidence, and the State here did not argue that the error was harmless and thus failed to meet its burden of showing that the constitutional error was harmless beyond a reasonable doubt.

Appeal by defendant from judgments dated 23 October 1998 by Judge Forrest A. Ferrell in Cherokee County Superior Court. Heard in the Court of Appeals 17 October 2000.

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

McKinney & Tallant, P.A., by Zeyland G. McKinney, Jr., for defendant-appellant.

GREENE, Judge.

David Eugene McGill, Jr. (Defendant) appeals from convictions of four counts of first-degree sexual offense upon a minor child (G.H.) and of two counts of indecent liberties with G.H.

Pre-trial

On 18 May 1998, Defendant filed motions requesting the right to inspect records of G.H. from the Cherokee County (CCDSS) and Gaston County (GCDSS) Departments of Social Services for exculpa-

tory information. Defendant believed these records would "show that the State's [p]rosecuting [w]itness, [G.H.], filed formal complaints against . . . Defendant in said Count[ies], and Defendant believes such records will show exculpatory material contained therein." On 21 May 1998, the trial court, after conducting an *in camera* inspection of the file of CCDSS, identified four pages of materials from the file as "possibly exculpatory" and ordered them to be given to Defendant and ordered a copy of the entire file be sealed and deposited for further *in camera* review, should it be necessary. The four pages given to Defendant contained allegations of abuse and neglect made in December 1996 against Lynn Hampton (Hampton), G.H.'s mother, and Defendant, Hampton's boyfriend. At the time these allegations were made, Hampton stated G.H. "was bad to set fires." Also contained in the four pages given to Defendant was an interview with the elementary school principal of G.H. and his younger brother R.H., in which the principal stated "he feels like [G.H. and R.H.] are prone to exagerate [sic] and make things bigger than they are."

On 19 October 1998, prior to jury selection, the trial court stated it had reviewed the records of GCDSS and "found nothing exculpatory in them. It's all inculpatory." The trial court then sealed the records of GCDSS for further *in camera* inspection if necessary.

State's evidence

G.H. testified that in 1997 and the early part of 1998, when he was nine years old, G.H., R.H., and Hampton lived with Defendant in Murphy, North Carolina. In November 1997, Defendant awakened G.H. at approximately 12:00 a.m. and made G.H. "come in the living room and sit on his lap." Defendant made G.H. sit there and watch a pornographic movie as he "touched [G.H.'s] privates . . . and made [G.H.] take [Defendant's] pants off." G.H. was in the living room with Defendant for approximately one hour.

In January 1998, Defendant awakened G.H. from his sleep at around 2:30 a.m. and made G.H. watch the same video he had seen in November. Shortly after the video ended, Defendant made G.H. take off Defendant's pants and then Defendant went into the bathroom. Defendant made G.H. enter Defendant's bedroom and Defendant removed G.H.'s clothes. G.H. testified Defendant made him "suck [Defendant's] peter" and made G.H. kiss him. G.H. stated "this whole thing" lasted "[a]bout five hours," while Defendant "stuck his tongue in[to G.H.'s] butt," bit G.H.'s penis, and put [Defendant's] penis into

G.H.'s "butt." On cross-examination, G.H. stated he wanted to live with his grandmother, even during the time period he was living with Defendant.

R.H. testified that in November 1997, G.H. was crying and G.H. told him Defendant made him watch a pornographic movie and made G.H. pull Defendant's pants off. R.H. recalled that during the "second time," which he believed occurred in November 1997, G.H. went into Defendant's bedroom and Defendant closed the door. The next morning, G.H. told R.H. Defendant "molested him in the behind." On cross-examination, R.H. testified he wanted to live with his grandmother because Defendant "would be mean to [him]" and Defendant would tell him to do his homework and chores. If R.H. or G.H. did not do their homework or chores, they "would get a whipping." R.H. denied ever watching pornographic videos at his grandmother's house.

Hampton testified that a week after the November 1997 incident, G.H. told her Defendant "got [G.H.] up in the middle of the night and had [G.H.] come and watch [television] with [Defendant] . . . and [Defendant] had [G.H.] take [Defendant's] pants off." G.H. told Hampton Defendant "pulled [G.H.] down toward[] [Defendant's] penis." In January 1998, when she arrived home from work during the early morning hours, Hampton found Defendant who was naked under the covers and G.H. in the bed together.

On cross-examination, Hampton testified when she and Defendant, along with R.H. and G.H., lived in Gastonia, before their move to Murphy in 1996, she and Defendant were investigated concerning allegations about sexual contact with G.H. and R.H. Hampton recalled making a statement about G.H. "watching dirty movies at [his grandmother's] house and looking through a peephole and watching" his uncle and another man engaging in sexual acts. After finding G.H. in the bed with Defendant in January 1998, Hampton never saw any "blood or feces" in G.H.'s underwear and did not inspect the sheets in Defendant's bedroom. In addition, Hampton did not notice any discomfort in G.H. subsequent to the incident in January of 1998.

Chanda Enand (Enand), a physician's assistant at Carolina Medical Center in Charlotte, North Carolina, examined G.H. on 30 April 1998 after the reported sexual abuse. Enand testified G.H.'s physical exam was "normal," however, the overall assessment, "including [an] interview and physical exam [was] consistent with probable sexual abuse." Enand revealed "[s]ixty or seventy percent of the children who are sexually abused" have normal exams.

Defendant's evidence

Defendant testified he did not sexually assault G.H. nor did he make G.H. watch a pornographic video. In addition, Debra Sears (Sears), the Child Protective Services Supervisor for CCDSS, testified Hampton and Defendant had previously been investigated concerning allegations of sexual abuse and "nothing was found."

Closing arguments

In closing arguments, Defendant argued testimony G.H. and R.H. watched pornographic videos and G.H. and R.H. saw their uncle and another man engaging in sexual acts provided "the source of the information where some child ten years old could get . . . these types of allegations." The State, however, argued G.H.'s exposure to pornography did not provide a basis for his allegations. The State contended "what happened to [G.H.] that night was . . . awful . . . . Do you think [G.H.] saw that on a pornographic video?"

The dispositive issue is whether the records from GCDSS concerning prior allegations of sexual abuse by G.H. contain information that is favorable to Defendant and material to his guilt or punishment.

Defendant argues the trial court erred in refusing to give him access to the records of GCDSS. He asks this Court to review the records to determine whether they contain any exculpatory information.

A defendant who is charged with sexual abuse of a minor has a constitutional right to have the records of the child abuse agency that is charged with investigating cases of suspected child abuse, as they pertain to the prosecuting witness, turned over to the trial court for an *in camera* review to determine whether the records contain information favorable to the accused and material to guilt or punishment. *Pennsylvania v. Ritchie*, 480 U.S. 39, 58, 94 L. Ed. 2d 40, 58 (1987). If the trial court conducts an *in camera* inspection but denies the defendant's request for the evidence, the evidence should be sealed and "placed in the record for appellate review." *State v. Hardy*, 293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977). On appeal, this Court is required to examine the sealed records to determine if they contain information that is "both favorable to the accused and material to [either his] guilt or punishment." *Ritchie*, 480 U.S. at 57, 94 L. Ed. 2d at 57; *see also Hardy*, 293 N.C. at 127-28, 235 S.E.2d at 842; *State v.*

Jarrett, 137 N.C. App. 256, 267, 527 S.E.2d 693, 700, *disc. review denied*, 352 N.C. 152, — S.E.2d — (2000). If the sealed records contain evidence which is both "favorable" and "material," defendant is constitutionally entitled to disclosure of this evidence. *Id.* at 60, 97 L. Ed. 2d at 59.

Evidence favorable to defendant

"Favorable" evidence includes evidence which tends to exculpate the accused, as well as "any evidence adversely affecting the credibility of the government's witnesses." *U.S. v. Trevino*, 89 F.3d 187, 189 (4th Cir. 1996); *see also Love v. Johnson*, 57 F.3d 1305, 1313 (4th Cir. 1995).

We have reviewed the records of GCDSS which were sealed by the trial court to determine if they contain information favorable to Defendant. Prior to the incidents in this case, there are two other allegations Defendant abused G.H. and R.H., neither of which were substantiated by GCDSS. The allegation made in 1996 is revealed in the four pages the trial court ordered be made available to Defendant; and the November 1994 allegation of neglect and improper discipline is contained in the records of the undisclosed files of GCDSS. In the report on the November 1994 allegation, R.H., five years old at the time, gives an account of what happened, stating Defendant "skinned his weenie back and hit it [seven times]." When the social worker asked him what "skinned" means, he stated "he doesn't know, his grandma told him what to say. . . . [N]o one has touched his privates . . . [and] he didn't know what his privates were until [the social worker] pointed to them."[1] G.H., six years old at the time, stated his grandma told him the social worker was coming and that "no one ever touched his privates. [Defendant] never touches him or [R.H.], not even for a bath."[2] In addition, there is information contained in the sealed documents that G.H.'s and R.H.'s grandmother was trying to obtain custody of G.H. and R.H. and Hampton believed the grandmother fabricated allegations of abuse in order to obtain custody.[3] Evidence contained in the files of GCDSS tends to show

1. R.H.'s statement could have been inquired into by Defendant on cross-examination of R.H. to attack R.H.'s character for truthfulness or untruthfulness. *See* N.C.G.S. § 8C-1, Rule 608(b) (1999).

2. G.H.'s statement to a social worker in 1994 may have been inquired into on cross-examination by Defendant. *See* N.C.G.S. § 8C-1, Rule 611(b) (1999).

3. This statement is relevant in cross-examining Hampton as to whether she believed the allegations were fabricated in this case and also is relevant to cross-examining G.H. concerning any influence on his testimony.

that false accusations were made against Defendant in 1994 and thus could properly be used to impeach the credibility of key witnesses for the State. *State v. Anthony*, 89 N.C. App. 93, 96-97, 365 S.E.2d 195, 197 (1988) (evidence of previous false accusation admissible to impeach credibility of witness). The Defendant was accordingly denied evidence favorable to him.

Materiality

We must next determine if the favorable evidence is material either to Defendant's guilt or punishment. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985) (opinion of Blackmun, J).

In this case, G.H. and R.H. were the only witnesses to give an account of the events that happened in November 1997 and January 1998. The medical exam performed in April of 1998, almost four months after the alleged sexual assault occurred, was normal and Hampton testified she did not notice any discomfort in G.H. nor any blood or feces in his underwear. There was evidence presented that G.H. may have witnessed his uncle and another man having sex and evidence G.H. had been exposed to pornographic videos outside of Defendant's home. This evidence tends to rebut the State's theory that G.H. was too young to have fabricated the abuse by Defendant. Thus, there is a reasonable probability that had the records of GCDSS been disclosed to Defendant, the result of the trial would have been different. Accordingly, because this evidence is both favorable and material, Defendant should have been given access to this information and the trial court erred in denying that access.

Prejudicial error

The failure of the trial court to turn over evidence to Defendant that was both favorable and material to Defendant does not guarantee Defendant a new trial, unless the failure was prejudicial to Defendant. *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983). The violation of a defendant's constitutional rights is prejudicial unless this Court "finds that it was harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b) (1999).

In this case, because we have determined evidence contained in the records of GCDSS was both favorable and material, Defendant's

constitutional right to have the evidence was violated. The State has the burden of showing the error was harmless beyond a reasonable doubt. *Id.* The State has made no argument on this issue and thus has failed to meet its burden. Accordingly, Defendant is entitled to a new trial.

We have carefully reviewed Defendant's other assignments of error and determine they are unlikely to arise upon retrial and, accordingly, are not addressed.

New trial.

Judges MARTIN and EDMUNDS concur.

STATE OF NORTH CAROLINA v. MITCHELL WAYNE WATTS

No. COA99-1234

(Filed 19 December 2000)

Evidence— hearsay—not medical diagnosis and treatment exception

The trial court erred in a first-degree statutory rape and indecent liberties case by admitting hearsay statements of a nurse and two doctors regarding the alleged victim's statements as substantive evidence under the medical diagnosis and treatment exception of N.C.G.S. § 8C-1, Rule 803(4), because: (1) the record does not reveal that the victim understood she was making the statements for medical purposes, or that the medical purpose of the examination and importance of truthful answers were adequately explained to her; and (2) it cannot be said that there was no reasonable possibility that a different result would have been reached when the doctors' renditions of the incident were among the most damaging evidence offered and the nurse's testimony was the only direct evidence of actual penetration. However, this testimony may be admissible as substantive evidence with the proper foundation under the residual hearsay exceptions of N.C.G.S. § 8C-1, Rules 803(24) and 804(b)(5), and under N.C.G.S. § 8C-1, Rule 703 pertaining to expert witness testimony.

Appeal by defendant from judgment entered 21 May 1999 by Judge C. Preston Cornelius in Randolph County Superior Court. Heard in the Court of Appeals 18 September 2000.

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

Moser, Schmidly, Mason & Roose, by Richard G. Roose for defendant-appellant.

FULLER, Judge.

On 2 March 1997 defendant Mitchell Wayne Watts was arrested and charged with first degree statutory rape and taking indecent liberties with a minor. Evidence admitted at trial tended to show that on the afternoon of 28 February 1997 defendant arrived home as his wife, Vickie Watts (Watts), was leaving to take her sister home. Defendant's three young daughters, as well as his eleven year-old stepdaughter (hereinafter referred to as S), were at home with defendant. Watts testified that upon returning home approximately one half hour later, she thought she saw defendant leaving S's bedroom. Watts noticed S standing in the doorway of her bedroom closet naked from the waist down and holding her underwear. S was unresponsive to Watts' questions as to why she was unclothed.

Watts questioned S about the incident the following day when defendant was not home. S responded that defendant had touched her private parts, whereupon Watts took S to a Family Crisis Center and to the hospital emergency room for treatment. S was later examined by a Child Medical Examiner and a Child Mental Health Examiner.

Over defendant's hearsay objection, the State introduced testimony from Nurse Gail Rushing, who examined S upon her arrival at the hospital. Nurse Rushing read into evidence her emergency room notes from her examination of S, including a statement that S "revealed that dad in her room on her bunk bed put his private part all the way in her private part. . . ."

The State also introduced, over defendant's objections, testimony of Dr. Mary Johnson, the Child Medical Examiner, and Dr. Christopher Sheaffer, the Child Mental Health Examiner. Dr. Johnson testified that S said defendant, wearing only a towel, entered S's room while she was playing, took her clothes off and made her lay down, and that defendant "put his privates" against her. Dr. Sheaffer also

testified S relayed to him that defendant entered her bedroom while she was playing, removed her clothes and made her lay down, and that defendant removed his towel and touched her with his private parts.

As to all three witnesses, the trial court instructed the jury that such testimony was only to be considered for the purpose of corroborating the testimony of a later witness and not for the purpose of proving the truth of the matter asserted. However, during S's *voir dire* testimony, she was unresponsive to questions asked by both the State and the defense. The trial court ruled S incompetent to testify, and the State therefore rested its case without offering her testimony.

Defendant moved to strike the corroborative testimony, followed by a motion to dismiss. The trial court, without specifically addressing the motion to strike, denied defendant's motion to dismiss. Upon argument from defense counsel, the trial court revisited the admissibility of the testimony previously admitted as corroborative. The trial court concluded that the testimony of "medical authorities and psychologists, and investigating officers" was allowed into evidence under the medical exception to the hearsay rule, with certain portions of such testimony being admitted under the "medical diagnosis and treatment" exception; that the testimony was found to be reliable and trustworthy due to the consistency of the hearsay statements; that some evidence was admissible under the "state of mind" exception to the hearsay rule; and that some of the evidence was admissible as substantive such that the jury could determine the credibility of the testimony.

Defendant testified on his own behalf. At the close of all evidence, defendant moved to dismiss the charges against him, moved for a mistrial based on the admission of corroborative evidence without victim testimony, and moved to strike the corroborative evidence. The trial court denied all motions and the jury returned a verdict of guilty on both charges. Defendant appeals.

Defendant brings forth nine assignments of error on appeal, including that the trial court erred in admitting hearsay statements under the "medical examination and treatment" exception as substantive evidence. Because we agree with defendant that the admission of certain hearsay statements as substantive evidence under the medical diagnosis and treatment exception was error entitling him to a new trial, we need not address remaining arguments.

N.C. Gen. Stat. § 8C-1, Rule 803(4) (1999) of the North Carolina Rules of Evidence provides an exception to the rule excluding hearsay for statements made for the purpose of medical diagnosis or treatment:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

This exception has been interpreted by our Supreme Court as requiring a two-part inquiry: "(1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000); *see also*, *State v. McGraw*, 137 N.C. App. 726, 529 S.E.2d 493, *disc. review denied*, 352 N.C. 360, —— S.E.2d —— (2000); *In re Clapp*, 137 N.C. App. 14, 526 S.E.2d 689 (2000).

The *Hinnant* court elaborated on the evidence required to meet the two-part test, holding that the first prong requires the proponent "affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Hinnant*, 351 N.C. at 287, 523 S.E.2d at 669. Regarding the second prong, the Supreme Court determined that to ensure admission of statements made only for treatment purposes, "Rule 803(4) does not include statements to non-physicians made after the declarant has already received initial medical treatment and diagnosis." *Id.* at 289, 523 S.E.2d at 670.

Thus, the *Hinnant* court excluded expert hearsay testimony of a child sexual abuse psychologist where there was "no evidence that [the child] had a treatment motive when speaking to [the expert]. The record does not disclose that [the expert] or anyone else explained to [the child] the medical purpose of the interview or the importance of truthful answers." *Id.* at 289, 523 S.E.2d at 671. In sum, there was simply "no affirmative record evidence indicating that [the child's] statements were medically motivated and, therefore, inherently reliable." *Id.* at 290, 523 S.E.2d at 671. Moreover, because the child's statements were made to the expert two weeks after the initial medical examination, the Supreme Court determined the evidence also failed to satisfy the pertinency requirement of Rule 803(4). *Id.*

The Supreme Court recently followed principles enumerated in *Hinnant*. *State v. Waddell*, 351 N.C. 413, 527 S.E.2d 644 (2000). In holding expert witness testimony pertaining to sexual abuse inadmissible under Rule 803(4), the court again noted that the record "lacks any evidence that there was a medical treatment motivation on the part of the child declarant or that [the expert] or anyone else explained to the child the medical purpose of the interview or the importance of truthful answers." *Id.* at 418, 527 S.E.2d at 648.

Applying these principles here, the testimony of Nurse Rushing and Drs. Johnson and Sheaffer regarding S's statements was improperly admitted as substantive evidence under Rule 803(4). As in *Hinnant* and *Waddell*, the record is devoid of evidence that S understood she was making the statements to any of the three for medical purposes, or that the medical purpose of the examination and importance of truthful answers were adequately explained to her. Indeed, Nurse Rushing testified that when Watts brought S in for treatment, "[S] really didn't know what was going on. She acted like she didn't know what she was even there for." Moreover, both Drs. Johnson and Sheaffer examined S approximately three months after her initial medical examination, making S's statements even less medically pertinent than those in *Hinnant* elicited two weeks following initial examination.

We are cognizant that the erroneous admission of hearsay does not always amount to prejudicial error requiring a new trial. *See, e.g.*, *Waddell*, 351 N.C. at 419, 527 S.E.2d at 648; *Hinnant*, 351 N.C. at 291, 523 S.E.2d at 672. While the *Waddell* court concluded admission of the expert's hearsay testimony was not prejudicial so as to require a new trial, the Supreme Court qualified the holding by noting that the issue was under a plain error review, and that with several other witnesses' substantive testimony, there was an "abundance of evidence properly presented at trial, particularly defendant's own extensive and detailed admissions. . . ." *Waddell*, 351 N.C. at 421, 527 S.E.2d at 650.

In the present case, however, there was no such abundance of substantive evidence before the court. Indeed, both experts' rendition of the incident according to S was among the most damaging evidence offered by the State. Moreover, Nurse Rushing's hearsay testimony was the only direct evidence of actual penetration. We therefore cannot hold there was no reasonable possibility that a different result would have been reached absent the error, and thus, that the admission of the hearsay testimony was harmless.

However, this holding does not foreclose the possibility that such testimony is admissible as substantive evidence with the proper foundation. As was Justice Lake in *Hinnant*, we too are compelled to emphasize that although the testimony at issue here was not admissible under Rule 803(4), such evidence may be admissible with the proper foundation under the residual hearsay exceptions, Rule 803(24), Rule 804(b)(5), and, we believe, Rule 703 pertaining to expert witness testimony.

Reversed and remanded.

Chief Judge EAGLES and TIMMONS-GOODSON concur.

ALTON D. McNEILL, PLAINTIFF-APPELLANT v. JAMES C. HOLLOWAY, DEFENDANT-APPELLEE

No. COA99-1619

(Filed 19 December 2000)

1. Appeal and Error— preservation of issues—punitive damages

Plaintiff properly preserved the punitive damages issue for appellate review in an automobile collision negligence case by assigning error to the trial court's refusal to submit the issue of punitive damages to the jury because it encompasses the trial court's grant during the jury charge conference of defendant's motion for a directed verdict on the issue of punitive damages.

2. Motor Vehicles— driving while intoxicated—accident—punitive damages—no showing of willful or wanton conduct

The trial court did not err in an automobile collision negligence case by granting defendant's motion for a directed verdict on the issue of punitive damages even though plaintiff submitted evidence of defendant's driving while intoxicated, because: (1) while the intentional act of driving while impaired in violation of the impaired driving statute is sufficiently wanton to warrant punitive damages, allegations of intoxication alone are not a sufficient basis to permit a punitive damages claim to be submitted to a jury; and (2) plaintiff failed to carry his burden of proof that intoxication of defendant while driving rose to the level of willful

or wanton conduct since the only evidence of wanton conduct as a result of driving while intoxicated comes from the testimony of plaintiff and of the officer investigating the collision that both smelled alcohol on the breath of defendant at the scene of the collision, plaintiff described some slurring of speech, and the officer testified he gave field sobriety tests but does not remember which tests that defendant performed or how well defendant had actually performed them.

Appeal by plaintiff from judgment entered 10 September 1999 by Judge James F. Ammons, Jr. in Harnett County Superior Court. Heard in the Court of Appeals 8 November 2000.

Brent Adams & Associates, by Brenton D. Adams, for plaintiff-appellant.

Smith Law Offices, P.C., by Christopher N. Heiskell, for defendant-appellee.

McGEE, Judge.

Plaintiff appeals the refusal of the trial court to submit to the jury an issue of punitive damages in an automobile collision negligence case. For the reasons stated below, we affirm the judgment of the trial court.

Plaintiff's automobile and defendant's pickup truck collided at the intersection of West Trade Street and Montgomery Avenue in Charlotte, North Carolina at 8:50 p.m. on the rainy night of 17 February 1995. Plaintiff filed this action seeking compensatory damages and punitive damages on 23 January 1998.

This case was tried before a jury on 9 and 10 August 1999. Plaintiff testified at trial that immediately after the collision, defendant approached plaintiff's vehicle. Plaintiff rolled down his window and spoke with defendant. Plaintiff stated that he smelled alcohol on defendant's breath and noticed that defendant's speech was slurred.

Plaintiff also introduced evidence at trial in the form of portions of a deposition of the police officer who investigated the collision on the night of 17 February 1995. The officer testified that after reviewing the accident report he prepared following the collision, the only specific recollections he had of defendant were that defendant had alcohol on his breath, and that defendant was cooperative and per-

formed certain psycho-physical tests used to gauge his level of intoxication. However, the officer did not recall which tests defendant performed, nor the results of those tests except that they "would have been performed unsatisfactorily." The officer testified that he formed an opinion that defendant "consumed a sufficient amount of alcohol that his physical abilities may be appreciably impaired[,]" and that his opinion was based on "[t]he odor of alcohol on [defendant's] breath, and . . . most likely with his psycho physical tests."

The trial court granted plaintiff's motion for a directed verdict on the issue of negligence and granted defendant's motion for a directed verdict on the issue of punitive damages. The jury awarded plaintiff $1,000.00 in compensation for his injuries. Plaintiff appeals the trial court's directed verdict on the issue of punitive damages. Plaintiff argues that he presented sufficient evidence of defendant's wanton behavior due to defendant's driving while intoxicated to require the trial court to submit an issue of punitive damages to the jury.

[1] Defendant asserts that plaintiff failed to properly preserve the punitive damages issue for appellate review in that plaintiff did not assign error to the trial court's granting of defendant's motion for directed verdict. The record shows that plaintiff instead assigned error to the trial court's refusal to submit an issue of punitive damages to the jury. Defendant argues that once the motion for a directed verdict was granted, submission to the jury of the issue of punitive damages became moot.

We disagree with defendant's argument and find that plaintiff adequately preserved the issue of punitive damages for review. A motion for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a) "presents the question of whether plaintiff's evidence is sufficient to submit to the jury." *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 665, 391 S.E.2d 831, 832 (1990) (citations omitted). We therefore find that plaintiff's assignment of error to the trial court's refusal to submit an issue of punitive damages to the jury encompasses the trial court's grant, during the jury charge conference, of defendant's motion for a directed verdict on the issue of punitive damages.

[2] Our Court found no error in a trial court's refusal to submit an issue of punitive damages to the jury in *Brake v. Harper*, 8 N.C. App. 327, 174 S.E.2d 74 (1970), where the only evidence of wanton conduct due to driving while intoxicated came in the form of testimony from

the highway patrolman who investigated the automobile collision. The patrolman testified that, in his opinion, the defendant was under the influence of alcohol when he talked to him at the scene of the collision. However, the record was silent as to the basis for the patrolman's opinion, and the patrolman could not remember the results of the breathalyzer test he administered to the defendant other than that it was under .10.

While the "intentional act of driving while impaired in violation of [the impaired driving statute] is sufficiently *wanton*" to warrant punitive damages, *Ivey v. Rose*, 94 N.C. App. 773, 776, 381 S.E.2d 476, 478 (1989) (emphasis in original), "allegations of intoxication *alone* are not a sufficient basis to permit a punitive damages claim to be submitted to a jury." *Howard v. Parker*, 95 N.C. App. 361, 365, 382 S.E.2d 808, 810 (1989) (emphasis added). In *Ivey*, we found error in the trial court's refusal to submit an issue of punitive damages to the jury where the defendant testified that she had been drinking all day, up until about two hours before the accident. The police officer who investigated the accident testified in detail as to how the defendant failed the four psycho-physical sobriety tests he gave her and described the defendant, saying:

> Her face was flushed, eyes were glassy, and she had an odor of alcohol on her breath when I was talking to her, wasn't steady on her feet. . . . In my opinion she was impaired, so I put her in my vehicle and charged her with driving while impaired.

Ivey, 94 N.C. App. at 775-76, 381 S.E.2d at 478. Another officer testified that he administered a breathalyzer test to the defendant, and that the lowest reading was .18, well in excess of the legal limit of .10. *Id.* at 776, 381 S.E.2d at 478.

In *Howard*, on the other hand, we affirmed the trial court's summary judgment removing the issue of punitive damages from the jury. In *Howard*, the defendant refused to take a breath analysis test after the accident and pleaded guilty to driving while impaired under the mistaken belief that he was pleading guilty to refusing to take the breath analysis test. *Howard*, 95 N.C. App. at 362, 382 S.E.2d at 809.

> Here the evidence does not support a finding of wantonness: there is no breathalyzer reading, though defendant pleaded guilty to driving while impaired and admitted having consumed three beers earlier in the day. The complaint alleging impairment is not

> verified; there are no affidavits or depositions of witnesses to the defendant's impairment.

Id. at 366, 382 S.E.2d at 811.

In *Boyd v. L. G. DeWitt Trucking Co.*, 103 N.C. App. 396, 405 S.E.2d 914 (1991), we affirmed the trial court's denial of the defendant's motion for a directed verdict on the plaintiff's claim for punitive damages. Our Court found that the plaintiff's evidence was "sufficient to support a jury finding that [the defendant's] conduct 'manifested a reckless indifference to the rights of others.' " *Id.* at 402, 405 S.E.2d at 919.

> The plaintiff's evidence tended to show that [the defendant] was intoxicated at the time of the accident, that he was traveling in excess of the posted speed limit, with a fully-loaded [tractor-trailer] rig and with an unauthorized female passenger, and that no attempt was made to avoid the accident prior to its occurrence. In addition, even though [the defendant] was traveling on a straight, if somewhat hilly road, his own testimony reveals that he did not see the decedent's vehicle until an instant before the collision.

Id. at 402, 405 S.E.2d at 918-19. The evidence of the defendant's intoxication included: (1) an eyewitness who testified that he smelled alcohol on the defendant following the accident; (2) an emergency medical technician who testified that he smelled an odor of alcohol on the defendant as he was helping the defendant into an ambulance; (3) a nurse who happened upon the scene of the accident who testified that she smelled alcohol on the defendant's person and that he looked as if "he might be going to fall down any minute[,]" *id.* at 402-03, 405 S.E.2d at 919; and (4) a service station attendant who testified that he saw the defendant drinking a beer less than an hour before the accident, *id.* at 403, 405 S.E.2d at 919, that he had been slapped by the defendant during an ensuing argument, and that "in his opinion, [the defendant] should not have been driving that night, due to his intoxication." *Id.* at 399, 405 S.E.2d at 917.

In the case before us, the only evidence of wanton conduct due to driving while intoxicated comes from the testimony of plaintiff and of the officer investigating the collision. Both plaintiff and the officer testified that they smelled alcohol on the breath of defendant at the scene of the collision. Plaintiff further described some slurring of defendant's speech. The officer testified that he formed an opinion

that defendant's physical abilities "*may* be appreciably impaired" (emphasis added), and that his opinion was based on the odor of alcohol on defendant's breath and the results of certain psycho-physical tests performed by defendant, but that he could not remember what tests were performed or how well defendant had actually performed them.

In granting defendant's motion for a directed verdict on the issue of punitive damages, the trial court found that

> the plaintiff has produced evidence from which the jury could find that the defendant had a moderate odor of alcohol about his breath immediately after the accident, that he was given field sobriety tests by the officer. The officer does not remember which tests or how he performed, except that he assumes that he would have failed them. That other than the odor of alcohol, and the "failure," quote-unquote of the psycho-physical tests, he has no recollection of—in regard to the defendant's state of sobriety, and in fact says that, "In my opinion he had consumed a sufficient amount of alcohol that his physical abilities may be appreciably impaired." That there is no evidence of any conviction of the defendant. That there is no evidence of any Breathalyzer. That there is no evidence as to how much alcohol was consumed by the defendant. That there are no affidavits from any witnesses or testimony from any witnesses about the defendant's impairment other than opinion of the officer. That there was no evidence of any reckless and wanton driving, other than edging out at a stop sign too far into traffic and being hit by the plaintiff. There is no evidence as to the defendant's physical characteristics such as his face or eyes or being unsteady on his feet.

Under N.C. Gen. Stat. § 1D-15, enacted in 1995, punitive damages may now be awarded only if a plaintiff can prove willful or wanton conduct (or fraud or malice) by clear and convincing evidence. We hold that plaintiff failed to carry his burden of proof that any intoxication of defendant while driving rose to the level of willful or wanton conduct. The trial court did not err in granting defendant's motion for a directed verdict on the issue of punitive damages and the judgment of the trial court is affirmed.

Affirmed.

Judges LEWIS and HORTON concur.

STATE OF NORTH CAROLINA v. STEVEN LARON PEOPLES, DEFENDANT

No. COA99-1318

(Filed 19 December 2000)

1. Homicide— attempted murder and assault—intent to kill—sufficiency of evidence

There was sufficient evidence to deny defendant's motion to dismiss charges of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury where defendant contended that there was insufficient evidence of intent to kill but the evidence was that defendant and the victim had been involved in an altercation only an hour or two earlier in which the victim had hit defendant in the face; defendant pulled up next to the victim, got out of the car, and pointed a gun at the victim; defendant used a gun to assault the victim; he fired and missed, paused, and then fired again; his second shot hit the victim; he was only a few feet from the victim when he fired; and, even after the second shot, defendant continued to approach the victim with an angry look and only retreated at the urging of his aunt.

2. Appeal and Error— assignment of error—multiple issues—violation of appellate rules

Raising two separate issues in a single assignment of error violated N.C. R. App. P. 10(c)(1).

3. Constitutional Law— double jeopardy—assault with intent to kill—attempted murder

There was no double jeopardy in the imposition of separate sentences for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The assault conviction requires proof of the use of a deadly weapon as well as proof of a serious injury, elements not required for attempted first-degree murder, and attempted first-degree murder requires premeditation and deliberation, which goes beyond an intent to kill.

4. Criminal Law— defendant's argument—possible sentences—refusal to permit—no prejudice

Although defense counsel in a prosecution for assault with a deadly weapon with intent to kill and attempted murder should have been allowed to advise the jury of possible sentences, the

error did not have an impact on the jury's determination where jurors were presented with conflicting versions of events, in one of which defendant was simply not at the scene.

Appeal by defendant from judgments entered 11 May 1999 by Judge James E. Ragan, III in Hertford County Superior Court. Heard in the Court of Appeals 9 October 2000.

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

Charles A. Moore, for defendant-appellant.

FULLER, Judge.

Defendant appeals judgments entered upon convictions by a jury of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant contends the trial court erred in denying his motions to dismiss both charges, and in sustaining the State's objection to defendant's attempt to inform the jury of the punishment for the offenses charged. We find no error.

The State's evidence at trial tended to show the following. On 18 February 1999, Anthony D. Eley arrived at his mobile home in Murfreesboro, North Carolina at approximately 4:30 p.m. Eley saw defendant and two other individuals outside of his home, and he believed they were selling drugs. Eley had asked defendant not to sell drugs in front of his home on at least five prior occasions. After a brief verbal confrontation, during which defendant refused to leave, Eley hit defendant in the face. Defendant fell to his knees and then he and the other two individuals left. Later that evening Eley went to the nearby home of his friend Kalvin Clark. Eley and Clark agreed to walk over to Eley's mother's house. Eley left Clark's house first at approximately 6:40 p.m., with Clark following close behind. As Eley reached the bottom of a hill, he saw a car slowly approaching until it pulled up next to him. Eley looked in the car from no more than a foot away and saw defendant in the passenger's seat and defendant's aunt, Joyce Peoples, driving the car. Eley crossed to the other side of the street, away from defendant. Eley heard someone say, "Hey, y'all dog," and turned around to see defendant standing with the car door open, pointing a gun directly at Eley. Defendant shot once and missed. Eley dropped to the ground, then got up and began to run. Defendant fired again from about fifteen feet away, hitting Eley in the lower left leg

and knocking him down. Defendant started coming toward Eley with an angry look as the two were face-to-face. Eley started yelling for defendant to stop. At that point, defendant's aunt grabbed defendant's arm and urged him to leave. They then got back into the car and left.

Clark's testimony indicated that he had left shortly after Eley, and was about ten to twenty feet away as he witnessed the entire incident. Clark's testimony about the details of the incident substantially corroborates Eley's testimony.

Defendant testified at trial that between 4:00 and 5:00 p.m. he was standing with two other individuals in the mobile home park, but he was not selling drugs. Eley came up to defendant and hit him without a word or warning. Defendant did not retaliate because Eley had others with him. Instead, defendant walked away. Defendant then went to his girlfriend's house and did not see Eley again that night.

Defendant was charged with attempted first degree murder pursuant to N.C.G.S. § 14-17 (1999). The elements of this offense are: (1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the existence of malice, premeditation, and deliberation accompanying the act; and (4) a failure to complete the intended killing. *See State v. Cozart*, 131 N.C. App. 199, 202-03, 505 S.E.2d 906, 909 (1998), *disc. review denied*, 350 N.C. 311, — S.E.2d — (1999). Defendant was also charged with assault with a deadly weapon with intent to kill inflicting serious injury pursuant to N.C.G.S. § 14-32(a) (1999). The essential elements of this offense are: (1) an assault; (2) the use of a deadly weapon; (3) an intent to kill; and (4) the infliction of serious injury not resulting in death. *See State v. James*, 321 N.C. 676, 687, 365 S.E.2d 579, 586 (1988). After the State presented its evidence, and again at the conclusion of all the evidence, defendant moved to dismiss both charges. The trial court denied the motions and submitted both charges to the jury. The jury found defendant guilty of both offenses and defendant was sentenced accordingly.

[1] In defendant's first argument he contends the trial court erred in denying his motion to dismiss both charges and in submitting the attempted first degree murder charge to the jury. Defendant specifically argues the evidence was insufficient to establish his intent to kill Eley, an element required for both offenses. In order to withstand a motion to dismiss, each element of the crime charged must be supported by "substantial evidence," which is that amount of evidence

that a reasonable mind might accept as adequate to support a conclusion. *See State v. Grigsby*, 351 N.C. 454, 456, 526 S.E.2d 460, 462 (2000). "[I]t is well settled that the evidence is to be considered in the light most favorable to the State and that the State is entitled to every reasonable inference to be drawn therefrom." *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994).

In the context of G.S. § 14-32(a), an intent to kill may be inferred from "the nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances." *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982). In the context of attempted first degree murder, an intent to kill and the existence of malice, premeditation and deliberation may be inferred from the conduct and statements of the defendant before and after the incident, ill-will or previous difficulty between the parties, and evidence regarding the manner of the attempted killing. *See State v. Coplen*, 138 N.C. App. 48, 59, 530 S.E.2d 313, 321 (2000).

Considered in the light most favorable to the State, the following facts reasonably support the inference that defendant intended to kill Eley and that he acted with malice, premeditation and deliberation: that Eley and defendant had been involved in an altercation only an hour or two earlier in which Eley had hit defendant in the face; that defendant proceeded slowly in pulling up next to Eley, getting out of the car, and pointing a gun at Eley; that defendant used a gun to assault Eley; that after defendant fired and missed, he paused and then fired again; that defendant's second shot did, in fact, hit Eley; that defendant shot Eley from only a few feet away; that even after the second shot, defendant continued to approach Eley with an angry look on his face, and only retreated upon the urging of his aunt. *See State v. Cain*, 79 N.C. App. 35, 47, 338 S.E.2d 898, 905 (inferring intent to kill from defendant's use of a revolver and defendant's firing numerous times at victim), *disc. review denied*, 316 N.C. 380, 342 S.E.2d 899 (1986).

Furthermore, in the context of attempted first degree murder, the intentional use of a deadly weapon itself gives rise to a presumption that the act was undertaken with malice. *State v. Judge*, 308 N.C. 658, 661, 303 S.E.2d 817, 820 (1983). We believe the State presented evidence from which a reasonable mind could have concluded that defendant acted with an intent to kill, and with malice, premeditation, and deliberation. Thus, the motions to dismiss were properly denied, and both charges were properly submitted to the jury. This assignment of error is overruled.

[2] Defendant's first argument cites six assignments of error, five of which pertain to defendant's motions to dismiss as discussed above. Defendant's first argument also cites assignment of error 11 which, as set forth in the record, states: "The denial of defendant's motion to set aside the jury's verdict and to arrest the verdict on attempted murder." This single assignment of error, in fact, addresses two separate issues: first, whether the trial court erred in denying defendant's motion to set aside the verdict; and second, whether the imposition of separate sentences for the two offenses charged raises a double jeopardy concern. This assignment of error thus violates N.C.R. App. P. 10(c)(1), which provides that "[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law." Defendant has also violated N.C.R. App. P. 28(b)(5) by failing to state any argument or cite any authority to support this assignment of error.

[3] However, it appears from the transcript that the double jeopardy issue was the source of some considerable discussion during the charge conference, and that it was given significant consideration by the court and counsel. Therefore, in our discretion, we address whether the imposition of separate sentences for the offenses of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury raise a double jeopardy concern. *See* N.C.R. App. P. 2.

During the charge conference, the trial court discussed its concern that all of the elements of attempted first degree murder are also required for a violation of G.S. § 14-32(a), and that, as a result, the imposition of a separate sentence for each offense would violate defendant's constitutional rights against twice being punished for the same criminal act. *See State v. Woodberry*, 126 N.C. App. 78, 485 S.E.2d 59 (1997). Ultimately, the trial court was persuaded that separate sentences for the two offenses would not constitute double jeopardy and, therefore, instructed the jury on both charges. After the jury returned verdicts of guilty on both charges, defendant moved to arrest judgment as to either one of the charges, which motion was denied by the trial court.

Conviction for two separate offenses stemming from one incident is not a violation of a defendant's constitutional rights where each offense requires proof of at least one element that the other does not. *See State v. Hill*, 287 N.C. 207, 217, 214 S.E.2d 67, 74 (1975). Here, G.S. § 14-32(a) requires proof of the use of a deadly weapon, as well as proof of serious injury, elements not required for attempted first

degree murder. Attempted first degree murder requires premeditation and deliberation, elements not required by G.S. § 14-32(a). Furthermore, the elements of premeditation and deliberation are not identical in substance to the intent to kill required by G.S. § 14-32(a). Although an intent to kill is "a necessary constituent of the elements of premeditation and deliberation in first degree murder," *State v. Gordon*, 241 N.C. 356, 358, 85 S.E.2d 322, 324 (1955), premeditation and deliberation go beyond merely an intent to kill. In the context of attempted first degree murder, these elements require evidence that the defendant formed the intent to kill (1) at some period of time, however short, before the attempted killing, and (2) "in a cool state of blood rather than under the influence of a violent passion suddenly aroused by sufficient provocation." *State v. Harshaw*, 138 N.C. App. 657, 659, 532 S.E.2d 224, 226, *disc. review denied*, 352 N.C. 594, — S.E.2d — (2000) (citation omitted). Therefore, because each offense requires proof of at least one element that the other does not, the trial court did not err in ordering a separate sentence for each of the two offenses charged.

[4] In his second and final argument, defendant contends the trial court erred in sustaining the State's objection to defendant's attempt in his closing argument to inform the jury of the punishment for the offenses charged. "In jury trials the whole case as well of law as of fact may be argued to the jury." N.C.G.S. § 7A-97 (1999). G.S. § 7A-97 secures to a defendant the right to have the jury informed of the punishment prescribed for the offenses for which the defendant is being tried. *See State v. Walters*, 294 N.C. 311, 313, 240 S.E.2d 628, 630 (1978). "In serious felony cases, at least, such information serves the salutary purpose of impressing upon the jury the gravity of its duty. It is proper for defendant to advise the jury of the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration." *State v. McMorris*, 290 N.C. 286, 288, 225 S.E.2d 553, 554 (1976).

In the case *sub judice*, the State concedes that defendant was improperly denied this right at trial. However, the State argues that the error was merely technical and does not amount to a prejudicial error warranting a new trial. The issue, then, is whether there is a reasonable possibility that a different result would have been reached by the jury had the error in question not been committed. *See* N.C.G.S. § 15A-1443(a) (1999); *State v. Cabe*, 131 N.C. App. 310, 315, 506 S.E.2d 749, 752 (1998). "Whether an error is to be considered prejudicial or

harmless must be determined in the context of the entire record." *State v. Lewis*, 274 N.C. 438, 452, 164 S.E.2d 177, 186 (1968).

In the instant case, the jury was provided two different versions of the events. Eley's version was fully corroborated by Clark's eyewitness testimony. In addition, Deputy Michael Stephenson, who arrived at the scene shortly after the shooting, testified that Eley stated that he had been shot by defendant. Defendant's version, that he simply was not there, was also presented to the jury, as well as testimony from a treating emergency medical technician that he could not recall whether Eley identified the assailant by name while receiving on-site first aid. Although defense counsel should have been allowed to advise the jury of the possible sentences, we fail to see how such error had any impact on the jury's determination. This assignment of error is overruled.

No Error.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

STAN BRATTON, PLAINTIFF v. KEVIN OLIVER, JOHN W. HARPER AND SOUTH CAROLINA INSURANCE COMPANY, D/B/A THE SEIBELS BRUCE INSURANCE COMPANIES, DEFENDANTS

No. COA99-1202

(Filed 19 December 2000)

Insurance— boat—liability—borrowed for commercial use—exclusion

Summary judgment was properly granted for defendant-insurance company in a declaratory judgment action to determine coverage for a parasailing accident where a default judgment had been obtained against the driver of the boat, Oliver, who ran a parasailing business and who had borrowed the insured boat because his was out of service. The policy excluded coverage while the boat was being used for a fee or to carry persons or property for a fee; the record demonstrates that the owner knowingly allowed the boat to be borrowed for a commercial purpose and that Oliver used the boat to operate a business for profit. The record does not reveal precisely who would

receive what portion of the profits of the business, but such precision is not required; the policy's focus is on the commercial use of the boat for a fee.

Appeal by plaintiff from order and judgment entered 7 June 1999 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 August 2000.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by Rex C. Morgan, for plaintiff-appellant.

Golding Holden Cosper Pope and Baker, L.L.P., by Harvey L. Cosper, Jr., and Tricia Y. Morvan, for defendant-appellee Seibels Bruce.

EDMUNDS, Judge.

Plaintiff appeals the trial court's grant of summary judgment in favor of defendant South Carolina Insurance Company, d/b/a The Seibels Bruce Insurance Companies (Seibels Bruce). We affirm.

Plaintiff Stan Bratton was injured on 4 July 1994 in a parasailing accident at Atlantic Beach, North Carolina. He was being towed by a boat owned by defendant John Harper (Harper) and driven by defendant Kevin Oliver (Oliver). Harper was the named insured in a policy of insurance on the boat issued by Seibels Bruce.

Because this case was resolved by the trial court's granting of Seibels Bruce's summary judgment motion, we obtain our statement of facts from the depositions and other filings. Plaintiff and Harper knew that at one time Oliver owned a boat and operated a business called Sky-High Parasailing. Harper had seen pamphlets for the business, and plaintiff recalled that Oliver had posted an advertisement visible to those crossing the intercoastal waterway to Atlantic Beach. Harper believed Oliver charged customers $30.00 to $35.00 for a fifteen-minute parasail ride. Plaintiff, who often helped Oliver, stated that on some days they would take fifteen to thirty people parasailing and that Oliver typically charged $30.00 for a fifteen-minute ride. Both plaintiff and Harper knew that Oliver required his parasailing customers to sign a release.

On 3 July 1994, Oliver approached Harper at Atlantic Beach, mentioned that his boat was out of service, and asked if he could use Harper's boat to pull parasailers. Harper consented. Although oil and

gas were never mentioned, Harper understood that Oliver would return the boat with the oil and gas replenished. In addition, while Harper did not recall discussing any specific compensation he would receive from Oliver in exchange for letting him use the boat, he did remember that he was "hoping to make some money out of it."

The next day, Oliver, accompanied by plaintiff, met with Harper to borrow Harper's boat again. In his deposition and complaint, plaintiff recounted that Harper stated he (Harper) would receive half of any money Oliver made, and Oliver would ensure that Harper's boat was checked for oil and filled with gas. Harper again loaned Oliver his boat to take people parasailing.

Once the boat and equipment were ready, plaintiff "agreed to test the parasailing apparatus by strapping on the parasail and taking a test flight with defendant Oliver driving the launch boat." Plaintiff was pulled approximately thirty to forty feet in the air before the boat unexpectedly decelerated. Plaintiff fell into shallow surf and sustained severe injuries to his left foot.

Plaintiff filed suit on 24 June 1996 against Oliver, driver of the boat, and Harper, owner of the boat. When Oliver failed to appear, default judgment was entered against him on 4 August 1997. Final judgment was entered against Oliver on 25 September 1997.

On 13 October 1997, plaintiff filed a complaint for declaratory judgment against Oliver, Harper, and Seibels Bruce, asking the trial court to find that the policy Seibels Bruce issued to Harper provided coverage for Oliver in connection with the default judgment obtained by plaintiff. Seibels Bruce denied coverage based on exclusions contained in the policy. The policy reads in pertinent part:

> We do not provide liability protection for:
>
> (1) damages for bodily injury or property damage arising out of the ownership, maintenance or use of property
>
> (a) while it is being used:
>
> . . . .
>
> (iii) for a fee or to carry persons or property for a fee.

Seibels Bruce moved for summary judgment, and plaintiff filed a cross-motion for summary judgment. On 7 June 1999, at the conclusion of a hearing on the motions, the trial court granted Seibels

Bruce's motion for summary judgment and denied plaintiff's motion. Plaintiff appeals.

"Summary judgment may be granted in a declaratory judgment action," *N.C. Farm Bureau Mut. Ins. Co. v. Briley*, 127 N.C. App. 442, 444, 491 S.E.2d 656, 657 (1997) (citation omitted), and is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law," N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). We review the record in the light most favorable to the nonmoving party. *See Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). "The meaning of specific language used in an insurance policy is a question of law," *Briley*, 127 N.C. App. at 445, 491 S.E.2d at 658 (citation omitted), and "[a] trial court's grant of summary judgment is fully reviewable by this Court because the trial court rules only on questions of law," *Metropolitan Prop. and Casualty Ins. Co. v. Lindquist*, 120 N.C. App. 847, 849, 463 S.E.2d 574, 575 (1995) (citation omitted).

The trial court was not required to, and did not, make findings of fact or conclusions of law in granting Seibels Bruce's summary judgment motion. *See Mosley v. Finance Co.*, 36 N.C. App. 109, 243 S.E.2d 145 (1978). However, because the underlying action is based upon the meaning of exclusions quoted above in the policy covering Harper's boat, we will review that policy language as applied to the facts of this case.

The pertinent exclusion precludes coverage for the insured "while [the boat] is being used . . . for a fee or to carry persons or property for a fee." The policy does not contain a definition of "fee," and our research reveals no North Carolina cases interpreting a similar clause in an insurance policy. "In the absence of such definition, nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise." *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (citation omitted).

Plaintiff argues that "[t]here is no evidence in the present action to support the contention of Seibels Bruce that the boat was being used by Kevin Oliver for a 'fee,' as that term is ordinarily understood." However, we note that in his complaint in the underlying suit for damages, plaintiff alleged:

> On or about July 4, 1994, defendant Oliver was engaged in offering parasailing rides to the public for a fee at Atlantic Beach, North Carolina.
>
> . . . .
>
> . . . Upon information and belief, defendant Harper had agreed to allow the defendant Oliver to borrow the boat on July 4, 1994 to launch parasailers in return for the defendant Oliver agreeing to pay to the defendant Harper one-half of any sums received from parasail riders that day.

Plaintiff attached a copy of that complaint to the instant complaint for declaratory judgment. He now seeks a declaration by the trial court that the default judgment obtained against Oliver on the basis of the underlying complaint is covered by the insurance policy issued by Seibels Bruce to Harper. Because the foundation of the instant declaratory action is the original complaint for damages, and because plaintiff has not changed the theory of the underlying action, the allegations in that complaint are controlling. "A party is bound by his pleadings and, unless withdrawn, amended or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings." *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964) (citations omitted). Accordingly, plaintiff may not deny that Oliver was using the boat for a fee.

Moreover, plaintiff admitted that he was working with Oliver in his parasail business when he was injured and stated that while Oliver would drum up interest in parasailing by taking someone aloft so that others on the beach could see, it was plaintiff's idea that demonstrating the parasail might attract interest on the day he was injured. Evidence was presented to support a conclusion that plaintiff was injured while testing the parasailing equipment. Oliver's sole purpose in borrowing the boat on 4 July 1994 was to offer rides to the paying public, and both Harper and plaintiff knew that Oliver customarily charged approximately $30.00 for a fifteen-minute ride.

Although no member of the public was paying for a parasail ride or was even in the boat at the time of plaintiff's injury, we do not deem that factor to be decisive; testing equipment and demonstrating the business activity were aspects of using the boat for its ultimate fee-generating purpose. In *Farmers Ins. Exchange v. Knopp*, 58 Cal.

Rptr. 2d 331 (Cal. Ct. App. 1996), a California Court of Appeals reviewed analogous facts to reach a similar result. In that case, the plaintiff was driving a vehicle for his employer when he collided with a limousine. At the time of the accident, the plaintiff had discharged his passenger and was returning to his employer's place of business. The plaintiff's personal auto insurance policy provided coverage for damages arising out of his use of non-owned vehicles, but excluded coverage for accidents arising out of the use " 'of a vehicle while used to carry persons or property for a charge.' " *Id.* at 333. The court held that this phrase included " 'driving a vehicle while it is employed in accomplishing the assignment of carrying persons or property for a charge.' " *Id.* at 334. Because returning the vehicle to the plaintiff's employer was a "phase[] [of] the process of carrying a person for a charge," the exclusion applied. *Id.*

Plaintiff cites cases where courts have found the use of the word "fee" ambiguous. Several of these cases have examined the role of a driver delivering pizza under circumstances where it was debatable whether the driver's wages should be considered a fee within the meaning of the policy. *See, e.g., U.S. Fid. & Guar. v. Lightning Rod,* 687 N.E.2d 717 (Ohio 1997); *Progressive Cas. Ins. Co. v. Metcalf,* 501 N.W.2d 690 (Minn. Ct. App. 1993). However, the record in the case at bar demonstrates that Harper knowingly allowed Oliver to borrow his boat for a commercial purpose, and that Oliver used the boat to operate a business for profit, charging customers for the privilege of parasailing. Interpreting such payment as a "fee" is consistent with the sense in which it is used in ordinary speech. *See Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522. Although the record does not reveal precisely who would receive what portion of the profits of the business, such precision is not required; the policy's focus is on the commercial use of the boat for a fee, not the identity of the recipient of the fee. Accordingly, we agree with the trial court that this is an unambiguous use of the boat "for a fee," and summary judgment was properly granted in favor of defendant.

Affirmed.

Judges GREENE and SMITH concur.

HOLZ-HER U.S., INC., PLAINTIFF v. UNITED STATED FIDELITY AND GUARANTY COMPANY, DEFENDANT

No. COA99-1602

(Filed 19 December 2000)

Insurance— commercial general liability coverage—no duty to defend in lawsuit—no "occurrence"

Defendant insurer, which provided commercial general liability insurance coverage for plaintiff and agreed to defend plaintiff in any litigation in which an occurrence and either bodily injury or property damage are allegedly involved, does not have a duty to defend plaintiff in a lawsuit brought against plaintiff in Texas for fraudulent misrepresentations, breach of contract, and deceptive trade practices stemming from an alleged leasing agreement between plaintiff and a third party, because: (1) the ultimate focus is on the injury and whether it was expected or intended, rather than upon the act and whether the act was intended; (2) the insurance policy defined an "occurrence" as an accident, including continued or repeated exposure to substantially the same general harmful conditions; and (3) the underlying Texas lawsuit did not involve an "occurrence" since plaintiff's refusal to lease equipment to a newly-formed company after already allegedly agreeing to do so was substantially certain to cause delays and other consequential business injuries.

Appeal by plaintiff from order entered 12 October 1999 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 November 2000.

Parker, Poe, Adams & Bernstein, L.L.P., by Josephine H. Hicks and John E. Grupp, for plaintiff-appellant.

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

LEWIS, Judge.

This appeal involves the issue of whether defendant United States Fidelity & Guaranty Company ("USF&G") had a duty to defend plaintiff Holz-Her U.S., Inc. ("Holz-Her") in a lawsuit brought against Holz-Her in Texas. We conclude that defendant had no such duty.

On 14 February 1996, South Bay Industries ("South Bay") and Ralph Durden filed a complaint against, among others, Holz-Her for fraudulent misrepresentations, breach of contract, and deceptive trade practices stemming from an alleged leasing agreement between South Bay and Holz-Her. At the time of the suit, USF&G provided commercial general liability insurance coverage for Holz-Her. Under the terms of the insurance contract, USF&G agreed to defend Holz-Her in any litigation in which Holz-Her was alleged to have caused "bodily injury" or "property damage" as the result of an "occurrence." USF&G refused to defend Holz-Her in the suit, claiming that the Texas lawsuit involved neither an "occurrence" nor "bodily injury" or "property damage." Holz-Her incurred $213,422 in legal expenses defending the suit and eventually settled with South Bay for $190,000. Holz-Her thereafter instituted this cause of action to recover $403,422 (the legal expenses plus the settlement cost) from USF&G for its refusal to defend in the Texas lawsuit. The trial court granted summary judgment in favor of USF&G, and Holz-Her now appeals.

In determining whether an insurer has a duty to defend the underlying lawsuit, our courts employ the so-called "comparison test." *Smith v. Nationwide Mut. Fire Ins. Co.*, 116 N.C. App. 134, 135, 446 S.E.2d 877, 878 (1994). That test requires us to read the pleadings in the underlying suit side-by-side with the insurance policy to determine whether the alleged injuries are covered or excluded. *Id.* The duty to defend is thus measured by the facts alleged in the pleadings. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986).

> When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

Id. The ultimate focus, then, is on the facts that are pled, not how the claims are characterized. *See, e.g., Eubanks v. State Farm Fire and Casualty Co.*, 126 N.C. App. 483, 488-89, 485 S.E.2d 870, 873 (refusing to distinguish between claims for intentional infliction of emotional distress and negligent infliction of emotional distress in analyzing a duty to defend provision because the same alleged facts were used to

support both claims), *disc. review denied*, 347 N.C. 265, 493 S.E.2d 452 (1997).

As stated previously, the insurance policy here obligated USF&G to defend Holz-Her in any suit in which it was alleged to have caused "bodily injury" or "property damage" as the result of an "occurrence." Thus, USF&G was only obligated to defend suits in which (1) an "occurrence" is allegedly involved *and* (2) either "bodily injury" or "property damage" is allegedly involved. We only address the issue of "occurrence" as described in the policy as neither "bodily injury" nor "property damage" are relevant in this case.

Under the insurance policy, an "occurrence" is defined as "an accident, including continued or repeated exposure to substantially the same general harmful conditions." Although "accident" is not further defined in the policy, that term is nontechnical in nature; thus it will be given the same meaning it usually receives in ordinary speech. *Waste Management*, 315 N.C. at 694, 340 S.E.2d at 379. According to its ordinary meaning, an accident is " 'an unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence.' " *Waste Management*, 315 N.C. at 694, 340 S.E.2d at 379 (quoting *Tayloe v. Indemnity Co.*, 257 N.C. 626, 627, 127 S.E.2d 238, 239-40 (1962)). Whether injuries are accidental and thus satisfy the definition of an "occurrence" depends upon whether they were expected or intended from the insured's point of view. *Id.* at 696, 340 S.E.2d at 380.

On appeal, the parties have focused upon the alleged *acts* involved in the underlying lawsuit. Specifically, they have focused on whether the acts resulting in the injury were allegedly negligent or intentional. This is an improper focus. The ultimate focus is on the *injury*, i.e., whether it was expected or intended, not upon the act and whether it was intended. *Washington Housing Auth. v. N.C. Housing Authorities*, 130 N.C. App. 279, 285, 502 S.E.2d 626, 630 (1998). Even intentional acts can trigger a duty to defend, so long as the injury was "not intentional or substantially certain to be the result of the intentional act." *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 709, 412 S.E.2d 318, 325 (1992).

With this background in mind, we now look to South Bay's complaint in the underlying lawsuit to determine whether it alleged an occurrence. In particular, it alleged the following. South Bay was a newly-formed company set up to manufacture certain wood compo-

nents for furniture. To get its business under way, it sought to lease certain equipment from Holz-Her needed to manufacture these components. AT&T would provide the necessary financing for the lease. After receiving South Bay's lease application, financial statements, and business plans, Holz-Her agreed that it would lease the equipment upon South Bay's payment of a one percent commitment fee to AT&T. South Bay submitted the one percent fee. In reliance upon Holz-Her's representations, South Bay negotiated further contracts with other companies for the construction of buildings needed to house the leased equipment and borrowed $880,000 as a result. Subsequently, Holz-Her began to impose additional requirements upon South Bay before it would lease the necessary equipment. South Bay tried to accommodate these new demands, but Holz-Her ultimately refused to lease the equipment. As a result, Ralph Durden, South Bay's majority owner, was forced to sell off much of his majority ownership interest in order to pay off the $880,000 loan. Furthermore, South Bay was forced to lease the equipment from elsewhere, causing delays in the start-up of its business.

Based upon these allegations, we hold that the underlying Texas lawsuit did not involve an "occurrence" within the meaning of the insurance policy. The business injuries alleged here were either expected or substantially certain to occur. A refusal to lease equipment to a newly-formed company after already allegedly agreeing to do so, even from the viewpoint of Holz-Her, was substantially certain to cause South Bay delays and other consequential business injuries.

In reaching this result, we find the case of *Henderson v. U.S. Fidelity & Guaranty Co.*, 124 N.C. App. 103, 476 S.E.2d 459 (1996), *aff'd*, 346 N.C. 741, 488 S.E.2d 234 (1997), to be instructive. In that case, the underlying cause of action involved alleged misrepresentations and fraudulent concealment about the existence of water problems on certain property caused by a severely-flooded drainage area. *Id.* at 105, 476 S.E.2d at 460. In holding that the underlying action did not involve an "occurrence," this Court reasoned:

> Notwithstanding Hicks' assertions that he did not intend or anticipate his misrepresentations to injure or damage plaintiffs, such purposeful and intentional acts were so substantially certain to cause injury and damage as to infer an intent to injure as a matter of law. Accordingly, we hold that any bodily injury or property damage sustained by plaintiff as a result of Hicks'

intentional conduct was not caused by an occurrence within the insuring agreements contained in the USF&G and Great American policies.

Id. at 111, 476 S.E.2d at 464. Here, as in *Henderson*, Holz-Her's alleged misrepresentations were substantially certain to cause South Bay the business injuries at issue. We therefore can infer an intent to injure as a matter of law. As a result, no "occurrence" was involved and USF&G had no duty to defend. *See also State Bancorp, Inc. v. United States Fidelity & Guar. Ins. Co.*, 483 S.E.2d 228 (W. Va. 1997) (per curiam) (holding that defendant had no duty to defend in a suit involving the alleged refusal of a financing company to extend $75,000 in credit after initially agreeing to do so because no "occurrence" was involved). We therefore affirm the trial court's entry of summary judgment in favor of USF&G.

Affirmed.

Judges McGEE and HORTON concur.

D. McKINLEY PRICE AND J.L. PRICE AND WIFE, LOU ANN V. PRICE, PLAINTIFFS V. HEZEKIAH DOBSON, JR., AND SQUIRES TIMBER COMPANY, DEFENDANTS

No. COA99-1583

(Filed 19 December 2000)

Appeal and Error— appealability—consent judgment—agreement means no right of appeal

A defendant's appeal from a consent judgment in an action seeking damages for timber wrongfully removed from plaintiffs' property is dismissed because the record shows the parties informed the trial court of their intent to enter into a consent judgment, there is no evidence in the record to show consent was not present at the time of its entry, and therefore the parties are bound by the terms of the consent judgment.

Appeal by defendant Hezekiah Dobson, Jr. from judgment entered 12 July 1999 by Judge Russell J. Lanier, Jr. in Superior Court, Duplin County. Heard in the Court of Appeals 7 November 2000.

E. C. Thompson, III, P.C., by Susan Collins Mikitka, for plaintiffs-appellees.

Lanier & Fountain, by Keith E. Fountain, for defendant-appellant Hezekiah Dobson, Jr.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Lee B. Johnson and Catherine Ross Dunham, for defendant-appellee Squires Timber Company.

WYNN, Judge.

In the fall of 1993, Hezekiah Dobson, Jr. hired Squires Timber Company to cut and remove timber from his land in Duplin County, North Carolina. Mr. Dobson's land bordered land owned by D. McKinley Price, J.L. Price and his wife, Lou Ann V. Price.

In January 1996, the Prices brought an action alleging that Squires Timber, at the direction of Mr. Dobson, removed timber from their property. Mr. Dobson and Squires Timber cross-claimed against one another. The trial court ordered the parties to attend a Mediated Settlement Conference.

At the Mediated Settlement Conference, the Prices and Mr. Dobson entered into an agreement that provided that Mr. Dobson would pay the Prices $12,800 upon execution of a boundary line agreement. After the execution and filing of the Memorandum of Mediated Settlement, a surveyor surveyed the boundary line. Mr. Dobson, however, disagreed with the surveyor's beginning point and refused to execute the boundary line agreement.

The Prices then moved for specific performance of the Mediated Settlement Agreement. Superior Court Judge Jerry Tillet held a hearing on 16 February 1998 and found that the parties had not reached a meeting of the minds about the boundary line. He directed Mr. Dobson's attorney to draft an order denying the Prices' motion for specific performance of the Mediated Settlement Agreement. However, Mr. Dobson's attorney never drafted the order, so Judge Tillet's ruling on the Prices' motion was neither reduced to writing nor filed with the clerk of court. Accordingly, Judge Tillet's ruling on that motion was never entered in accordance with N.C.R. Civ. P. 58.

In April 1999, the case came on for trial before Superior Court Judge Russell J. Lanier, Jr. At the outset of the trial, Squires Timber

moved to enforce the Mediated Settlement Agreement. The trial court heard Squires Timber's motion and allowed the other parties to respond. The court withheld a ruling on the motion until the next morning, giving all parties time to research and present case law about the motion. The next morning, the parties argued as to whether Judge Lanier had authority to rule on the motion. After holding that he did have the authority to rule on the motion, Judge Lanier asked Mr. Dobson if he needed more time to prepare for the hearing on the motion to enforce the Mediated Settlement Agreement. Mr. Dobson's attorney requested a brief recess.

After the recess, the parties informed the trial court that in lieu of a contested hearing on Squires Timber's motion, they had agreed to modify the original settlement. At the request of the parties, Judge Lanier entered an order reflecting the new agreement.

Mr. Dobson now appeals to this Court on two grounds: (1) Squires Timber failed to timely serve its motion and provide him with adequate notice of the hearing, and (2) the trial court was without authority to grant Squires Timber's motion.

Before addressing Mr. Dobson's arguments, we must first address the nature of the trial court's judgment. The record indicates that the trial court entered a *consent judgment* and not an order regarding Squires Timber's motion to enforce the Mediated Settlement Agreement. After Mr. Dobson requested a recess on the second day of the trial, the Prices' attorney told the trial court,

> Your Honor, in—during the recess, rather than revisit the hearing on the enforcement of the mediated settlement agreement, we have amended the terms of that somewhat. All the parties have agreed to that. And we would like Your Honor to enter an order to that effect.

Mr. Dobson's attorney then discussed the particulars of the new agreement with the trial court, explicitly consenting to the new agreement. Indeed, in its judgment, the trial court reiterated the parties' desire to enter into a consent judgment. The judgment provided:

> 8. That in lieu of proceeding with a contested hearing on the issue of enforcement of the Mediated Settlement Agreement in this matter, and to prevent appeals and further litigation, the parties have revised their agreement and have consented that judgment be entered as follows: . . .

The particulars of the new agreement included a determination of the boundary line, the amount of Mr. Dobson's payment to the Prices, the dismissal of the Prices' claim against both defendants, the dismissal of the defendants' cross-claims against each other, and an apportionment of costs.

All of these facts point to the inescapable conclusion that the judgment from which Mr. Dobson seeks to appeal was not an adjudication of Squires Timber's motion to enforce the Mediated Settlement Agreement; rather, he appeals from a consent judgment agreed to by all of the parties. As such, we must address whether Mr. Dobson may appeal from that judgment.

A consent judgment is a contract between the parties entered upon the records of a court of competent jurisdiction with its sanction and approval. *See Milner v. Littlejohn*, 126 N.C. App. 184, 187, 484 S.E.2d 453, 455, *review denied*, 347 N.C. 268, 493 S.E.2d 458 (1997). "The power of a court to sign a consent judgment depends upon the unqualified consent of the parties thereto[.]" *Ledford v. Ledford*, 229 N.C. 373, 376, 49 S.E.2d 794, 796 (1948). "A duly agreed to and entered consent order in a judicial proceeding is a final determination of the rights adjudicated therein and generally is a waiver of a consenting party's right to challenge the adjudication by appealing therefrom." *In the Matter of Williams*, 88 N.C. App. 395, 396, 363 S.E.2d 380, 381 (1988). A judgment is "entered" when it is "reduced to writing, signed by the judge, and filed with the clerk of court." N.C.R. Civ. P. 58. By joining in a consent order, a party waives his right to appeal from the judgment and leaves the case with no unresolved issue to appeal. *See Williams*.

In this case, the parties informed the trial court of their intent to enter into a consent judgment on 12 April 1999, and the trial court entered an order stating the terms of the consent judgment on 12 July 1999. There is no evidence in the record regarding whether the parties consented to the terms of the consent judgment at the time of its entry. Nevertheless, Mr. Dobson has not presented any evidence that he had withdrawn his consent before the entry. Accordingly, because the record shows the parties informed the trial court of their intent to enter into a consent judgment and there is no evidence in the record to show consent was not present at the time of its entry, the parties are bound by the terms of the consent judgment.

In sum, by agreeing to the consent judgment, Mr. Dobson waived his right to appeal the outcome of the case.

Appeal dismissed.

Judges GREENE and FULLER concur.

CYNTHIA STALLINGS, PLAINTIFF v. FOOD LION, INC., DEFENDANT

No. COA99-1592

(Filed 19 December 2000)

1. Civil Procedure— slip and fall—directed verdict granted—procedural error

The trial court's order granting directed verdict in favor of defendant store in a slip and fall case must be reversed based on a procedural error, because: (1) if a defendant offers evidence after making a motion for directed verdict, any subsequent ruling by the trial judge upon defendant's motion for directed verdict must be upon a renewal of the motion by defendant at the close of all evidence, and the judge's ruling must be based upon the evidence of both plaintiff and defendant; and (2) in this case, defendant moved for directed verdict at the close of plaintiff's evidence, the trial court reserved its ruling on the motion and defendant proceeded to offer evidence, and defendant renewed its motion for directed verdict before resting its case and the trial court granted that motion.

2. Premises Liability— slip and fall—directed verdict—negligence—contributory negligence—sufficiency of evidence

The trial court erred in a slip and fall case by granting directed verdict under N.C.G.S. § 1A-1, Rule 50 in favor of defendant store, because: (1) in regard to plaintiff's case of negligence, the record reveals that there are factual questions as to whether defendant properly warned plaintiff about the dangerous condition it had created when it mopped the floor in the produce section; and (2) in regard to defendant's claim of contributory negligence, there was controverted evidence regarding whether plaintiff actually saw or should have seen the warning sign in the exercise of ordinary care.

Appeal by plaintiff from judgment entered 23 July 1999 by Judge Wiley F. Bowen in Superior Court, Wake County. Heard in the Court of Appeals 7 November 2000.

Jones Martin Parris & Tessener Law Offices P.L.L.C., by Hoyt G. Tessener, for plaintiff-appellant.

Poyner & Spruill, L.L.P., by Keith H. Johnson, for defendant-appellee.

WYNN, Judge.

While Cynthia Stallings shopped at a Food Lion, Inc. store on 2 April 1997, a store employee mopped the floor in the produce section. The mopper cleaned an area between two tables, then set down a yellow "wet floor" cone between the two tables. He then began to mop on the other side of the far table, leaving his bucket next to a pole and display, away from the area already mopped.

As Ms. Stallings approached the produce section, she stopped at the corner of the first table to pick up some apples. She then walked past the area between the tables that had just been mopped—the yellow cone was several feet away. As soon as she rounded the corner of the second table she slipped and fell, injuring her shoulder. A surveillance camera recorded the entire event, and employees of Food Lion wrote a report and took photographs of the accident scene.

This appeal arises from Ms. Stallings' action alleging that Food Lion negligently created the dangerous condition on the floor and failed to warn her about the danger. Food Lion answered and asserted the defense of contributory negligence.

At the close of Ms. Stallings' evidence, Food Lion moved for directed verdict. The trial court reserved ruling on the motion and Food Lion proceeded with its case. Before resting its case, Food Lion sought permission to renew its motion for directed verdict. The trial court granted this motion and Ms. Stallings appealed to this Court.

[1] Before addressing the merits of this appeal, we note a procedural error that provides an alternate basis for reversing the trial court's order. A defendant may move for a directed verdict at the close of the plaintiff's evidence. N.C.R. Civ. P. 50(a). When a motion is made for directed verdict at the close of the plaintiff's evidence, the trial court may either rule on the motion or reserve its ruling on the motion.

Overman v. Gibson Products Co., 30 N.C. App. 516, 519-20, 227 S.E.2d 159, 161-62 (1976). By offering evidence, however, a defendant waives its motion for directed verdict made at the close of plaintiff's evidence. *Id.* at 518, 227 S.E.2d at 161. Accordingly, if a defendant offers evidence after making a motion for directed verdict, "any subsequent ruling by the trial judge upon defendant's motion for directed verdict must be upon a renewal of the motion by the defendant at the close of all the evidence, and the judge's ruling must be based upon the evidence of both plaintiff and defendant." *Id.* at 520, 227 S.E.2d 162.

In this case, Food Lion moved for directed verdict at the close of Ms. Stallings' evidence. The trial court reserved its ruling on the motion and Food Lion proceeded to offer evidence. Before resting its case, Food Lion renewed its motion for directed verdict and the trial court granted that motion. As in *Overman*, this procedural error requires reversal of the trial court's order granting directed verdict in favor of Food Lion. *See id.* at 521, 227 S.E.2d at 162.

[2] Alternatively, we agree with Ms. Stallings that the grant of directed verdict was improper since there were unresolved issues that should have been decided by a jury.

A store has a duty to exercise ordinary care to keep its premises in a reasonably safe condition and to warn of any hidden dangers of which it knew of should have known. *See, e.g., Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990). Failure to do so constitutes negligence. *See Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992). "Reasonable persons are assumed, absent a diversion or distraction, to be vigilant in the avoidance of injury in the face of a known and obvious danger." *Id.* at 66, 414 S.E.2d at 344. A person who can understand and avoid a known danger but fails to do so is chargeable with contributory negligence. *See Presnell v. Payne*, 272 N.C. 11, 13, 157 S.E.2d 601, 602 (1967). The test for contributory negligence is whether a person using ordinary care for his or her safety under similar circumstances would have recognized the danger. *See Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981).

A motion for directed verdict under N.C.R. Civ. P. 50 presents the question of "whether the evidence, when considered in the light most favorable to the plaintiff, was sufficient for submission to the jury." *See Smith v. Wal-Mart Stores, Inc.*, 128 N.C. App. 282, 285, 495 S.E.2d 149, 151 (1998) (quoting *Kelly v. International Harvester Co.*, 278

N.C. 153, 157, 179 S.E.2d 396, 397 (1971). Directed verdict in a negligence case is rarely proper because it is the duty of the jury to apply the test of a person using ordinary care. *See Smith v. Wal-Mart*; *Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987). Likewise, directed verdict is rarely appropriate in determining contributory negligence and should only be allowed when the "plaintiff's evidence, considered in the light most favorable to him, together with inferences favorable to him that may reasonably be drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn." *Smith v. Wal-Mart*, 128 N.C. App. at 286, 495 S.E.2d at 151 (quoting *Peeler v. Southern Railway Co.*, 32 N.C. App. 759, 760, 233 S.E.2d 685, 686 (1977)). When more than one interpretation of the facts is possible, the issues of negligence and contributory negligence are matters to be decided by a jury. *See Maness v. Fowler-Jones Constr. Co.*, 10 N.C. App. 592, 598, 179 S.E.2d 816, 819, *cert. denied*, 278 N.C. 522, 180 S.E.2d 610 (1971); *Smith v. Wal-Mart.*

In the case at bar, the record is unclear as to whether the trial court granted Food Lion's motion for a directed verdict because Ms. Stallings did not show that Food Lion was negligent or because it found as a certainty that she was contributorily negligent. We will address each possibility in turn.

First, regarding Ms. Stallings' case of negligence, the record reveals that there are factual questions as to whether Food Lion properly warned her about the dangerous condition it had created. The parties presented conflicting evidence as to whether Ms. Stallings could see the bucket, whether she could see the mopper over the produce table, and whether a yellow warning cone on one side of the table should have alerted her to a wet floor on the other side. The resolution of these factual issues is a job for the jury.

Next, regarding Food Lion's claim of contributory negligence, we again note the controverted evidence regarding what Ms. Stallings actually saw or should have seen in the exercise of ordinary care. After reviewing the videotape of the fall, we cannot say as a matter of law that the cone, bucket and mopper should have been noticed by a reasonably prudent person exercising ordinary care. Again, the resolution of these factual issues and the application of the reasonably prudent person test are matters for a jury.

Food Lion strenuously argues that Ms. Stallings must have seen the warnings or at least would have seen them if she were careful;

however, because there is conflicting evidence, the resolution of the facts is a matter for a jury, not the court. Since it is the province of a jury to decide issues of negligence and contributory negligence when the evidence is inconclusive, the trial court erred when it granted directed verdict for Food Lion.

In sum, we conclude that Ms. Stallings is entitled to a new trial on both procedural and substantive grounds.

Reversed and remanded.

Judges GREENE and FULLER concur.

ROBERTA HOLT, GUARDIAN AD LITEM FOR MARY ELIZABETH HOLT, A MINOR; AND ROBERTA HOLT, PLAINTIFFS V. ATLANTIC CASUALTY INSURANCE COMPANY, DEFENDANT

No. COA99-1481

(Filed 19 December 2000)

1. **Insurance— automobile—parent's claim for minor's medical expenses—derivative of child's claim**

The trial court properly granted summary judgment for defendant-insurance company on a claim for injuries to the minor plaintiff arising from a car accident where defendant had settled the claim by tendering the per person limit for bodily injury for the minor's injury, but plaintiff-mother contended that her claim for reimbursement of medical expenses was separate from her daughter's claim, so that the aggregate bodily injury limit applied rather than the per person limit. The mother's claim for expenses is derivative in nature and was subsumed in the settlement of the daughter's claim.

2. **Insurance— automobile—medical expenses—not property damage**

The trial court properly granted summary judgment for defendant-insurance company on a mother's claim under a property damage provision for medical expenses which she paid following her daughter's automobile accident. There is nothing tangible about this claim and it is not properly characterized as a separate claim for lost money compensable as property damage.

Appeal by plaintiffs from order entered 21 June 1999 by Judge Abraham P. Jones in Columbus County Superior Court. Heard in the Court of Appeals 18 October 2000.

Hill & High, L.L.P., by John Alan High, for the plaintiff-appellants.

Johnson & Lambeth, by John G. Tillery, III, for the defendant-appellee.

LEWIS, Judge.

On 30 March 1995 the minor plaintiff, Mary Elizabeth Holt, was injured in a single-car accident. She was a passenger in an automobile driven by Michael Ray Willoughby. The automobile was insured under an insurance policy issued by Atlantic Casualty Insurance Company ("Atlantic policy"), in which Willoughby was the named insured. The Atlantic policy provided bodily injury liability coverage of $25,000 per person and $50,000 per accident, and property damage liability coverage of $25,000 per accident.

Roberta Holt, Mary Elizabeth's mother, incurred medical expenses for the treatment of her daughter as a result of injuries arising from the accident. Consequently, plaintiffs filed a negligence action against Willoughby seeking to recover for Mary Elizabeth's injuries. Atlantic Casualty Insurance Company ("Atlantic") settled this claim by tendering the $25,000 per person limit for bodily injury for settlement of Mary Elizabeth's injuries under the Atlantic policy.

Despite payment of that policy limit, plaintiffs instituted the present declaratory judgment action against Atlantic asserting that Roberta Holt suffered a separate and distinct injury through payment of her daughter's medical expenses, entitling her to coverage under the Atlantic policy provisions for either bodily injury or property damage. The complaint does not state the total amount of Mary Elizabeth's medical expenses; however, the settlement agreement stipulates that in the event Roberta Holt prevails in the declaratory judgment action, her damages total $8146.45.

On 21 June 1999, the trial court entered summary judgment for Atlantic, concluding that the maximum policy limits had been exhausted and Roberta Holt was not entitled to any additional coverage, citing *Howard v. Travelers Insurance Cos.*, 115 N.C. App. 458, 445 S.E.2d 66 (1994). Plaintiffs appeal.

[1] We first address plaintiffs' argument that Roberta Holt is afforded coverage under the bodily injury provisions in the Atlantic policy, despite the fact that Atlantic already tendered the per person limit for bodily injury in favor of Mary Elizabeth. Plaintiffs contend that Roberta Holt's claim for reimbursement of medical expenses is separate from Mary Elizabeth's claim, such that the aggregate bodily injury policy limits of $50,000 apply, instead of the $25,000 per person limit.

The "bodily injury" provisions in the Atlantic policy provide as follows:

DEFINITIONS

"Bodily injury" means bodily harm, sickness or disease, including death that results.

LIABILITY COVERAGE

We will pay damages for *bodily injury* or *property damage* for which any insured becomes legally responsible because of an auto accident.

LIMIT OF LIABILITY

The limit of liability shown in the Declarations for each person for Bodily Injury Liability Coverage [$25,000 each person/$50,000 each accident] is our maximum limit of liability for *all damages* for bodily injury, including damages for care, loss of services or death, sustained by any one person in any one auto accident. Subject to this limit for each person, the limit of liability shown in the Declarations for each accident for Bodily Injury Liability Coverage is our maximum limit of liability for *all damages* for bodily injury resulting from any one auto accident. . . . This is the most we will pay as a result of any one auto accident regardless of the number of:

1. Insureds;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the auto accident.

(Emphasis added).

In *Howard*, the parents of a minor child sought to collect for their child's medical expenses in the amount of $305,919.09. 115 N.C.

App. at 460, 445 S.E.2d at 67. The bodily injury limits on the policy at issue were $100,000 per person and $300,000 per accident. *Id.* at 459, 445 S.E.2d at 67. As in this case, the parents in *Howard* contended their claim for medical expenses was separate from their minor child's claim for bodily injury, asserting they were entitled to the full amount of the child's expenses under the aggregate bodily injury limit of $300,000. *Id.* at 460, 445 S.E.2d at 68. Our Court in *Howard* determined that the per person policy limit of $100,000 applied, concluding that "[t]he parent's claim for the child's medical expenses is derivative in nature; accordingly the parents cannot recover since they themselves have sustained no 'bodily injury' within the meaning of the policy." *Id.* at 463, 445 S.E.2d at 69.

The *Howard* opinion was supported by *South Carolina Insurance Co. v. White*, 82 N.C. App. 122, 345 S.E.2d 414 (1986). The "Limit of Liability" language at issue in *White* was similar to the Atlantic policy language in this case. *Id.* at 124, 345 S.E.2d at 415. In *White*, the injured party was insured by a policy with bodily injury limits of $25,000 per person and $50,000 per accident. *Id.* After the insurance company paid the injured party $25,000 in full settlement of his damage claim, his wife sought damages for loss of consortium, asserting that the aggregate policy limit applied. *Id.* The *White* Court held the insurance company had no obligation toward the wife for her derivative claim, stating:

> The term "all damages" used in the policy is all-inclusive. It includes not only direct damages for bodily injury sustained by [the husband], but also any indirect or consequential damages for loss of consortium. Perhaps when the award to the person who sustained the direct bodily injury does not exhaust the maximum policy limits, a consequential or derivative damage claim for the difference may be maintained. But when, as in this case, the policy limit has been exhausted by the settlement of $25,000 paid to the person who sustained the direct bodily injury, all consequential or derivative damage claims for personal injuries are subsumed within the settlement award.

Id.

Pursuant to *Howard* and *White*, we conclude Roberta Holt's claim for Mary Elizabeth's medical expenses is derivative in nature. Thus, when Atlantic exhausted the per person limit of $25,000 in settling Mary Elizabeth's claim, who sustained the direct bodily injury, Roberta Holt's derivative damage was subsumed within that settle-

ment award. *Howard*, 115 N.C. App. at 463, 445 S.E.2d at 69; *cf. White*, 82 N.C. App. at 124, 345 S.E.2d at 415 ("Perhaps when the award to the person who sustained the direct bodily injury does not exhaust the maximum policy limits, a consequential or derivative claim for the difference may be maintained.").

[2] We next consider plaintiffs' contention that Roberta Holt is entitled to recover under the property damage provisions of the Atlantic policy. As previously noted, the policy provides coverage for "property damage," which is defined as "physical injury to, destruction of or loss of use of *tangible property.*" (Emphasis added). Plaintiffs contend that Roberta Holt lost the use of her money through payment of her daughter's medical expenses, and that money is "tangible property," entitling her to coverage under this provision.

At least one other court has addressed this issue, and concluded that a parent may not recover medical expenses resulting from injury to its minor child under the property damage provision in an insurance policy. *Virginia Farm Bureau Mutual Ins. Co. v. Frazier*, 440 S.E.2d 898 (Va. 1994). The property damage provision in *Frazier* similarly afforded coverage for damage to tangible personal property, and not for damage to intangible personal property. *Id.* at 900. The *Frazier* court concluded that the parents' claims for damages sustained by reason of paying their minor daughter's medical expenses constituted intangible property, and thus did not qualify as property damage. *Id.* at 901.

We also conclude there is nothing tangible about Roberta Holt's claim for damages sustained by reason of paying her daughter's medical expenses. Roberta ultimately seeks coverage for the medical expenses arising from her daughter's bodily injury. Her claim is not properly characterized as a separate claim for lost money compensable as property damage, as plaintiffs contend.

The trial court did not err in granting summary judgment in favor of Atlantic.

Affirmed.

Judges WYNN and HUNTER concur.

STATE OF NORTH CAROLINA v. THEODORE MEAD KIMBLE

No. COA99-1518

(Filed 19 December 2000)

1. **Appeal and Error— preservation of issues—sufficiency of evidence to support Alford pleas—no objection**

Issues concerning the sufficiency of evidence to support Alford pleas to eight counts of solicitation of first-degree murder and whether there was in fact only one solicitation were not addressed in the Court of Appeals where defendant did not object during the plea hearing to the State's summary of the factual basis for entry of judgment or argue that the facts supported only one count. Although defendant brought a motion to withdraw his pleas subsequent to the entry of judgment, the basis of the motion was not that there were insufficient facts to support the pleas.

2. **Appeal and Error— preservation of issues—evidence to support aggravating factors—no objection—prejudice of plain error not argued**

Whether there was competent evidence to support aggravating factors found by the court when sentencing defendant for murder, arson, and solicitation was not properly before the Court of Appeals where defendant did not object to the court's findings during the sentencing hearing and, although he asserted plain error in his brief, he did not make any argument regarding the prejudicial impact of the alleged plain error.

Appeal by defendant from judgments dated 5 March 1999 and from denial of defendant's motion to withdraw his pleas of guilty to said judgments by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 7 November 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Edwin W. Welch, for the State.

Appellate Defender Malcolm Ray Hunter, Jr. by Assistant Appellate Defender Danielle M. Carman, for defendant-appellant.

GREENE, Judge.

Theodore Mead Kimble (Defendant) appeals judgments dated 5 March 1999, finding him guilty of second-degree murder, conspiracy to commit first-degree murder, first-degree arson, and eight counts of solicitation to commit first-degree murder.[1]

On 7 April 1997, Defendant was indicted by a Guilford County grand jury for first-degree murder based on the death of Patricia Gail Kimble (Kimble), Defendant's wife. The indictment alleged Kimble was murdered on 9 October 1995. On 3 November 1997, Defendant was indicted for arson and conspiracy to commit first-degree murder based on the 9 October 1995 incident, and on 6 July 1998, Defendant was indicted for first-degree arson based on the 9 October 1995 incident. Finally, on 28 January 1999, the State filed bills of information charging Defendant with eight counts of solicitation to commit first-degree murder. The eight counts of solicitation to commit first-degree murder related to an incident that occurred subsequent to the 9 October 1995 death of Kimble.

On 25 January 1999, Defendant pled guilty to second-degree murder, conspiracy to commit first-degree murder, and first-degree arson. Defendant also entered *Alford* pleas[2] to the eight counts of solicitation to commit first-degree murder. At the time Defendant entered his pleas, the trial court asked whether Defendant "stipulate[d] that a factual basis exists for the entry of the pleas of guilty." Defense counsel answered: "Defendant does." The trial court then asked Defendant whether he "stipulate[d] that, if necessary, the State may summarize the factual basis." Defense counsel answered: "Yes, sir, we do." The State then summarized the factual basis for Defendant's pleas. Subsequent to the State's summary, the trial court made the following findings: "The court finds that . . . Defendant is competent to stand trial and that the plea entered is . . . Defendant's informed choice and it is made freely, voluntarily[,] and understandingly. . . . Defendant's plea is hereby accepted by the court and it is ordered recorded."

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1. Defendant also appeals from and assigns error to the trial court's order, made in open court, denying Defendant's motion to withdraw his guilty pleas. As Defendant makes no argument in his brief to this Court regarding the trial court's order denying this motion, this assignment of error is deemed abandoned. N.C.R. App. P. 28(b)(5).

2. An *Alford* plea allows a defendant to "voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970).

Defendant did not object to the trial court's acceptance of Defendant's pleas.

On 26 February 1999, Defendant filed a *pro se* motion to "withdraw [his] guilty-plea on all accounts and charges" on the ground he was "pressured into [his] earlier plea." The trial court subsequently held a hearing on the motion. At the conclusion of the hearing, the trial court "conclude[d] as a matter of law that . . . [D]efendant has wholly failed to meet his burden of showing to the Court that the motion to withdraw is supported by some fair and just reasons." The trial court, therefore, denied Defendant's motion to withdraw his guilty pleas.

On 4 March 1999 through 5 March 1999, the trial court held Defendant's sentencing hearing. At the conclusion of the hearing, the trial court found aggravating and mitigating factors existed. The trial court found the following aggravating factors when sentencing Defendant for second-degree murder: (1) "[D]efendant acted with premeditation and deliberation in committing this offense," and (2) "[D]efendant acted for pecuniary gain in committing the offense." Also, the trial court found the following aggravating factor when sentencing Defendant for first-degree arson: "This offense was committed for the purpose of avoiding detection in the murder of . . . Kimble and for the purpose of covering up the murder." Finally, the trial court found the following aggravating factor when sentencing Defendant for six counts of solicitation to commit first-degree murder: "The offense was committed to: a. disrupt the lawful exercise of a governmental function or the enforcement of laws[, and] b. hinder the lawful exercise of a governmental function or the enforcement of laws." In regard to the charges of second-degree murder, first-degree arson, and six counts of solicitation to commit first-degree murder, the trial court found the aggravating factors outweighed the mitigating factors and sentenced Defendant in the aggravated range. In regard to the charges of conspiracy to commit first-degree murder and two counts of solicitation to commit first-degree murder, the trial court found no aggravating or mitigating factors existed.

The issues are whether: (I) Defendant preserved for appellate review the issue of whether there was a factual basis to support the *Alford* pleas entered by Defendant for eight charges of solicitation to commit first-degree murder; and (II) Defendant preserved for appellate review the issue of whether the aggravating factors found by the trial court regarding Defendant's convictions for second-degree mur-

der, first-degree arson, and six counts of solicitation to commit first-degree murder were supported by competent evidence, and whether the trial court erroneously used the same evidence to prove two aggravating factors.

I

[1] Defendant argues the trial court erroneously entered judgment against Defendant for eight counts of solicitation to commit first-degree murder because there was an insufficient factual basis for the pleas, in violation of N.C. Gen. Stat. § 15A-1022(c) and the Fourteenth Amendment of the United States Constitution. Defendant argues, in the alternative, that seven of Defendant's eight convictions for solicitation to commit first-degree murder should be vacated because "the [State's] factual narrative showed that there was only one solicitation as a matter of law." Defendant, however, did not object during the plea hearing to the State's summary of the factual basis for the entry of judgment against Defendant for these charges. Additionally, Defendant did not argue before the trial court that the factual basis for the entry of judgment against Defendant supported only one count of solicitation to commit first-degree murder. Further, although Defendant brought a motion to withdraw his pleas subsequent to the entry of judgment, the basis of this motion was not that there was an insufficient factual basis to support Defendant's pleas. This issue, which was not raised before the trial court, is therefore not properly before this Court. *See* N.C.R. App. P. 10(b)(1). Accordingly, we do not address this issue.

II

[2] Defendant argues the aggravating factors found by the trial court when sentencing Defendant for second-degree murder, first-degree arson, and six counts of solicitation to commit first-degree murder were not supported by competent evidence in the record. Defendant, however, did not object to these findings during the sentencing hearing. This issue, therefore, is not properly before this Court.[3] N.C.R. App. P. 10(b)(1); *State v. Hughes*, 136 N.C. App. 92, 98, 524 S.E.2d 63, 67 (1999), *disc. review denied*, 351 N.C. 644, — S.E.2d — (2000); *State v. Degree*, 110 N.C. App. 638, 643, 430 S.E.2d 491, 494 (1993).

3. We note that in the event the trial court's written findings on aggravating and mitigating factors differ from its findings made in open court, there would be no requirement Defendant object to the written findings in order to preserve his right to appellate review of the written findings. This is because Defendant would not have an opportunity to object to findings made by the trial court outside of Defendant's presence.

Additionally, although Defendant states in his brief to this Court that "[D]efendant asserts plain error," Defendant does not make any argument in his brief to this Court regarding the prejudicial impact of the alleged plain error. Accordingly, the issue of whether any alleged errors resulted in plain error pursuant to Rule 10(d) of the North Carolina Rules of Appellate Procedure is not properly before this Court. *See State v. Cummings*, — N.C. —, —, 536 S.E.2d 36, 61 (2000) ("Defendant's empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule.").

Affirmed.

Judges TIMMONS-GOODSON and FULLER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 DECEMBER 2000

ATTAWAY v. ZITO No. 99-1441	Hyde (98CVD46)	Affirmed
BATTS v. SUNSHARES No. 99-1435	Ind. Comm. (583105)	Affirmed
BRIDGES v. BRIDGES No. 99-1361	Durham (97SP474)	Affirmed
CENTURA BANK v. GREITZER, INC. No. 00-3	Nash (98CVS1212)	Reversed
DOAN v. DOAN No. 99-1460	Wake (98CVD06381)	Affirmed in part, vacated in part, and remanded
ESTATE OF SPURLING v. BROUGHTON HOSP. No. 99-1589	Cleveland (98CVS1181)	Affirmed
FINNEY v. STUDEVENT No. 99-1545	Forsyth (98CVS4597)	No Error
HADNOTT v. PATEL No. 99-1322	Guilford (98CVS7792)	Reversed and remanded
IN RE BERK No. 99-1552	Watauga (99J20)	Vacated and remanded
IN RE BERK No. 00-102	Watauga (99J19)	Vacated and remanded
IN RE FORECLOSURE OF HOOPER No. 99-1342	Jackson (99SP16)	Affirmed
ISASI v. F.D.Y., INC. No. 99-917	Forsyth (97CVS6692)	No Error
JOHNSTON v. U.S. AIR EXPRESS/C.C. AIR, INC. No. 00-278	Ind. Comm. (530746)	Dismissed
KINDLEY v. SKIPPER'S DRY STORAGE, INC. No. 99-1464	Iredell (99CVS1748)	Affirmed
LANE v. N.C. DEP'T OF TRANSP. No. 00-195	Stokes (99CVS478)	Dismissed
LILLY v. CONTAINER PRODS. CORP. No. 99-1332	New Hanover (98CVS2044)	Dismissed

MARTIN v. GRANT No. 99-1278	Buncombe (98CVD3282)	Affirmed
MURROW v. MURROW No. 99-1521	Mecklenburg (95CVD12923)	Remanded in part, affirmed in part
RATCHFORD v. C.C. MANGUM, INC. No. 99-1611	Ind. Comm. (585911)	Reversed and remanded
STATE v. ADAMS No. 00-171	Gaston (96CRS37215) (96CRS37216) (96CRS34577)	No Error
STATE v. BRITTON No. 99-1239	Wake (97CRS075842) (97CRS075843) (97CRS075844)	Case No. 97CRS75842—new trial. Case No. 97CRS75843—no error. Case No. 97CRS75844—no error.
STATE v. BUCHANAN No. 99-1473	Graham (98CRS38) (98CRS39)	No Error
STATE v. CLORE No. 00-397	Wake (98CRS55767) (98CRS55768)	No Error
STATE v. DOCKERY No. 99-1501	Guilford (98CRS18951) (99CRS23004)	No Error
STATE v. HAMM No. 99-1419	Union (98CRS010299)	New Trial
STATE v. HONEYCUTT No. 99-1275	Lee (99CRS1871) (99CRS1010)	No Error
STATE v. JONES No. 00-323	Wayne (99CRS02181)	Affirmed
STATE v. LEWIS No. 00-447	Nash (96CRS16377) (96CRS16378) (96CRS16379)	No Error
STATE v. MEDLEY No. 99-1553	Alamance (98CRS8518)	No Error

STATE v. QUICK No. 00-422	Lee (98CRS7644) (98CRS7652) (98CRS7653) (98CRS7654)	No Error
STATE v. ROBINSON No. 99-1381	Buncombe (98CRS53611) (98CRS53612) (98CRS53613)	No Error
STATE v. ROGERS No. 99-1214	Dare (98CRS2740) (98CRS2741)	No Error
STATE v. ROSEBORO No. 99-1070	Mecklenburg (98CRS2657)	No Error
STATE v. SIMON No. 00-33	Burke (96CRS9843) (96CRS9846)	Affirmed
STATE v. SNYPE No. 00-211	Mecklenburg (97CRS150195)	No Error
STATE v. TRUSELL No. 99-1284	Moore (97CRS5684) (97CRS5685) (97CRS5686) (97CRS5688)	No error in trial. Remanded for resentencing
STATE v. WILLIAMS No. 99-1339	Guilford (97CRS14610) (99CRS23040)	No Error
TRIVETTE v. MID-SOUTH MGMT., INC. No. 99-1380	Ind. Comm. (356305)	Affirmed in part, remanded in part
WATTS v. NORRIS No. 99-1603	Ind. Comm. (492160)	Affirmed

STATE OF NORTH CAROLINA v. JAKIE HAMMONDS

No. COA00-89

(Filed 29 December 2000)

1. Constitutional Law— right to speedy trial—pretrial delay

A defendant in a first-degree murder case was not deprived of his constitutional right to a speedy trial even though he was incarcerated without bond for over four and a half years before trial, because: (1) the record reveals that the local docket was congested with capital cases, and congestion of criminal dockets is a valid justification for delay; (2) there is no indication in the record that the prosecutor's decisions pertaining to scheduling and trial order were based upon unconstitutional factors; (3) defendant's counsel represented one of the defendants in the "exceptional" case for a murder that occurred after defendant's event for which he was charged but tried ahead of this case, and defense counsel also represented defendants in many other cases on the docket; (4) defendant's action of asserting his right to a speedy trial four years and two days after he was arrested was not consistent with a desire for speedy trial; and (5) defendant did not suffer prejudice as a result of the delay although the State's principal investigator died and two key witnesses changed their description of events prior to trial since hardly a criminal case exists where defendant could not make these general averments of impaired memory and lost witnesses. U.S. Const. amend. VI; N.C. Const. art. I, § 18.

2. Constitutional Law— right to timely appeal—numerous extensions of time for transcript

A defendant in a first-degree murder case was not improperly denied a timely appeal in violation of his right to due process even though the State failed to provide the transcript necessary for his appeal for another two and a half years based on the court reporter filing a number of motions for extension of time to produce the transcript, because: (1) the Court of Appeals consistently approved the reporter's requests for extensions of time; (2) defendant's mental burden did not affect his ability ultimately to perfect the appeal and bring forth the issues he sought to have decided; and (3) the transcript eventually prepared and made available to the parties was adequate to allow full development of appeal issues.

3. Appeal and Error— incomplete transcript—adequacy for appeal

The transcript of defendant's trial in a first-degree murder case that was stipulated to be incomplete, based on the fact that portions of the record could not be reconstructed due to poor recordation and unclear or missing stenographic outlines, was adequate to allow defendant to assign and brief all preserved issues, because: (1) in most instances it is possible to reconstruct the substance of what was said, even if the precise words are lost; (2) when argument of counsel or the court's reason for a holding are lost, the fact of the objection and the subsequent ruling are evident; (3) the context of purportedly objectionable evidentiary rulings can be reconstructed; and (4) the transcript, despite its imperfections, is not so inaccurate as to prevent meaningful review by the Court of Appeals.

4. Evidence— husband-wife privilege—not confidential marital communications

The trial court did not err in a first-degree murder case by allowing defendant's wife to testify on cross-examination to alleged confidential marital communications allegedly in violation of N.C.G.S. § 8-57, because: (1) defendant failed to make a timely objection to two of the statements as required by N.C. R. App. P. 10(b)(2); (2) the wife's statement during cross-examination that cable workers were outside was at most a casual observation not induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship; (3) the wife's statement during cross-examination that she observed defendant remove a firearm from under their bed was not induced by or even part of the marital relationship, defendant took no steps to ensure confidentiality while obtaining the weapon, and the wife's presence in the bedroom to watch defendant arm himself was incidental; and (4) the wife's statement during cross-examination that defendant told her what he had done to the victim cannot be considered the disclosure of a confidential marital communication since the wife did not reveal the content of any communication between herself and defendant, and defendant's brother was also told what happened.

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

Although the short-form murder indictment used to charge defendant with first-degree murder did not allege premeditation and deliberation nor felony murder, the trial court did not err by

concluding the indictment did not violate defendant's right to due process because it complies with the requirements of N.C.G.S. § 15-144.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 10 March 1997 by Judge D. Jack Hooks, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 12 September 2000.

Michael F. Easley, Attorney General, by Steven M. Arbogast, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janet Moore, Assistant Appellate Defender, for defendant-appellant.

EDMUNDS, Judge.

Defendant appeals his conviction of first-degree murder. We find no error.

On the morning of 24 July 1992, Charles Pickens (Pickens) and the victim, Allen Graham (Graham), were installing cable television lines in the vicinity of defendant's home. They parked near defendant's lawn, unloaded an all-terrain vehicle, referred to in the transcripts as a four-wheeler, and began unrolling cable. Shortly thereafter, defendant confronted the two men and pointed a shotgun at them while telling them that they were trespassing on his property. Graham began to re-roll the cable in preparation to leave and said to defendant, "Can we talk—." Before Graham could complete his sentence, defendant shot him in the face. Graham fell behind the trailer, and defendant ran back into his house. Pickens fled and heard three more shots fired as he ran.

Pickens reached a nearby school where he encountered Peggy Locklear and told her "[m]y buddy's been shot." Peggy Locklear noticed that Pickens was muddy and smelled of gunpowder. Shortly afterwards, she observed a vehicle, which was later identified as belonging to defendant, speeding up and slowing down in front of the school. When Pickens returned to the scene of the shooting, he observed that Graham's body was at the driver's side of the truck, and the door to their vehicle was open. Both back windows to the vehicle had been damaged by gunshots, and there was a trail of blood from the back of the truck to Graham's body.

At defendant's trial, Melanie Graham, the victim's wife, corroborated Pickens' version of events by testifying as to what he told her had happened that day. Anthony Thompson, a detective with the Robeson County Sheriff's Department, testified that three firearms were recovered from the trunk of defendant's vehicle at the time of his arrest. Thomas Trochum, a special agent with the North Carolina State Bureau of Investigation, tested the recovered firearms and determined that one had been used to shoot Graham. Stuart McPhatter (McPhatter), a deputy sheriff with the Robeson County Sheriff's Department, testified that when he arrived at the crime scene, he saw the body of Graham on his knees between the door of his truck and the inside of the door. McPhatter collected four waddings and a shotgun shell near the truck. Dr. Marvin Thompson, a pathologist who performed an autopsy on Graham, concluded that Graham bled to death from a shotgun wound to the face. He added that a person suffering such a wound could have walked or crawled a few yards.

Two former neighbors of defendant, Terry Chavis (Chavis) and Randy Locklear, testified as to statements defendant made regarding those trespassing on his land. Defendant told Chavis on 23 July 1992 that the cable people wanted to put cable lines on his property and that he "better not catch them over there on my land." Defendant told Randy Locklear that he wanted to kill a Jeep driver who had trespassed on his property. Willie Ray Chavis also testified that approximately one week before the shooting, defendant told him that:

> [H]e could kill somebody and hide them in the acres in the neck of the woods back there and nobody would never find them, nobody would ever find out that he had killed anybody. He told me if he got caught killing somebody, he would go to jail two or three years, plead insanity and be out, and the jail wasn't nothing but a vacation, anyhow.

Finally, defendant's wife, Doreen Hammonds (Mrs. Hammonds) testified during the State's case in chief that she and defendant were in the bedroom when Graham and Pickens arrived on 24 July 1992. She heard defendant outside arguing with both men. When she heard a gunshot, she hid in the corner of the bedroom.

Defendant presented evidence tending to show that he suffered from various mental disorders and was very protective of his property. Timmy Hunt, a former neighbor, stated that defendant dug a trench in the road in front of his property and placed a "private prop-

erty" sign on a pole at the edge of his yard. He further testified that he had never seen defendant confront anyone on his property. Carlie and Priscilla Locklear, also former neighbors, testified that defendant was bothered by four-wheelers in his yard and had placed barriers on his property. Both stated that defendant suffered from mood swings and appeared to have a mental problem.

Mrs. Hammonds was called as a defense witness and testified as to defendant's frustration with four-wheelers and his mental problems. She stated that defendant had nightmares the week before the shooting and could not sleep. She also testified that there was a "private property" sign on the pole in front of their yard, a "no trespassing" sign attached to a chain across their driveway, and that defendant had placed a board studded with nails in the trench in the road.

When cross-examined by the State, Mrs. Hammonds testified that on the morning of 24 July 1992, she saw a truck and told defendant that the cable people were outside. She heard defendant cursing and apparently observed defendant obtain a gun from beneath the bed.[1] In addition, she testified that she was scared of her husband and that she had previously seen him use guns to confront people in the road. When asked if defendant had told her after the shooting what he had done, she answered in the affirmative.

Dr. Shelley Snead, assistant professor of psychiatry at East Carolina University, interviewed defendant and reviewed his medical records, police reports, an investigative report, an autopsy report, and a transcript of a telephone conversation between defendant and his wife. She gave defendant a primary diagnosis of personality disorder with paranoid features and provisional borderline intellectual functioning, and a secondary diagnosis of intermittent explosive disorder and alcohol dependence, remission in a closed environment. In her opinion, defendant was not malingering and did not have the ability to form a specific intent to kill on 24 July 1992.

Mona Jacobs, defendant's sister, testified that she had observed mood changes in her brother after the death of their stepfather. She stated that she visited defendant the week before 24 July 1992 and told him that he might need to seek some help because he appeared

1. Mrs. Hammond's testimony on this point is ambiguous. "Q: Did you see [defendant] when he came back in the bedroom and got the gun out from under the bed? A: Yes, I seen him when he came back in the bedroom."

agitated and nervous. In addition, she testified to the poor living conditions and abuse that she and defendant suffered as children.

Defendant was arrested on 25 July 1992 and has remained incarcerated since that date. He was indicted on 1 February 1993 for first-degree murder. Approximately three and a half years after his indictment, defendant filed a motion for speedy trial requesting that his case be brought to trial within sixty days or, in the alternative, be dismissed with prejudice. The trial court granted defendant's motion on 18 November 1996 and ordered that defendant's trial begin before 1 March 1997. Defendant did not object to this form of relief.

Defendant's trial commenced on 3 February 1997. On 6 March 1997, the jury found defendant guilty of first-degree murder and thereafter recommended life imprisonment without parole. Defendant filed notice of appeal on 17 March 1997. The court reporter filed a series of motions for extension of time to produce a transcript of the trial court proceedings. On 26 January 1999, 26 February 1999, and 16 March 1999, defendant filed motions for new trial due to the court reporter's failure to produce the transcript. Defendant obtained the transcript after a series of extensions covering two and a half years, and the record on appeal was filed on 20 January 2000.

I.

Defendant first contends that he was deprived of his constitutional right to a speedy trial, arguing that his incarceration without bond for over four and a half years before trial, followed by the State's failure to provide the transcript necessary for his appeal for another two and a half years, violated his rights to a speedy trial, access to the courts, due process, equal protection of the law and other rights guaranteed by the United States and North Carolina Constitutions. Accordingly, defendant asks that his conviction be vacated and the murder charge dismissed with prejudice.

[1] We begin with an analysis of the pretrial delay. The Sixth Amendment to the United States Constitution and the fundamental law of this State provide every individual formally accused of a crime the right to a speedy trial. *See, e.g., State v. Lyszaj*, 314 N.C. 256, 261, 333 S.E.2d 288, 292 (1985). The Sixth Amendment states, in relevant part, "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. This provision is made applicable to the states by the Fourteenth Amendment. *See Klopfer v. North Carolina*, 386 U.S. 213, 222, 18 L. Ed. 2d 1, 8 (1967). Likewise,

Article I, Section 18 of the North Carolina Constitution provides that "all courts shall be open to every person . . . without favor, denial or delay." N.C. Const., Art. 1, 18. The same analysis is employed under both the Sixth Amendment and Article I when reviewing speedy trial claims. *See State v. Flowers*, 347 N.C. 1, 489 S.E.2d 391 (1997).

In *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), the United States Supreme Court established a balancing test involving four interrelated factors for courts to conduct on a case by case basis in determining whether a defendant's constitutional right to a speedy trial has been violated. *See id.* at 530, 33 L. Ed. 2d at 116-17. These factors include: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay. *See id.*

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Id. at 533, 33 L. Ed. 2d 118-19.

North Carolina courts have adopted these standards in analyzing alleged speedy trial violations. *See State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985). In addition, our Supreme Court has stated:

> The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978) (citation omitted). With these principles in mind, we now balance the four factors considering the evidence in this case.

A. Length of Delay

"[A] defendant's right to a speedy trial attaches upon being formally accused of criminal activity, by arrest or indictment." *State v. Pippin*, 72 N.C. App. 387, 391, 324 S.E.2d 900, 904 (1985) (citations omitted). The length of time that is appropriate between formal accusation and trial in each case is initially within the discretion of the trial court. *See id.* at 392, 324 S.E.2d at 904.

As to this factor, our courts have noted that "some delay is inherent and must be tolerated in any criminal trial; for example, the state is entitled to an adequate period in which to prepare its case for trial." *Id.* at 391-92, 324 S.E.2d at 904 (internal citations omitted); *see also McKoy*, 294 N.C. at 141, 240 S.E.2d at 388. Consequently, "[t]he length of a delay is not determinative of whether a violation has occurred." *Bare*, 77 N.C. App at 519, 335 S.E.2d at 750 (citing *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 533 (1984)). Rather,

> [t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.

Barker, 407 U.S. at 530-31, 33 L. Ed. 2d at 117. Because the length of delay is viewed as a triggering mechanism for the speedy trial issue, "its significance in the balance is not great." *State v. Hill*, 287 N.C. 207, 211, 214 S.E.2d 67, 71 (1975).

Although the United States Supreme Court has not set a definite period for which a delay will be deemed presumptively prejudicial, it has noted:

> Depending on the nature of the charges, the lower courts have generally found postaccusation delay "presumptively prejudicial" at least as it approaches one year. We note that, as the term is used in this threshold context, "presumptive prejudice" does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry.

Doggett v. United States, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992) (internal citations omitted).

In the present case, defendant was arrested on 25 July 1992 and tried on 3 February 1997. The delay of approximately four and a half years, well over the one year set forth in *Doggett*, is presumptively prejudicial. *See, e.g., State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994) ("[w]hile not enough in itself to conclude that a constitutional speedy trial violation has occurred, [a sixteen month] delay is clearly enough to cause concern and to trigger examination of the other factors"); *Hill*, 287 N.C. at 211, 214 S.E.2d at 71 (delay of twenty-two months sufficient to trigger examination of other factors); *State v. Avery*, 95 N.C. App. 572, 577, 383 S.E.2d 224, 226 (1989), *appeal dismissed*, 326 N.C. 51, 389 S.E.2d 96 (1990) (delay of two and a half years enough to trigger analysis of other factors). However, because this Court does not "determine the right to a speedy trial by the calendar alone," *State v. Wright*, 290 N.C. 45, 51, 224 S.E.2d 624, 628 (1976) (citation omitted), we must now consider this delay in relation to the three remaining factors.

B. Reason for Delay

In analyzing this factor, our courts have held that:

> The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. . . . Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay. The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort.

State v. Johnson, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969) (internal citations omitted). "The burden is on an *accused* who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution." *Id.* at 269, 167 S.E.2d at 278 (emphasis added).

Defendant argues that the delay between his arrest and trial was caused in part by the State's "laggard performance." The record, however, reveals that the local docket was congested with capital cases. The trial court described it as "chopped the block [sic] with capital cases. They're trying two at a time and just one right after the other, and there are only so many that can be tried." "Our courts have consistently recognized congestion of criminal court dockets as a valid justification for delay." *State v. Hughes*, 54 N.C. App. 117, 119, 282 S.E.2d 504, 506 (1981) (citations omitted) (finding defendant

failed to meet his burden where delay was result of backlog of cases). Indeed, "[b]oth crowded dockets and lack of judges or lawyers, and other factors, make some delays inevitable." *State v. Brown*, 282 N.C. 117, 124, 191 S.E.2d 659, 664 (1972) (citation omitted). Accordingly, in assessing defendant's speedy trial claim, we see no indication that court resources were either negligently or purposefully underutilized.

Defendant also argues that the delay between his arrest and trial was caused by the State's procedure of choosing more recent cases for earlier trial. In this regard, defendant claims that he received unequal treatment because the highly publicized capital murder case involving the death of Michael Jordan's father, though occurring after the event for which he was charged, was designated "exceptional" and tried ahead of his. However, such a designation is made by the Chief Justice, not by the prosecutor.[2] *See* Gen. R. Pract. Super. and Dist. Ct. 2.1, 1999 Ann. R. N.C. 3. In addition, our Supreme Court has acknowledged that a prosecutor may exercise selectivity in preparing the trial calendar and "the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon 'an unjustifiable standard such as race, religion or other arbitrary classification.' " *State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979) (citation omitted). In the case at bar, there is no indication in the record that the prosecutor's decisions pertaining to scheduling and trial order were based upon unconstitutional factors. Finally, the record reveals that defendant's counsel represented one of the defendants in the "exceptional" case cited above and represented defendants in many other cases on the docket. In light of these reasons, we conclude that the delay was due to neutral factors, and defendant failed to carry his burden to show delay due to neglect or wilfulness of the State. *See, e.g., State v. Heath*, 77 N.C. App. 264, 268, 335 S.E.2d 350, 353 (1985), *rev'd on other grounds*, 316 N.C. 337, 341 S.E.2d 565 (1986) (finding that defendant did not meet burden where delay was "due primarily to congested court dockets and the unavailability, for various reasons, of defendant's trial counsel").

C. Assertion of Right

Regarding this factor, the United States Supreme Court has stated:

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2. The record does not reveal who recommended the case to the Chief Justice for designation as "exceptional."

> The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. *We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.*

Barker, 407 U.S. at 531-32, 33 L. Ed. 2d at 117-18 (emphasis added); *see also Doggett*, 505 U.S. 647, 120 L. Ed. 2d 520 (observing that if defendant knew of his indictment years before he was arrested and failed to invoke his right to a speedy trial, this factor "would be weighed heavily against him"). Likewise, our courts have noted that a "[d]efendant's failure to assert his right to a speedy trial sooner in the process does not foreclose his speedy trial claim, but does weigh against his contention that he has been denied his constitutional right to a speedy trial." *Flowers*, 347 N.C. at 28, 489 S.E.2d at 407 (citing *Webster*, 337 N.C. at 680, 447 S.E.2d at 352).

In the present case, defendant first asserted his right to a speedy trial on 23 July 1996, four years and two days after he was arrested. He was tried approximately six months later. Although defendant argues in his appellate brief that he "wanted his case to come to trial, and was upset that instead his attorney, the local Public Defender, was preoccupied trying cases of more recent origin," "the State cannot be charged with knowledge of communication between the attorney and his client." *State v. Roberts*, 22 N.C. App. 579, 582, 207 S.E.2d 373, 376, *aff'd in part and rev'd in part*, 286 N.C. 265, 210 S.E.2d 396 (1974). Defendant's actions were not consistent with a desire for speedy trial. Accordingly, his delay in seeking a speedy trial is weighed against him.

D. Prejudice to Defendant

Finally, we consider whether defendant has suffered prejudice as a result of the delay of his trial. As to this factor, the United States Supreme Court has recognized three objectives of the right to a speedy trial: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118 (citation omitted). In his appellant brief, defendant only asserts that he has been prejudiced by the third factor. In this regard, "the test for prejudice is whether significant evidence or testimony that would have been helpful to the defense was lost due to

delay." *State v. Jones*, 98 N.C. App. 342, 344, 391 S.E.2d 52, 54-55 (1990) (citation omitted). Although defendant contends that he need not demonstrate prejudice resulting from the delay to obtain relief, citing *Doggett*, 505 U.S. 647, 120 L. Ed. 2d 520, the holding of *Doggett* is that the need to demonstrate prejudice diminishes as the egregiousness of the delay increases. "[T]o warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice." *Id.* at 657, 120 L. Ed. 2d at 532. Nevertheless, "[c]ourts will not presume that a delay in prosecution has prejudiced the accused. The defendant has the burden of proving the fourth factor." *Hughes*, 54 N.C. App. at 120, 282 S.E.2d at 506. As noted above, the delay in the case at bar, albeit extended, was not the result of unjustifiable or unconstitutional factors.

Defendant contends that he was prejudiced by the death of the State's principal investigator and by the fact that two key witnesses changed their description of events prior to trial. Our Supreme Court has noted that "[h]ardly a criminal case exists where the defendant could not make these general averments of impaired memory and lost witnesses." *State v. Dietz*, 289 N.C. 488, 493, 223 S.E.2d 357, 361 (1976) (citation omitted); *see also State v. Goldman*, 311 N.C. 338, 345, 317 S.E.2d 361, 365 (1984) (noting that "[d]efendant's only allegations of prejudice concern claims of faded memory and evidentiary difficulties inherent in any delay"). Indeed,

> [p]assage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context.

United States v. Marion, 404 U.S. 307, 321-22, 30 L. Ed. 2d 468, 479 (1971).

The absence of a principal investigator is generally not considered by defendants to be bad news. In the case at bar, defendant argues that his ability to present facts favorable to his defense theory was impaired because the investigator had died. However, the record reveals that the State presented other investigators who testified to the same events and observations sought by defendant, and defendant was able to impress upon the jury the absence of the detective

best able to testify as to certain events and observations. As we noted in *State v. Shelton*, 53 N.C. App. 632, 281 S.E.2d 684 (1981), *appeal dismissed*, 305 N.C. 306, 290 S.E.2d 707 (1982) "[i]t is impossible for us to say what prejudice, if any, was caused by the unavailability of [a] witness [because] [w]e do not know what his testimony would have been." *Id.* at 638, 281 S.E.2d at 690. In addition, the fact that two other witnesses changed their version of events could occur at any trial; such circumstances are not an inevitable consequence of delay. While we do not condone a delay as protracted as that in the case at bar, upon applying the balancing test required by *Barker*, we are unable to hold that defendant was denied his constitutional right to a speedy trial.

[2] Defendant also contends that he was improperly denied a timely appeal. Although our research has found no North Carolina case on point, nor have we found any case from the United States Supreme Court recognizing a constitutional right to a speedy appeal, we agree with the holding in the United States Court of Appeals for the Fourth Circuit that "undue delay in processing an appeal *may* rise to the level of a due process violation." *United States v. Johnson*, 732 F.2d 379, 381 (4th Cir. 1984) (citations omitted). Determining whether a particular delay reaches the level of a due process violation requires an analysis of the factors enunciated in *Barker*. *See id.*

The length of the delay, approximately two and a half years, while not so unsettling as the protracted pretrial delay in this case, is nevertheless sufficient to trigger the examination of the remaining factors. The reason for the delay is troublesome. According to the record, the court reporter filed a number of motions for extension of time to produce the transcript, citing plausible excuses. This Court granted a number of extensions and enlargements of time in 1997 and 1999. Finally, the Administrative Office of the Courts had to intervene, the computer disks and transcription notes were obtained from the reporter, and a substitute reporter prepared the trial transcript. Although none of the delay is attributable to defendant, in light of the fact that this Court consistently approved the reporter's requests for extensions of time, we are equally unable to find that the delay is attributable to the prosecution. *See id.* at 382

As to the third factor, there is no question that defendant made a timely assertion of his right to a speedy appeal. Finally, we must consider any prejudice suffered by defendant. His anxiety over the outcome of the appeal is not a factor that we weigh heavily because any

convicted defendant is subject to such anxiety. Although defendant's mental burden may have been increased because of the protracted appeal, that burden did not affect his ability ultimately to perfect the appeal and bring before this Court the issues he sought to have decided. In addition, defendant claims that the delay resulted in an inaccurate and incomplete transcript. As we discuss more fully below, the transcript eventually prepared and made available to the parties was adequate to allow full development of appeal issues.

Accordingly, we hold that defendant did not suffer unconstitutional delay of either a speedy trial or a speedy appeal. This assignment of error is overruled.

II.

[3] Defendant next contends that the incomplete transcript of his trial violates his constitutional and statutory rights entitling him to a new trial. He additionally argues that the transcript is inaccurate, citing some hundred places in which the transcript bears the notation "unable to reconstruct the record." Defendant claims that he "is prejudiced by *every* instance in which appellate counsel and this Court are forced to operate in the dark."

On 20 January 1999, the parties:

> stipulated and agreed that a transcript of the proceedings to the trial tribunal, consisting of four thousand one hundred eighty-five (4185) pages bound in twenty-two (22) volumes along with concordances of ninety-two (92) pages bound in six (6) volumes, is incomplete in that portions of the record could not be reconstructed due to poor recordation and unclear or missing stenographic outlines and the portions prepared by Court Reporters Pamela A. Mayo and Deborah Cashion are certified as accurate only to the best of those Reporters' abilities.

We acknowledge that the omissions in the transcript increase defendant's difficulties in arguing his case on appeal. Nevertheless, we have conducted a careful review of the entire trial transcript through the jury verdict (we have not reviewed the sentencing portion, in light of the life sentence recommended by the jury) and have scrutinized with particularity those areas cited by defendant as so garbled and incomplete as to prevent him from raising issues on appeal. On the basis of this review, we conclude that the transcript was adequate to allow defendant to assign and brief all preserved issues.

Defendant contends he is unable to argue that the trial court may have committed error pursuant to *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), relating to his consent to his attorney's opening statement, in which his attorney conceded that defendant had committed certain acts. Our review of the transcript reveals that while part of the bench conference between the trial judge and defense counsel could not be retrieved, the court's ensuing colloquy with defendant before opening statement, during which the court discussed the proposed statement and defendant gave his approval, is complete; in addition, at the conclusion of defense counsel's opening statement, the trial judge again addressed defendant about the statement, giving defendant an opportunity to voice any objection to what his counsel had said. Accordingly, this issue was sufficiently preserved in the record to allow defendant to have raised and argued it on appeal.

Defendant contends that the incomplete nature of the transcript prevents him from arguing numerous evidentiary rulings. Specifically, defendant states that he is unable to raise in this appeal issues relating to: (1) late discovery pertaining to defendant's marital relationship; (2) the prosecution's displaying to the jury allegedly unrelated weapons seized from defendant; (3) possible impeachment of an investigating deputy and a technician; (4) display of gory photographs to the jury; (5) impermissible testimony pertaining to "bad acts," other hearsay, and irrelevant testimony; and (6) objections by the State to evidence of defendant's mental illness and instability. Our review of the record, both the portions to which defendant refers us and the surrounding material that give context to the missing parts, satisfies us that while some specific portions of the record are indeed lost, in every case the context of the purportedly objectionable rulings can be reconstructed. For example, as to the prosecution's display of weapons to the jury, the record suggests that trial counsel was momentarily confused as to which weapon bore which exhibit number. However, that uncertainty was promptly resolved, and the substance of defendant's objection and the court's ruling are unambiguous. Similarly, while the objection itself pertaining to evidence of defendant's mental illness and instability are confusing because of omitted portions, the subsequent *voir dire* sufficiently sets out the contested issue.

Defendant also argues that the incomplete transcript impairs his ability to appeal alleged violations of his right to assist in his defense. Defendant first cites a portion of the transcript in which the trial

court read the names of potential jurors. Although some names are evidently missing from the transcript, even if the names were not available through the office of the clerk of court in the district of trial, defendant has failed to cite any authority to support his assertion that he is now entitled to the names of those in the jury pool, nor are we aware of any such authority. Moreover, any names missing from this roll call must have been names of those in the pool who were never called to the jury box, for the transcript includes the *voir dire* of each individual questioned as a potential juror. Defendant also contends that the record's condition prevents him from determining "the basis for the overruling of Defendant's objection to instruction of potential jurors outside of his presence." However, the record reflects the court's ruling and the court's statement that it was making the ruling in its discretion.

Finally, defendant argues that the condition of the record prevents him from appealing issues related to having an unbiased and representative jury. Defendant states that it is not possible to determine the basis of his objection to the jury selection procedure and the grounds for the court's ruling. However, it is a relatively straightforward task to reconstruct the basis of defendant's objection from the available transcript, and the ruling of the court is certain. For instance, defendant states that the record is incomplete concerning the court's inquiry into the contact between a juror and one of the State's witnesses. However, a review of the transcript shows that the only inaudible portion occurs after the court completed its questioning of the jury, made its ruling, and moved on to addressing the issue of sufficient leg room for another juror. Defendant also argues that the transcript impairs his ability to raise appeal issues relating to juror prejudice and dismissal of a juror for reasons of personal hardship. Again, our review of the transcript indicates that these matters are sufficiently preserved so that the court's actions can be readily understood.

In short, the transcript is incomplete in places, most frequently in bench conferences. As a result, reading those portions of the transcript is comparatively burdensome. Nevertheless, in most instances it is possible to reconstruct the substance of what was said, even if the precise words are lost. Where argument of counsel or the court's reason for a holding are lost, the fact of the objection and the subsequent ruling are evident. As stated by our Supreme Court in *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988), *judgment vacated and remanded on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601

(1990), "[a]lthough the transcript in the case *sub judice* cannot be described as a model of reporting service, it is not so inaccurate as to prevent this Court from reviewing it for errors in defendant's trial." *Id.* at 108, 372 S.E.2d at 75 (dismissing defendant's argument that the condition of the transcript of his capital trial and the length of time it took the court reporter to prepare the transcript precluded meaningful appellate review). Similarly, in the case at bar, the transcript, despite its imperfections, is not so inaccurate as to prevent meaningful review by this Court. Any inaccuracies or omissions do not rise to the level found by the Supreme Court in *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (granting new trial where meaningful appellate review was precluded by "the entirely inaccurate and inadequate transcription of the trial proceedings and [where] no adequate record [could] be formulated").

Because the transcript was adequate to allow defendant to raise the appellate issues discussed above, those issues are deemed abandoned. N.C. R. App. P. 28(b)(5). Defendant's assignment of error relating to the condition and quality of the transcript is overruled.

III.

[4] Defendant next contends that the trial court violated his rights to a fair trial, due process and other rights secured by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution by allowing his wife to testify on cross-examination to confidential marital communications. We will examine each of the challenged communications below. However, we note as a preliminary matter that defendant failed to make timely objection to the first and second statements at trial as required by N.C. R. App. P. 10(b)(2). Accordingly, these statements are reviewed for plain error. *See State v. Rush*, 340 N.C. 174, 180, 456 S.E.2d 819, 823 (1995) (reviewing defendant's assignment of error under the plain error rule where defendant failed to object to the admission of marital communications made by his spouse at trial). Our Supreme Court has defined "plain error" as "an error so prejudicial that it amounts to a denial of a fair trial to the defendant." *State v. Hasty*, 133 N.C. App. 563, 565, 516 S.E.2d 428, 429, *disc. review denied*, 350 N.C. 842, 539 S.E.2d 302 (1999) (citation omitted). "In order to prevail under plain error analysis, defendant must first establish that the trial court committed error and then show that 'absent the error, the jury probably would have reached a different result.' " *Rush*, 340 N.C. at 180, 456 S.E.2d at 823 (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)).

The statute controlling our analysis of this issue is section 8-57 of the North Carolina General Statutes, entitled Husband and Wife as Witnesses in Criminal Actions, which states:

> (a) The spouse of the defendant shall be a competent witness for the defendant in all criminal actions, but the failure of the defendant to call such spouse as a witness shall not be used against him. Such spouse is subject to cross-examination as are other witnesses.
>
> (b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:
>
> (1) In a prosecution for bigamy or criminal cohabitation, to prove the fact of marriage and facts tending to show the absence of divorce or annulment;
>
> (2) In a prosecution for assaulting or communicating a threat to the other spouse;
>
> (3) In a prosecution for trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other by mutual consent or court order;
>
> (4) In a prosecution for abandonment of or failure to provide support for the other spouse or their child;
>
> (5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse.
>
> (c) No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.

N.C. Gen. Stat. § 8-57 (1999). While recognizing that the cases and statutes pertinent to this issue "have not been models of clarity," *State v. Holmes*, 330 N.C. 826, 833, 412 S.E.2d 660, 664 (1992), our Supreme Court has interpreted section 8-57 to mean that a "spouses shall be incompetent to testify against one another in a criminal proceeding *only if the substance of the testimony concerns a* 'confidential communication' between the marriage partners made during the

duration of their marriage," *State v. Freeman*, 302 N.C. 591, 596, 276 S.E.2d 450, 453 (1981). This interpretation:

> allows marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation. However, by confining the spousal disqualification to testimony involving "confidential communications" with the marriage, we prohibit the accused spouse from employing the common law rule solely to inhibit the administration of justice.

Id. at 596, 276 S.E.2d at 453-54 (citation omitted). "To fall within the purview of this privilege, the communication must have been made confidentially between wife and husband during the marriage." *State v. Holmes*, 101 N.C. App. 229, 235, 398 S.E.2d 873, 876 (1990), *aff'd*, 330 N.C. 826, 412 S.E.2d 660 (1992) (citation omitted). Accordingly, the determination of whether a communication is "confidential" within the meaning of the statute depends on whether the communication "was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship." *Freeman*, 302 N.C. at 598, 276 S.E.2d at 454 (citations omitted). With these rules in mind, we now turn to the facts of the case at bar.

A. Statement That Cable Workers Were Outside

During trial, the State called defendant's wife as a prosecution witness during its case in chief. She was competent to testify, because the privilege of choosing whether or not to testify belonged to her and not to defendant. *See* N.C. Gen. Stat. § 8-57(b); *Holmes*, 330 N.C. at 834-35, 412 S.E.2d at 665; *State v. McQueen*, 324 N.C. 118, 137, 377 S.E.2d 38, 49 (1989); *State v. Britt*, 320 N.C. 705, 709 n.1, 360 S.E.2d 660, 662 n.1 (1987). However, when defendant objected to her testimony regarding confidential communications arising out of the marriage and asserted his privilege under N.C. Gen. Stat. § 8-57(c), the trial court held a *voir dire* examination, sustained defendant's objection, and limited Mrs. Hammonds' testimony.

Defendant thereafter called his wife as a witness on his behalf. When cross-examined by the State, Mrs. Hammonds testified:

> Q: On the morning that Mr. Graham was killed, you were in the bedroom, were you not?
>
> A: Yes, sir.
>
> Q: You saw the Defendant—or you saw the victim?

A: The victim, no, I never did.

Q: And did you look out the window and see the cable people?

A: Yes sir, I saw the truck outside.

Q: And did you tell your husband it was the cable people?

A: Yes, sir.

Although Mrs. Hammonds was subject to cross-examination like any other witness pursuant to N.C. Gen. Stat. § 8-57(a), "this right of cross-examination [does] not encompass the right to compel the testifying spouse to disclose a confidential marital communication." *Holmes*, 330 N.C. at 832, 412 S.E.2d at 663. Nonetheless, the statement was not induced by the confidence of the marital relationship. Instead, the statement was at most a casual observation not "induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship." *Freeman*, 302 N.C. at 598, 276 S.E.2d at 454 (citations omitted). Accordingly, we hold that this statement was properly admitted.

B. Defendant's Act of Retrieving a Gun

Mrs. Hammonds also testified on cross-examination:

Q: Did you see him when he came back in the bedroom and got the gun out from under the bed?

A: Yes, I seen him when he came back in the bedroom.

Although we have already noted the ambiguity of this testimony, *see* footnote 1, for purposes of this appeal, we will resolve the ambiguity in favor of defendant and assume that Mrs. Hammonds meant that she did observe the defendant remove a firearm from under the bed.

"An action may be protected if it is intended to be a communication and is the type of act induced by the marital relationship." *Holmes*, 330 N.C. at 835, 412 S.E.2d at 665; *see also State v. Suits*, 296 N.C. 553, 557, 251 S.E.2d 607, 609 (1979) (noting that "[a]n act, such as a gesture, can be a declaration within the meaning of this rule"). In *Holmes*, Debra Penn, the defendant's wife, testified for the State that she was at home when the defendant arrived with Holmes and Hooper. After several minutes, the defendant instructed Holmes and Hooper to go outside because he wanted to talk with his wife. When the defendant and his wife were alone, he took a gun out of the

kitchen cabinet and told his wife that he was going to kill Hooper. Debra Penn also testified that the defendant trusted her. The Supreme Court concluded that the defendant's action was a confidential marital communication.

By contrast, defendant's communication in retrieving the gun here was not induced by, or even part of, the marital relationship. Although Mrs. Hammonds stated that she watched over defendant when he had nightmares, she also testified that she was afraid of him and had previously seen him take guns out to confront other people on the road. Defendant took no steps to ensure confidentiality while obtaining the weapon. In short, the record shows that defendant sought to arm himself, and the weapon he wanted was under the bed; his wife's presence in the bedroom to watch was incidental. Accordingly, the admission of this testimony was not plain error.

3. Mrs. Hammonds' Statement That Defendant Told Her What Happened on 24 July 1992

Finally, Mrs. Hammonds testified on cross-examination:

Q: When the Defendant came back in from killing Mr. Graham, did he tell you what he'd done?

. . . .

THE COURT: The objection is overruled. You may reask the question. Ma'am, you may answer yes or no.

Q: Ma'am, did the Defendant tell you what he had done?

[DEFENSE COUNSEL]: Object.

THE COURT: Overruled. You may answer yes or no.

A: Yes, sir.

[PROSECUTOR]: Nothing further.

This testimony cannot be considered the disclosure of a confidential marital communication, because Mrs. Hammonds did not reveal the content of any communication between herself and defendant. However, even if the mere fact that a communication between husband and wife took place were itself confidential, an issue we do not address, a review of the complete record reveals that the trial court ruled correctly. Defendant called his brother as a witness to testify that immediately after the shooting, defendant telephoned and told his brother that he thought he had killed someone. Although the trial

court sustained the State's hearsay objection, defendant was allowed to put his brother's testimony in the record. This proffered testimony demonstrates that defendant did not treat his statement to his wife as a confidential matter. Accordingly, defendant's assignments of error relating to the marital privilege are overruled.

IV.

[5] Finally, defendant contends that the indictment in his case is fatally deficient because it alleges neither premeditation and deliberation nor felony murder. Defendant claims that the indictment as drafted violates his rights to due process, a jury verdict, and notice.

Defendant did not raise an objection to his indictment at trial. As our Supreme Court recently noted:

> It is well settled that "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." An attack on an indictment is waived when its validity is not challenged in the trial court. However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.

State v. Wallace, 351 N.C. 481, 503, 528 S.E.2d 326, 340-41, *cert. denied*, — U.S. —, 148 L. Ed. 2d 498 (2000) (internal citations omitted). Because defendant argues in his appellate brief that "the trial court lacked jurisdiction to proceed on an unconstitutional murder indictment that failed to specify all elements of the crime charged," this issue is properly before the Court.

Section 15-144 of the North Carolina General Statutes, listing the necessary elements for a valid short-form murder indictment, provides:

> In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law . . . and any bill

> of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be.

N.C. Gen. Stat. § 15-144 (1999). Our Supreme Court has repeatedly held that "indictments based on this statute are in compliance with both the North Carolina and United States Constitutions." *Wallace*, 351 N.C. at 504-05, 528 S.E.2d at 341; *see also State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000) (concluding that absence of allegations of premeditation and deliberation or felony murder did not render short-form indictment for murder defective); *State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988) (same); *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983) (noting that a bill of indictment complying with N.C. Gen. Stat. § 15-144 supports a conviction of first-degree murder); *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981) (finding that an indictment for murder in accordance with N.C. Gen. Stat. § 15-144 is sufficient to sustain a guilty verdict of murder and meets the requirements of due process of both the United States and North Carolina Constitutions); *State v. Norwood*, 303 N.C. 473, 279 S.E.2d 550 (1981) (holding that an indictment tracking the language of N.C. Gen. Stat. § 15-144 for murder allows the State to prove both premeditation and deliberation or felony murder). Therefore, it is "sufficient to charge first degree murder without specifically alleging premeditation and deliberation or felony murder." *State v. Avery*, 315 N.C. 1, 14, 337 S.E.2d 786, 793 (1985), *appeal dismissed*, 326 N.C. 51, 389 S.E.2d 96 (1990).

> The indictment in the present case stated:
>
> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously and of malice aforethought did kill and murder Allen H. Graham.

This language satisfies the requirements of N.C. Gen. Stat. § 15A-144. Accordingly, this assignment of error is overruled.

> Defendant received a fair trial free of prejudicial error.
>
> No error.
>
> Judge SMITH concurs.
>
> Judge GREENE dissents.

Judge GREENE dissenting.

A speedy trial, for persons accused of committing crimes, serves to protect not only the accused, but also certain societal interests. *Barker v. Wingo*, 407 U.S. 514, 519, 33 L. Ed. 2d 101, 110-11 (1972). The harm to society includes: (1) the detrimental effects on rehabilitation caused by a "delay between arrest and punishment"; (2) the cost of "lengthy pretrial detention"; (3) the loss of "wages which might have been earned" by the "incarcerated breadwinners"; (4) the opportunity of persons, released on bond for lengthy periods awaiting trial, to commit other crimes; and (5) the possibility, because of a large backlog of criminal cases, for defendants "to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system." *Id.* at 519-21, 33 L. Ed. 2d at 111. The harm to the accused includes: (1) "oppressive pretrial incarceration;" (2) "anxiety and concern of the accused;" and (3) "the possibility that the [accused's] defense will be impaired by" dimming memories and loss of exculpatory evidence. *Id.* at 532, 33 L. Ed. 2d at 118. Of these harms to the accused, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire [criminal] system." *Id.*

In evaluating whether a particular accused has been deprived of his constitutional right to a speedy trial, our courts have identified "some of the factors which . . . should [be] asses[ed]." *Id.* at 530, 33 L. Ed. 2d at 117. Those factors include whether: "delay before trial was uncommonly long, . . . the government or criminal defendant is more to blame for that delay, . . . in due course, the defendant asserted his right to a speedy trial, and . . . [the defendant] suffered prejudice as the delay's result." *Doggett v. United States*, 505 U.S. 647, 651, 120 L. Ed. 2d 520, 528 (1992). None of these factors are "a necessary or sufficient condition to the finding of a deprivation of the right of a speedy trial." *Barker*, 407 U.S. at 533, 33 L. Ed. 2d at 118. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.*

The length of the delay is actually a two-part inquiry. *Doggett*, 505 U.S. at 651, 120 L. Ed. 2d at 528. First, the court must determine if the delay between the accusation and the trial is unreasonable. As a general proposition, a post-accusation delay is unreasonable if it "approaches one year." *Id.* at 652 n.1, 120 L. Ed. 2d at 528 n.1. If the delay is not unreasonable, there has been no violation of the accused's speedy trial rights and, thus, no need to consider the other factors. If the post-accusation is unreasonable, the delay is "pre-

sumptively prejudicial" and the longer the delay, the more "intensified" the presumption of prejudice. *Id.* at 652, 120 L. Ed. 2d at 528.

There may be valid or acceptable reasons for the unreasonable delay, *i.e.*, difficulty in locating a missing witness. The reasons may be invalid or unacceptable, *i.e.*, prosecutorial bad faith (intentionally delaying the prosecution to gain some impermissible advantage over defendant at trial), prosecutorial negligence or overcrowded courts. *Barker*, 407 U.S. at 531, 33 L. Ed. 2d at 117. Prosecutorial bad faith, resulting in an unreasonable delay in prosecution, raises an inference of prejudice per se. *See Doggett*, 505 U.S. at 656, 120 L. Ed. 2d at 531. Although prosecutorial negligence is generally "to be weighed more lightly than a deliberate intent to harm the accused's defense," an excessive delay based on prosecutorial negligence necessarily "compromises the reliability of the trial in ways that neither party can prove or, for that matter, identify," *id.* at 655, 120 L. Ed. 2d at 531, and, thus, warrants granting a defendant relief, without a showing of particularized prejudice, unless the State can affirmatively show the delay left a defendant's ability to defend himself unimpaired, *id.* at 657-58, 120 L. Ed. 2d. at 532; *see State v. Chaplin*, 122 N.C. App. 659, 663, 471 S.E.2d 653, 655 (1996) (lengthy delay establishes *prima facie* case that delay was caused by neglect of the State and the State is required to offer evidence explaining delay).

In this case, there was a delay, between defendant's arrest and his trial, of four and one half years. He remained in jail, without the benefit of bond, during that entire time. This delay is not only unreasonable, but excessive and thus presumptively compromised the reliability and fairness of defendant's trial.[3] Because the State has neither justified the delay, nor shown the delay has not impaired the defendant's ability to defend himself, defendant has been denied his constitutional right to a speedy trial and is entitled to a reversal of his conviction.[4] Although there is no showing the prosecutor intention-

3. Even if defendant were required to show prejudice, which I do not believe is necessary in this case, he has done so.

Defendant was incarcerated for approximately four and one half years and held in jail without the benefit of bond. During this time, the State's principal investigator died and the principal investigator's notes were unable to be located by the State. Without the principal investigator, or his notes, defendant was prevented from discovering and presenting potentially exculpatory material at his trial. Moreover, as the majority points out, during the long delay, two witnesses changed their version of events.

4. Defendant's delay in asserting his speedy trial right, some four years into the process, weighs against him but does not foreclose his current claim. *State v. Flowers*,

ally delayed the trial for the purpose of obtaining an advantage over defendant, the record clearly shows the prosecutor did not make a reasonable effort to avoid the excessive delay of defendant's trial and thus was negligent. Indeed, the record reveals there were charges filed against other individuals, after defendant's arrest, and those cases were tried prior to the date of defendant's trial. Furthermore, there were forty-eight violent felonies filed in Robeson County Superior Court after defendant's case was filed, all of which were disposed of prior to defendant's case. These forty-eight felonies were disposed of, on average, within 502 days, as compared to defendant's case that was disposed of in 1,498 days.

In summary, the prosecutor of Robeson County[5] egregiously persisted in failing to prosecute defendant and, therefore, defendant is entitled to have his conviction reversed. To hold otherwise would permit the State to abuse the interests of criminal defendants assigned low prosecutorial priority.

STATE OF NORTH CAROLINA v. ERIC EARL GUICE

No. COA99-1261

(Filed 29 December 2000)

1. Kidnapping— second degree—purpose of terrorizing victim—sufficiency of evidence

The trial court did not err by denying a kidnapping defendant's motion to dismiss for insufficient evidence where the indictment alleged that defendant had acted for the specific purpose of terrorizing the victim, so that the jury could convict on that issue only, and the evidence was that defendant called the victim twice and entered her home uninvited and unannounced despite her threats to call the police; defendant repeatedly punched the vic-

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347 N.C. 1, 28, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). This delay in asserting his right must be balanced against the other factors in this case. The lengthy delay, the negligence of the State in causing the delay, and the un-rebutted presumption of prejudice to defendant far outweigh defendant's failure to earlier assert his speedy trial right. *See Chaplin*, 122 N.C. App. at 666, 471 S.E.2d at 657.

5. I note that at the time of defendant's arrest, J. Richard Townsend was the prosecutor of Robeson County and in 1994, L. Johnson Britt, III became the prosecutor of Robeson County.

tim in the face, pointed a gun at her face, and demanded the gun she kept in her house; she complied with that demand, then fled, clad only in a tee shirt, to a neighbor's house; defendant pursued her there and entered the house, pointing a gun at the the homeowner, who was a total stranger, and forcing him to lie on the floor; defendant pushed a table against the victim, choked her, and dragged her outside; defendant finally left after the victim implored him to do so; and the victim suffered multiple bumps on the head, bruises on her arms, and fractured ribs.

2. Sentencing— firearm enhancement—underlying crimes—use of firearm not an essential element

The trial court did not err by enhancing a second-degree kidnapping defendant's sentence based upon use of a firearm where defendant argued that use of the gun was necessary to the essential element of terrorizing the victim and that defendant was contemporaneously convicted of possession of a firearm by a convicted felon and assault by pointing a gun. Use of a firearm is not an essential element of second-degree kidnapping, regardless of the purpose alleged. As for the firearm-related convictions, all of the convictions were consolidated under the second-degree kidnapping conviction, for which defendant was sentenced.

3. Criminal Law— motion for appropriate relief on appeal—proper

A motion for appropriate relief was properly before the Court of Appeals where a kidnapping defendant asserted that a United States Supreme Court decision represented a significant change in the law applied in his sentencing and that retroactive application of the changed legal standard was required.

4. Sentencing— firearm enhancement—underlying facts not alleged

A kidnapping defendant's argument that the trial court was without jurisdiction to impose the 60-month firearm enhancement because the facts underlying the enhancement were not alleged in the indictment was without merit. Neither *Apprendi v. New Jersey*, 147 L. Ed. 2d 435 (2000), nor any other United States Supreme Court case, nor any binding case law from other federal courts or North Carolina courts command such an outcome under either the United States or the North Carolina constitutions.

5. Sentencing— firearm enhancement—statute violates due process

A kidnapping defendant's motion for appropriate relief in the Court of Appeals was granted insofar as it requested a determination that the firearm sentencing enhancement is facially unconstitutional. The statute removed from the jury the assessment of facts that increase the prescribed range of penalties to which the criminal defendant is exposed and is facially unconstitutional as violative of due process. N.C.G.S. § 15A-1340.16A

6. Evidence— hearsay—excited utterance exception—statement by victim to officer at scene

The trial court did not err in a kidnapping prosecution by allowing the State on three occasions to present an alleged hearsay statement by the victim where the statement was made by the victim to an officer when he first arrived on the scene, within several minutes of defendant dragging the victim from a house. She was crying and so terrified she was having difficulty breathing; her statement to the officer was properly admitted as an excited utterance.

7. Evidence— victim's written statement—corroboration—read by officer

The trial court did not err in a kidnapping prosecution by allowing into evidence a written statement from the victim where the statement was admitted for the limited purpose of corroborating the victim's testimony rather than as substantive evidence. Furthermore, it was not improper for the officer who took the statement to read a redacted version aloud; the declarant is not the only party entitled to read aloud a prior consistent statement that corroborates her in-court testimony.

8. Evidence— prior bad act—extrinsic evidence

There was no reversible or plain error in a kidnapping prosecution where the trial refused to allow defendant to introduce evidence that the victim had previously let the air out of the tires of defendant's vehicle. Defendant sought to elicit this testimony on direct examination from defendant's sister and did not question the victim concerning this incident during cross-examination.

Appeal by defendant from judgment entered 22 June 1999 by Judge Loto G. Caviness in Superior Court, Mecklenburg County. Heard in the Court of Appeals 20 September 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General James P. Longest, Jr., for the State.

Rudolf Maher Widenhouse & Fialko, by Christopher C. Fialko, for the defendant-appellant.

WYNN, Judge.

Following his trial, a jury convicted the defendant of various offenses stemming from events which occurred on 19 July 1998. He appeals from his conviction and sentence.

In the summer of 1997, the defendant met and befriended Kris Wall. Around November of that year, Ms. Wall separated from her husband. The nature of the relationship between the defendant and Ms. Wall is controverted; but, the record on appeal shows that Ms. Wall made attempts to end their relationship sometime during the late spring or early summer of 1998. In May 1998, Ms. Wall gave birth to a son.

On 19 July 1998, the defendant called Ms. Wall around 5 a.m. and again around 10:30 a.m. Shortly thereafter, the defendant arrived at Ms. Wall's house, entering unannounced and uninvited, and confronted her. The two argued and Ms. Wall fled from her house, with the defendant in pursuit. Clothed only in a t-shirt, Ms. Wall ran into the home of Michael Lawing, whose front door was open, and the defendant followed her inside. While pointing a gun at Mr. Lawing, the defendant ordered Mr. Lawing to lie face down on the floor. After Mr. Lawing complied with this order, the defendant and Ms. Wall continued to argue in Mr. Lawing's house.

The defendant then dragged Ms. Wall outside. After Ms. Wall refused to leave with the defendant, he retrieved his keys from Ms. Wall's house and departed. Shortly thereafter, John Ruisi, a police officer employed with the Charlotte-Mecklenburg Police Department, arrived and spoke with Ms. Wall. The defendant called Ms. Wall and spoke with Officer Ruisi. Officer Ruisi later took Ms. Wall to the hospital, where he prepared a written statement for her which she signed. The defendant turned himself in later that day.

In August 1998, the defendant was indicted for multiple offenses, including assault by pointing a gun, communicating threats, assault on a female, damage to personal property, and possession of a firearm by a felon. In June 1999, the defendant was indicted for second-degree kidnaping under a superceding indictment arising out of the same events. At the close of the State's evidence, the trial court dismissed the damage to personal property charge but denied the defendant's motion to dismiss the charge of second-degree kidnaping. On 22 June 1999, the jury returned verdicts of guilty on the remaining charges and the trial court entered judgment accordingly. After consolidating the cases under the second-degree kidnaping charge for sentencing purposes, the trial court enhanced the defendant's sentence for the kidnaping conviction under the firearm enhancement statute, N.C. Gen. Stat. § 15A-1340.16A (Supp. 1996).

The defendant appealed, asserting as assignments of error that the trial court erred in: (1) denying his motion to dismiss the charge of second-degree kidnaping; (2) enhancing his sentence on the count of second-degree kidnaping under the firearm enhancement provision found in N.C. Gen. Stat. § 15A-1340.16A; (3) allowing into evidence alleged hearsay statements of Ms. Wall; and (4) refusing to permit him to introduce evidence of a specific prior bad act of Ms. Wall. The defendant has also filed a motion for appropriate relief in light of the United States Supreme Court's recent decisions in *Apprendi v. New Jersey*, 530 U.S. —, 147 L. Ed. 2d 435 (2000), and *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999). We find no error in the trial, but remand for resentencing.

[1] First, the defendant argues that the State failed to prove the specific intent necessary to support a conviction for second-degree kidnaping; specifically, that he unlawfully confined, restrained or removed Ms. Wall for the purpose of terrorizing her. We disagree.

As kidnaping is a specific intent crime, the State bears the burden of proving that the defendant "unlawfully confined, restrained, or removed the [victim] for one of the eight purposes set out in the statute." *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986); *see* N.C. Gen. Stat. § 14-39 (Supp. 1996). "The indictment in a kidnaping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment." *Moore*, 315 N.C. at 743, 340 S.E.2d at 404.

N.C. Gen. Stat. § 14-39 provides in relevant part that:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of: . . .
>
> > (3) [T]errorizing the person so confined, restrained or removed . . . ;
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). . . . If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39. The superceding indictment for second-degree kidnaping in the present case stated the following:

> The jurors for the State upon their oath present that on or about the 19th day of July, 1998, in Mecklenburg County, Eric Earl Guice did unlawfully, wilfully and feloniously kidnap Kris Lavanta Wall, a person who had attained the age of sixteen (16) years, by unlawfully confining, restraining and removing her from one place to another, without her consent, and for the purpose of terrorizing.

The State was therefore limited at trial to proving that the defendant acted with the specific purpose of terrorizing Ms. Wall, and the jury was only allowed to convict the defendant on that theory. *See Moore*, 315 N.C. at 743, 340 S.E.2d at 404; *see also State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983).

In reviewing the trial court's denial of the defendant's motion to dismiss for insufficiency of the evidence to sustain a conviction, "we must examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime." *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). Substantial evidence is that which a reasonable person would consider adequate to support the conclusion that each essential element exists. *Id.* In short, we must determine "whether any rational trier of fact could have found the essential ele-

ments of the crime beyond a reasonable doubt." *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981) (citations omitted).

In determining whether there was sufficient evidence to support the jury's conclusion that the defendant sought to terrorize Ms. Wall, "the test is not whether subjectively [Ms. Wall] was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize her." *Moore*, 315 N.C. at 745, 340 S.E.2d at 405. Terrorizing requires more than just putting Ms. Wall in a state of fear; it requires "putting [her] in some high degree of fear, a state of intense fright or apprehension." *Id.* (citing *State v. Jones*, 36 N.C. App. 447, 244 S.E.2d 709 (1978)). The defendant's intent or purpose to terrorize Ms. Wall, or the absence of such intent or purpose, may be inferred from the circumstances surrounding the alleged crime. *State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 271 (1982).

When viewed in the light most favorable to the State, the evidence presented at trial showed that the defendant called Ms. Wall twice and entered her home uninvited and unannounced despite her threats to call the police. Ms. Wall testified that the defendant punched her repeatedly in the face and pointed a gun in her face, and demanded that she give him the gun she kept in her house. After she complied with this demand, Ms. Wall—clothed only in a t-shirt—fled to Mr. Lawing's house, where she was pursued and tracked down by the defendant. The defendant entered Mr. Lawing's house in pursuit of Ms. Wall, pointed a gun at him—a total stranger—and forced him to lie down on the floor. The defendant struggled further with Ms. Wall, pushed a table against her, choked her, and dragged her outside. After Ms. Wall again implored the defendant to leave, the defendant finally departed. During the course of the struggle with the defendant, Ms. Wall suffered multiple bumps on her head, bruises on her arms, and fractured ribs. We conclude that the State presented substantial evidence from which a rational trier of fact could have found beyond a reasonable doubt that the defendant acted with the purpose of terrorizing Ms. Wall.

[2] The defendant next contends that the trial court erred by enhancing his sentence for the second-degree kidnaping conviction as a result of his use of a firearm during the crime. Upon the jury returning guilty verdicts on all charges, the trial court held a sentencing hearing and consolidated all charges under the second-degree kidnaping charge for sentencing purposes. The trial court sentenced the defendant to a minimum term of 29 months imprisonment for the kid-

naping conviction, and enhanced the sentence, citing N.C. Gen. Stat. § 15A-1340.16A, by 60 additional months for a minimum of 89 months imprisonment.

N.C. Gen. Stat. § 15A-1340.16A provides in part that:

> (a) If a person is convicted of a Class . . . E felony and the court finds that the person used, displayed, or threatened to use or display a firearm at the time of the felony, the court shall increase the minimum term of imprisonment to which the person is sentenced by 60 months.

Second-degree kidnaping constitutes a Class E felony. *See* N.C. Gen. Stat. § 14-39. Subsection (b) of N.C. Gen. Stat. § 15A-1340.16A provides:

> Subsection (a) of this section does not apply in any of the following circumstances:
>
> . . .
>
> (2) The evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying . . . felony.

The defendant argues that the trial court's enhancement of the defendant's sentence for second-degree kidnaping under N.C. Gen. Stat. § 15A-1340.16A was improper as the use of the gun by the defendant was necessary for the State to prove the essential element of terrorizing to support the kidnaping charge. Alternatively, the defendant argues that the trial court improperly enhanced the sentence on the second-degree kidnaping charge for using a firearm when he was contemporaneously convicted on charges of possession of a firearm by a convicted felon and assault by pointing a gun. As to both theories, we disagree.

As to the defendant's first theory, we note that the use of a firearm is not an essential element of the crime of second-degree kidnaping, regardless of the purpose alleged. *See* N.C. Gen. Stat. § 14-39. Therefore, the State need not have shown that the defendant used, displayed, or threatened to use or display a firearm to prove that he intended to terrorize Ms. Wall. As our Supreme Court has stated, "[b]ecause the use or display of a firearm is not an essential element of second-degree kidnapping, the trial court was not precluded from relying on evidence of defendant's use of the firearm and enhancing defendant's term of imprisonment pursuant to the firearm enhance-

ment section." *State v. Ruff*, 349 N.C. 213, 216-17, 505 S.E.2d 579, 581 (1998).

As for the defendant's alternative argument that his "contemporaneous convictions" on firearm-related charges prevents the use of the firearm as a sentence-enhancement factor, we again disagree. First, we note that the defendant's convictions were consolidated by the trial court under the second-degree kidnaping charge, for which conviction he was sentenced. The defendant cites *State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984) for the proposition that a defendant's sentence cannot be enhanced by factors that are based on joined offenses of which the defendant has been contemporaneously convicted. However, as was noted in *Ruff*, the *Lattimore* case was,

> decided under the former Fair Sentencing Act, N.C.G.S. ch. 15A, art. 81A (1988). However, our legislature has since repealed the Fair Sentencing Act. Act of July 24, 1993, ch. 538, sec. 14, 1993 N.C. Sess. Laws 2298, 2318. Since defendant was found guilty and sentenced for crimes occurring after 1 October 1994, the Structured Sentencing Act, N.C.G.S. ch. 15A, art. 81B (1997), provides the controlling law. N.C.G.S. § 15A-1340.10 (1997).

Ruff, 349 N.C. at 216, 505 S.E.2d at 580. Similarly, in the instant case the defendant was convicted and sentenced for crimes occurring after 1 October 1994, so the Structured Sentencing Act controls. As was noted in *Ruff*, N.C. Gen. Stat. § 15A-1340.16A(a) does not apply where "[t]he evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying . . . felony." *See id.* (quoting N.C. Gen. Stat. § 15A-1340.16A(b)(2)). The underlying felony in the instant case, as in *Ruff*, is second-degree kidnaping, of which the use or display of a firearm is not an essential element. *See Ruff*, 349 N.C. at 216-17, 505 S.E.2d at 581. The trial court therefore committed no error in using the firearm enhancement provision to enhance the defendant's sentence on the charge of second-degree kidnaping. *See id.*

The defendant also challenges the constitutionality of the firearm enhancement provision in his motion for appropriate relief. According to the defendant, the recent holdings by the United States Supreme Court in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. —, 147 L. Ed. 2d 435 (2000), render N.C. Gen. Stat. § 15A-1340.16A unconstitutional on its face, and additionally argues that the statute was unconstitution-

ally applied to the defendant in the instant case. In support of his argument, the defendant also cites the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 19 and 23 of the North Carolina Constitution. We agree that the firearm enhancement statute is facially unconstitutional pursuant to the Supreme Court's holding in *Apprendi*, under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

[3] We first point out that the defendant's motion for appropriate relief is properly before this Court. N.C. Gen. Stat. § 15A-1418(a) (1999); *State v. Brock*, 46 N.C. App. 120, 264 S.E.2d 390 (1980); N.C. Gen. Stat. § 15A-1415 (1999). He asserts in his motion that the *Apprendi* decision is a Constitutional ruling and, as such, represents "a significant change in law" that was applied by the trial court in sentencing him, such that "retroactive application of the changed legal standard is required." N.C. Gen. Stat. § 15A-1415(b)(7) (1999). The defendant further asserts that he was "sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina." N.C. Gen. Stat. § 15A-1415(b)(4) (1999). Accepting the defendant's assertions as true, *arguendo*, we consider the defendant's motion for appropriate relief. We also note that *Apprendi* was decided on 26 June 2000, while this case was on direct review; as such, *Apprendi* applies here. *See Teague v. Lane*, 489 U.S. 288, 302-03, 103 L. Ed. 2d 334, 350-51 (1989) ("new rules should *always* be applied retroactively to cases on direct review, but . . . generally they should not be applied retroactively to cases on collateral review"); *State v. Green*, 350 N.C. 400, 405, 514 S.E.2d 724, 727 (1999).

Article I, Section 19 of the North Carolina Constitution provides the basis for due process in North Carolina:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art I, § 19. Our courts have long held that "[t]he 'law of the land' clause has the same meaning as 'due process of law' under the Federal Constitution." *Summey Outdoor Advertising, Inc. v. County of Henderson*, 96 N.C. App. 533, 541, 386 S.E.2d 439, 444, *disc. review denied*, 326 N.C. 486, 392 S.E.2d 101 (1989); *see also State v. Jones*,

305 N.C. 520, 290 S.E.2d 675 (1982); *State v. Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100, 104 L. Ed. 2d 1007 (1989) (the term "law of the land" in art. I, § 19 of the North Carolina Constitution is synonymous with "due process of law" as that term is used in the Fourteenth Amendment of the United States Constitution). Nonetheless, federal court interpretations (including those of the United States Supreme Court) of due process under the Fourteenth Amendment of the United States Constitution, while highly persuasive, are not binding in construing the "law of the land" clause under N.C. Const. art I, § 19. *Armstrong v. Armstrong*, 85 N.C. App. 93, 97, 354 S.E.2d 350, 353 (1987), *rev'd on other grounds*, 322 N.C. 396, 368 S.E.2d 595 (1988); *see also Smith*, 90 N.C. App. at 163, 368 S.E.2d at 35; *Bentley v. North Carolina Ins. Guar. Ass'n*, 107 N.C. App. 1, 9, 418 S.E.2d 705, 709 (1992); *Lorbacher v. Housing Auth. of City of Raleigh*, 127 N.C. App. 663, 674-75, 493 S.E.2d 74, 81 (1997). It is axiomatic that our "State constitutional due process requirements may be more expansive than the minimal due process requirements of the United States Constitution," *Wake County ex rel. Carrington v. Townes*, 53 N.C. App. 649, 650 n. 1, 281 S.E.2d 765, 766-67 n. 1 (1981), but that our state due process requirements under N.C. Const. art. I, § 19 must equal or surpass those imposed under U.S. Const. amend. XIV. Therefore, to comport with our state due process requirements, a statute must, at the least, meet the due process requirements under U.S. Const. amend. XIV. We therefore begin our analysis with a review of Fourteenth Amendment due process requirements.

The term "due process" has a dual significance, insofar as it "provides two types of protection for individuals against improper governmental action." *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998); *see also State v. Smith*, 265 N.C. 173, 180, 143 S.E.2d 293, 299 (1965); *In re Moore*, 289 N.C. 95, 101, 221 S.E.2d 307, 311 (1976). First,

> "Substantive due process" protection prevents the government from engaging in conduct that "shocks the conscience," . . . or interferes with rights "implicit in the concept of ordered liberty."

Thompson, 349 N.C. at 491, 508 S.E.2d at 282 (citations omitted); *see also Smith*, 265 N.C. at 180, 143 S.E.2d at 299; *Moore*, 289 N.C. at 101, 221 S.E.2d at 311. Second,

> "Procedural due process" protection ensures that when government action depriving a person of life, liberty, or property sur-

> vives substantive due process review, that action is implemented in a fair manner.

Id. (citations omitted).

An individual's liberty interest is substantial, and due process must be afforded when a state seeks to deprive an individual of that liberty interest. *See Townes*, 53 N.C. App. at 650, 281 S.E.2d at 767. Substantive due process "may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power." *Smith*, 265 N.C. at 180, 143 S.E.2d at 299 (citations omitted). "The traditional substantive due process test has been that a statute must have a rational relation to a valid state objective." *Moore*, 289 N.C. at 101, 221 S.E.2d at 311. Substantive due process, therefore, provides "a guaranty against arbitrary legislation, demanding that the law be substantially related to the valid object sought to be obtained." *Lowe v. Tarble*, 313 N.C. 460, 461, 329 S.E.2d 648, 650 (1985) (citing *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320 (1975)); *see State v. Killian*, 37 N.C. App. 234, 245 S.E.2d 812 (1978). Thus, we may not invoke Fourteenth Amendment substantive due process to overturn N.C. Gen. Stat. § 15A-1340.16A if there is some rational basis for the enactment of the statute. *Tarble*, 313 N.C. at 462, 329 S.E.2d at 650.

The defendant in this case does not contest—and indeed we hold—that the General Assembly had a reasonable basis for enacting N.C. Gen. Stat. § 15A-1340.16A. "[T]he governmental objectives of the statute are legitimate and permissible. The legislation is not arbitrary and is substantially related to the legislative goals." *Id.*; *see Apprendi*, 530 U.S. at —, 147 L. Ed. 2d at 446 ("The strength of the state interests that are served by the . . . legislation has no more bearing on this procedural question than the strength of the interests served by other provisions of the criminal code.").

As the substantive basis for the firearm enhancement statute is not at issue, we consider whether the statute comports with Fourteenth Amendment procedural due process requirements. *See Townes*, 53 N.C. App. at 651, 281 S.E.2d at 767 ("the touchstone of due process is the presence of fundamental fairness in any judicial proceeding adversely affecting the interests of an individual"). The United States Supreme Court's decisions in *Jones* and *Apprendi* are particularly instructive in analyzing this aspect of the North Carolina firearm enhancement statute, and we consider each decision in detail.

At issue in *Jones* was the federal carjacking statute, 18 U.S.C. § 2119 (1988 ed., Supp. V), and in particular certain provisions of the statute that established higher penalties to be imposed when the proscribed conduct resulted in serious bodily injury or death. The United States Supreme Court considered whether the fact of resulting serious bodily injury or death was a mere sentencing factor, or rather an additional element of the offense that must be charged in the indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict. 526 U.S. at 232, 143 L. Ed. 2d at 319 ("Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.") In a footnote, the United States Supreme Court stated the principle underlying its view, "that the carjacking statute, as construed by the Government, may violate the Constitution," *id.* at 243, 143 L. Ed. 2d at 326, as follows:

> [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. Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the statute rises only to the level of doubt, not certainty.

Id. at 243 n. 6, 143 L. Ed. 2d at 326 n. 6. Early in its opinion, the United States Supreme Court expressed skepticism toward the government's reading of the statute, stating that "[i]t is at best questionable whether the specification of facts sufficient to increase a penalty range . . . was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit." *Id.* at 233, 143 L. Ed. 2d at 319-20.

However, the United States Supreme Court recognized the possibility of two differing views of the carjacking statute: The construction advocated by the government, urging that the fact of "serious bodily harm" or death under the statute is a mere sentencing factor, and the opposing view treating the fact of such harm or death as an element of an offense. With these differing views in mind, the United States Supreme Court noted the rule that " 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such ques-

tions are avoided, our duty is to adopt the latter.' " *Id.* at 239, 143 L. Ed. 2d at 324 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408, 53 L. Ed. 2d 836, 849 (1909)).

As the construction advocated by the government would "open [the statute] to constitutional doubt in light of a series of cases over the past quarter century, dealing with due process and the guarantee of trial by jury," *id.* at 240, 143 L. Ed. 2d at 324, the United States Supreme Court instead adopted what it deemed the "fairest reading" of the statute, *id.* at 239, 143 L. Ed. 2d at 324, construing "serious bodily harm" as a distinct element of a separate offense from the carjacking offense, "which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Id.* at 251-52, 143 L. Ed. 2d at 331. The United States Supreme Court thereby avoided ruling on the constitutionality of the carjacking statute, instead remanding the case for further consistent proceedings. *Id.* ("Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding [the serious constitutional] questions" raised by the government's view).

In *Apprendi*, the United States Supreme Court considered a challenge to New Jersey's hate-crime statute, which provided for sentence enhancement if the trial judge found, by a preponderance of the evidence, that the defendant acted to intimidate on the basis of "race, color, gender, handicap, religion, sexual orientation or ethnicity." 530 U.S. at —, 147 L. Ed. 2d at 442 (citing N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000)). At the outset, the United States Supreme Court in *Apprendi* noted that "constitutional protections of surpassing importance" were at stake therein, including the Fourteenth Amendment "proscription of any deprivation of liberty without 'due process of law,' " as well as the Sixth Amendment guarantee to an accused in a criminal prosecution of " 'the right to a speedy and public trial, by an impartial jury.' " *Id.* at —, 147 L. Ed. 2d at 447. "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " *Id.* at —, 147 L. Ed. 2d at 447 (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 449 (1995)). The question before the United States Supreme Court was to what extent the same procedural protections should extend to facts which, while not formally defined by the legislature as "elements" of an offense, nonetheless increase the maximum statutory penalty to which a defendant may be subjected.

The United States Supreme Court elevated the above-quoted language in *Jones* from dicta to the status of constitutional law with respect to state prosecutions of state offenses, finding that New Jersey's hate-crime statute violated due process. In so doing, it held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at —, 147 L. Ed. 2d at 455. Following its discussion of the historical underpinnings of the constitutional guarantees of due process and trial by jury, the United States Supreme Court stated:

> We should be clear that *nothing* in this history *suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute.* We have often noted that judges in this country have long exercised *discretion* of this nature in imposing sentence *within statutory limits* in the individual case.

530 U.S. at —, 147 L. Ed. 2d at 449 (emphasis added in part). Thus, the rule set forth in *Apprendi* is not violated unless the trial court, following its discretionary consideration of factors relating to both the offense and the offender, imposes a penalty that exceeds the maximum the defendant could receive, by statute, for the particular underlying offense. The United States Supreme Court stated the relevant inquiry as so: "[D]oes the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at —, 147 L. Ed. 2d at 457.

[4] The defendant in this case first argues in his motion that the enhancement of his sentence under the firearm enhancement statute should be vacated, as the elements required for the enhancement, i.e., that the defendant "used, displayed, or threatened to use or display a firearm at the time of the felony," N.C. Gen. Stat. § 15A-1340.16A, were not alleged in the second-degree kidnaping indictment. According to the defendant, the omission of such facts rendered the indictment deficient, and the trial court therefore lacked the jurisdiction to impose the firearm enhancement.

The State does not contest that these facts were not alleged in the indictment, but argues that the *Apprendi* decision does not require such facts to be alleged in the indictment in state cases. Notably, it is the *Jones* decision, concerning the prosecution of a federal crime in

federal court, that includes language (quoted, *supra*) requiring such facts to be charged in the indictment. 526 U.S. at 243 n. 3, 143 L. Ed. 2d at 326 n. 3. The *Apprendi* Court, concerning a state prosecution of a state offense in state court, declared only that such facts "must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at —, 147 L. Ed. 2d at 455. The issue of whether the fact in question had to be charged in the indictment was not argued to the United States Supreme Court in *Apprendi*, wherein that Court stated in a footnote:

> *Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment.* He relies entirely on the fact that the "due process of law" that the Fourteenth Amendment requires the States to provide to persons accused of crimes encompasses the right to a trial by jury, *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), and the right to have every element of the offense proved beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). That Amendment has not, however, been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). *We thus do not address the indictment question separately today.*

Id. at — n. 3, 147 L. Ed. 2d at 447 n. 3 (emphasis added).

Thus, the *Apprendi* decision does not support the defendant's assertion that "[t]he Trial Court did not have jurisdiction to impose the 60-month firearm enhancement" on the grounds that "the facts underlying their imposition were not alleged in the indictments." Indeed, we are unaware of any United States Supreme Court case which has applied the Due Process Clause of the Fourteenth Amendment in a manner which requires that a state indictment for a state offense must contain each element and fact which might increase the maximum punishment for the crime charged. *See State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343 (2000) (upholding the constitutionality of North Carolina's short-form indictment despite a challenge in light of *Jones*). We are similarly unaware of any binding case law from any other federal courts, or from our own state courts, commanding such an outcome under either the United States Constitution or the North Carolina Constitution. The defendant's

argument that the trial court was without jurisdiction to impose the 60-month firearm enhancement as the facts underlying the enhancement were not alleged in the indictment for second-degree kidnaping is therefore without merit. *See Wallace*, 351 N.C. at 508, 528 S.E.2d at 343.

[5] The defendant next asserts that, in light of the *Apprendi* decision, the firearm enhancement statute is unconstitutional on its face, and as applied to him in this case, as it permits the trial court to make the requisite factual findings, instead of requiring that such factual determinations be submitted to the jury and proved beyond a reasonable doubt.

The defendant contends in his motion that, in determining the maximum penalty authorized by statute, one must consider the particular defendant's prior record level, as well as the existence or absence of aggravating or mitigating factors, as found by the trial court. Given the defendant's prior record level in the instant case of Level II and the absence of any finding of aggravating or mitigating factors, the defendant was subject to the presumptive range of minimum durations of punishment (23-29 months) for the offense of second-degree kidnaping, a Class E felony. *See* N.C. Gen. Stat. § 15A-1340.17 (Supp. 1996); N.C. Gen. Stat. § 14-39. The trial court imposed a minimum sentence of 29 months, which corresponds to a maximum term of imprisonment of 44 months. *See* N.C. Gen. Stat. § 15A-1340.17(e). The trial court then imposed the firearm enhancement, increasing the defendant's minimum term of imprisonment by 60 months to 89 months, which corresponds to a maximum term of imprisonment of 116 months. *See* N.C. Gen. Stat. § 15A-1340.16A(a); N.C. Gen. Stat. § 15A-1340.17(e). The defendant contends that his resulting sentence of 89 to 116 months was unconstitutional, as it far exceeded the "prescribed statutory maximum" for second-degree kidnaping, which, according to the defendant, was only 44 months.

The State counters that "the prescribed statutory maximum for an offense is the ultimate maximum possible provided by statute," such that the defendant's prior record level, and the absence or existence of aggravating or mitigating factors, is irrelevant in determining the maximum statutory punishment, and we need only look at the maximum punishment possible for the class of felony for which the defendant was convicted. Thus, by virtue of a jury's guilty verdict for a particular class of felony, the defendant would be subjected to the maximum punishment theoretically available to an offender commit-

ting that class of felony, assuming the highest prior record level (Level VI) and a finding of aggravating circumstances.[1]

Regardless of the manner in which the "prescribed statutory maximum" punishment is calculated, the State acknowledges that the firearm enhancement provision is unconstitutional as it was applied to the defendant in the instant case. Even assuming the State's asserted calculation of the "prescribed statutory maximum" punishment is correct, N.C. Gen. Stat. § 15A-1340.17(c) provides that for a defendant with prior record Level VI, and upon a finding of aggravating factors, the range of minimum durations of imprisonment for a Class E felony is 59-74 months. A minimum sentence of 74 months imprisonment (the absolute uppermost minimum term for a Class E felony) would correspond to a maximum term of 98 months. N.C. Gen. Stat. § 15A-1340.17(e). While the defendant contends the prescribed statutory maximum in this instance is 44 months, the State would apparently argue that the maximum penalty is 98 months. As the imposed sentence of 89 months minimum and 116 months maximum exceeded even the absolute uppermost statutory minimum of 74 months and maximum of 98 months, as calculated, the State concedes that the 60-month firearm enhancement was unconstitutionally applied in this instance. We agree.

Nonetheless, the State argues that the defendant has failed to establish that the statute is facially unconstitutional. Our Supreme Court has recently considered the requisite burden of proof in establishing the facial unconstitutionality of a statute, stating:

> "A facial challenge to a legislative [a]ct is, of course, the most difficult challenge to mount successfully." *United States v. Salerno*,

1. We note that the United States Court of Appeals, Fourth Circuit, recently construed North Carolina's structured sentencing scheme in order to determine what constitutes a previous conviction for "a crime punishable by imprisonment for a term exceeding one year" for purposes of applying 18 U.S.C. § 922(g)(1). *United States v. Jones*, 195 F.3d 205, 206 (4th Cir. 1999). The defendant had a prior felon-in-possession conviction in North Carolina under N.C. Gen. Stat. § 14-415.1, a Class H felony. The defendant, with a prior record level II, argued that the maximum he could have received was 12 months, assuming the presence of aggravating factors (corresponding to a 10-month minimum, the uppermost available in the Class H-Level II cell in the structured sentencing grid, N.C. Gen. Stat. § 15A-1340.17(c), (e)). *Id.* at 206-7. The Fourth Circuit disagreed, opting to view the "offense statutory maximum as the statutory maximum for the crime, regardless of the prior criminal record status of the defendant." *Id.* at 207. Nonetheless, we must only accord decisions of the Fourth Circuit such persuasiveness as they might reasonably command. *See Milligan v. State*, 135 N.C. App. 781, 783 n. 2, 522 S.E.2d 330, 332 n. 2 (1999); *State v. Adams*, 132 N.C. App. 819, 820, 513 S.E.2d 588, 589 (1999) (holding that federal circuit court decisions "are not binding upon either the appellate or trial courts of this State").

> 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed.2d 697, 707 (1987). "The presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if [it] can be upheld on any reasonable ground." *Ramsey v. N.C. Veterans Comm'n*, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964). An individual challenging the facial constitutionality of a legislative act "must establish that no set of circumstances exists under which the [a]ct would be valid." *Salerno*, 481 U.S. at 745, 107 S. Ct. at 2100, 95 L. Ed.2d at 707. The fact that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.*

Thompson, 349 N.C. at 491, 508 S.E.2d at 281-82. According to the State, *Thompson* states the inquiry as whether there exists any circumstances under which the firearm enhancement statute could be valid. As the defendant has failed to establish that there exist no circumstances under which the firearm enhancement could be constitutionally applied, the State contends that the firearm enhancement statute therefore is not facially unconstitutional as the defendant argues. *See id.*

Even assuming the defendant's more conservative method of calculating the prescribed statutory maximum punishment by considering the defendant's prior record level, the State argues that there are instances in which the 60-month firearm enhancement will not necessarily result in the imposition of a sentence exceeding the "statutory maximum." For example, a prior record Level II defendant convicted of a Class C felony *may* be subjected to a minimum term of 60 months (the lowermost term in the mitigated range) up to a minimum term of 125 months (the uppermost term in the aggravated range). If a defendant were sentenced in the mitigated range to a minimum of 60 months, even the imposition of the 60-month firearm enhancement would not exceed the uppermost statutory minimum in the aggravated range of 125 months. Again this ignores, in calculating the prescribed statutory maximum, any determination by the trial court of the absence or existence of mitigating or aggravating circumstances, such that the prescribed statutory maximum in every instance would be calculated based upon the highest statutory minimum in the aggravated range for a given class of felony and a given prior record level. The defendant argues that it is improper to ignore the trial court's finding of aggravating or mitigating circumstances in this manner.

While we perceive inequity in attributing theoretical characteristics to a defendant in this manner in order to determine the "prescribed statutory maximum" punishment available for an offense, we need not decide this question to resolve the issue currently before us, i.e., whether the firearm enhancement statute can be applied in a manner that would not offend the United States Supreme Court's decision in *Apprendi*.

In *United States v. Salerno*, 481 U.S. 739, 95 L. Ed. 2d 697 (1987)—relied upon by our Supreme Court in *Thompson*—the United States Supreme Court upheld the federal Bail Reform Act against a facial constitutionality challenge on the basis of substantive and procedural due process. As to the procedural due process challenge, the United States Supreme Court analyzed whether the procedures of the Bail Reform Act were sufficient to permit, pursuant thereto, the pretrial detention of *some* persons charged with crimes. *Salerno*, 481 U.S. at 751, 95 L. Ed. 2d at 711.

The United States Supreme Court noted that the Bail Reform Act limited the *possibility* of pretrial detention to only the most serious crimes, *id.* at 747, 95 L. Ed. 2d at 709, and concluded that "the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." *Id.* at 748, 95 L. Ed. 2d at 709. The United States Supreme Court declined to "intimate [a] view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." *Id.* at 747 note 4, 95 L. Ed. 2d at 709 n. 4. In rejecting the facial constitutionality challenge, the United States Supreme Court relied upon the legitimate and compelling regulatory purpose of the Act, as well as its finding that there were extensive procedural safeguards to protect the rights of pretrial detainees under the Act. *Id.* at 752, 95 L. Ed. 2d at 711-12.

In *Thompson*, our Supreme Court addressed the constitutionality of N.C. Gen. Stat. § 15A-534.1, authorizing the temporary pretrial detention, in limited circumstances, of certain persons charged with certain crimes of domestic violence. N.C. Gen. Stat. § 15A-534.1 (Supp. 1996). As in *Salerno*, the statute in *Thompson* involved a *discretionary* imposition of pretrial detention for a limited time (a maximum of 48 hours without a determination being made by a judge or magistrate), with attendant procedural safeguards for the protection of the detainees' rights. The pretrial detention statute survived the facial constitutional challenge on the basis that the application of the

procedural safeguards built into the statute served to protect the rights of defendants detained thereunder. While certain defendants (including Thompson) may, despite those safeguards, have their due process rights unconstitutionally denied as a result of an improper application of the statute, the General Assembly, in enacting the statute, included such safeguards to make such unconstitutional applications an anomaly, rather than the norm.

In contrast to the statutes at issue in *Salerno* and *Thompson*, the North Carolina firearm enhancement statute offers no such procedural safeguards, but instead removes from the jury the determination of facts that, if found, automatically deprive defendants of their liberty for a period of 60 months above and beyond that which the trial court could otherwise impose based upon the jury's guilty verdict on the underlying felony. The statute thus deprives defendants of their liberty while categorically denying them the attendant historical procedural safeguards: The right to have facts subjecting them to an increased penalty submitted to an impartial jury, and proved beyond a reasonable doubt.

The Bail Reform Act in *Salerno* presented federal prosecutors with a framework within which to seek pretrial detention in limited circumstances (yielding to trial courts the *discretion* to impose such detention), and established numerous procedural safeguards for the protection of the rights of persons so detained. The question of the constitutionality of the Act therefore became a matter of degree in its application, rather than constitutionality on its face. We find the facts of *Salerno* and its consideration of the federal Bail Reform Act to be inapposite to our present consideration of our state firearm enhancement statute. Likewise, insofar as *Thompson*, 349 N.C. 483, 508 S.E.2d 277, relies upon *Salerno*, we find *Thompson* to be inapposite, as it, too, dealt with a regulatory scheme rather than a punitive measure, and afforded discretion to trial judges, together with safeguards for defendants. It is precisely the lack of such discretion and procedural safeguards in the firearm enhancement statute which the defendant here contests.

Without endorsing the State's preferred method of calculating the "prescribed statutory maximum," we recognize the view that there *may* be circumstances (albeit rare) wherein the 60-month enhancement may be applied without exceeding the "prescribed statutory maximum" punishment. Nonetheless, the United States Supreme Court's decision in *Apprendi* commands that we find the firearm

enhancement statute unconstitutional. The *Apprendi* Court expressly endorsed:

> the statement of the rule set forth in the concurring opinions in [*Jones*]: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-53, 119 S. Ct. [at 1228-29, 143 L. Ed. 2d at 332] (opinion of Stevens, J.); *see also id.*, at 253, 119 S. Ct. [at 1229, 143 L. Ed. 2d at 332] (opinion of Scalia, J.).

Apprendi, 530 U.S. at —, 147 L. Ed. 2d at 455. The North Carolina firearm enhancement statute mandates that "the court shall increase the minimum term of imprisonment to which the [defendant] is sentenced by 60 months" if the court "finds that the [defendant] used, displayed, or threatened to use or display a firearm at the time of the felony," thereby explicitly removing from the jury the requisite factual determination. N.C. Gen. Stat. § 15A-1340.16A(a). Here, as in *Apprendi*, the statute in question removes any judicial discretion and *requires* an automatic enhancement of the sentence if the trial court makes a certain factual determination. *See* N.J. Stat. Ann. § 2C:44-3 (West Supp. 2000) (requiring the trial court to sentence the defendant "to an extended term if it finds, by a preponderance of the evidence," that the defendant "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity"). Such a scheme directly contravenes the rule established in *Apprendi*.

Contrary to the State's assertions, the United States Supreme Court's holding in *McMillan v. Pennsylvania*, 477 U.S. 79, 91 L. Ed. 2d 67 (1986), does not lend support to its argument. In *McMillan*, the United States Supreme Court considered a challenge to Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982), which subjected defendants convicted of certain felonies to a mandatory minimum sentence of five years' imprisonment if the sentencing judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the underlying felony. A separate sentencing statute mandated that the court "shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed." 42 Pa. Cons. Stat. § 9756(b) (1982).

Construing § 9712 and § 9756(b) together, the shortest maximum term permissible under the Mandatory Minimum Sentencing Act would be 10 years. The enumerated felonies listed in the Act consisted of felonies of the first degree, carrying a maximum penalty of 20 years' imprisonment, and of the second degree, carrying a maximum penalty of 10 years' imprisonment. *McMillan*, 477 U.S. at 87, 91 L. Ed. 2d at 77; *see* 42 Pa. Cons. Stat. §§ 9712, 9756(b). The statute thus operated "to divest the judge of discretion to impose any sentence of less than five years for the underlying felony," but did not "authorize a sentence in excess of that otherwise allowed for that offense." *Id.* at 81-82, 91 L. Ed. 2d at 73.

That is, the Act "ups the ante" for defendants, *id.* at 88, 91 L. Ed. 2d at 77, by increasing the minimum sentence to 5 years, and incidentally (pursuant to § 9756(b)) placing a lower limit of 10 years on the maximum term. Given that the maximum term of imprisonment (ignoring the 5-year minimum imposed by the Act) for the commission of the underlying felonies carries a maximum term of at least 10 years (and up to 20 years), the Act itself, when enforced according to its terms, does *not* expose defendants to greater or additional punishment. The same cannot be said of the North Carolina firearm enhancement statute, which, as demonstrated in the present case, "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at —, 147 L. Ed. 2d at 457.

As we find that the firearm enhancement statute at issue here, when enforced according to its terms, "remove[s] from the jury the assessment of facts that increase the prescribed range of penalties to which [the] criminal defendant is exposed," *id.* at —, 147 L. Ed. 2d at 455, we must, pursuant to *Apprendi*, declare the statute facially unconstitutional as violative of due process. *See id.* at —, 147 L. Ed. 2d at 459 (finding that the procedures in New Jersey's challenged hate-crime statute represent "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.") *See also* U.S. Const. amend. V, VI, XIV. As a result, the defendant's "as applied" constitutionality argument is moot; similarly, we need not consider the defendant's arguments under the North Carolina Constitution. The defendant's motion for appropriate relief is therefore (1) denied in part insofar as it requests the right to a full briefing on all issues raised therein, and (2) granted in part insofar as it requests a determination that N.C. Gen. Stat. § 15A-1340.16A is facially unconstitutional, and requests that the defendant's

60-month firearm sentence enhancement be vacated. *See* N.C. Gen. Stat. § 15A-1415(b)(7).

[6] In the defendant's third assignment of error, he argues that the trial court erred on three separate occasions in allowing the State to present alleged hearsay statements made by Ms. Wall. First, the defendant contends that the trial court erred in allowing Officer Ruisi to testify concerning oral statements made to him by Ms. Wall after he first found her in Mr. Lawing's back yard. Second, the defendant contends the trial court erred in allowing into evidence Ms. Wall's written statement which was taken by Officer Ruisi approximately two hours and forty-five minutes after the argument with the defendant. Third, the defendant argues that the trial court erred in allowing Officer Ruisi to read Ms. Wall's written statement aloud to the jury. We find no error.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c) (1992). Statements which constitute hearsay are "inadmissible except as provided by statute or the rules of evidence." *State v. Rogers*, 109 N.C. App. 491, 498, 428 S.E.2d 220, 224, *disc. review denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1008, 128 L. Ed. 2d 54, *reh'g denied*, 511 U.S. 1102, 128 L. Ed. 2d 495 (1994); *see also* N.C.R. Evid. 802 (1992).

An exception to the general rule of inadmissibility of hearsay is acknowledged for excited utterances. "[T]estimony of a witness as to a statement made by a declarant relating to a startling event and made while the declarant was under the stress of that event is not excludable under the hearsay rule." *State v. Sneed*, 327 N.C. 266, 272, 393 S.E.2d 531, 534 (1990); *see also State v. Littlejohn*, 340 N.C. 750, 459 S.E.2d 629 (1995); N.C.R. Evid. 803(2) (1992). Rule 803(2) provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" should not be excluded by the hearsay rule, even though the declarant is available to testify. N.C.R. Evid. 803(2). The rationale underlying the admissibility of an excited utterance is its inherent trustworthiness. *State v. Winguard*, 317 N.C. 590, 598, 346 S.E.2d 638, 644 (1986). In order for a statement to fall within the parameters of the excited utterance exception of Rule 803(2), " 'there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.' " *State v. Pickens*, 346 N.C. 628, 644,

488 S.E.2d 162, 171 (1997) (quoting *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985)).

The evidence presented at trial showed that Ms. Wall made an oral statement to Officer Ruisi when he first arrived at Mr. Lawing's house and found her in Mr. Lawing's back yard. This oral statement was made to Officer Ruisi within several minutes of the defendant dragging Ms. Wall out of Mr. Lawing's house. Officer Ruisi testified that Ms. Wall was crying when he first found her and was so terrified she was having difficulty breathing. The trial court permitted Officer Ruisi to testify as to Ms. Wall's oral statement to him on the basis that her statement constituted an excited utterance under Rule 803(2). Based on the circumstances surrounding the statement, we find no error in the trial court's determination that this oral statement was an excited utterance, and its admission via Officer Ruisi's testimony was not improper.

[7] The defendant's argument that Ms. Wall's written statement was inadmissible hearsay is likewise without merit. The trial court admitted the written statement not as substantive evidence, but for the limited purpose of corroborative evidence only, which does not constitute hearsay. *See State v. Ford*, 136 N.C. App. 634, 640 n. 2, 525 S.E.2d 218, —— n. 2 (2000); *State v. Marine*, 135 N.C. App. 279, 287, 520 S.E.2d 65, 69 (1999). Our courts have long held that a witness's prior consistent statements may be admissible to corroborate the witness's in-court testimony. *See State v. Gell*, 351 N.C. 192, 524 S.E.2d 332 (2000); *State v. Coffey*, 345 N.C. 389, 480 S.E.2d 664 (1997). In order to be admissible as corroborative evidence, "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." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986). Nonetheless, while "[t]he trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes," *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 513 (1998) (citing *State v. Levan*, 326 N.C. 155, 388 S.E.2d 429 (1990)), the State may not introduce as corroborative evidence prior statements of a witness that directly contradict the witness's trial testimony. *See Gell*, 351 N.C. at 204, 524 S.E.2d at 340.

We find that the written statement given by Ms. Wall to Officer Ruisi at the hospital was a prior consistent statement that the trial court properly admitted for the limited purpose of corroborating Ms. Wall's in-court testimony. While Ms. Wall's written statement was not

identical to her in-court testimony, it nonetheless was generally consistent with and tended to add weight or credibility to her sworn testimony. *See Ramey*, 318 N.C. at 468, 349 S.E.2d at 573; *see also State v. Locklear*, 320 N.C. 754, 762, 360 S.E.2d 682, 686 (1987). Furthermore, the trial court allowed defense counsel to redact certain portions of the statement, and instructed the jury to consider the statement for corroborative purposes only. We further conclude that it was not improper for the trial court to permit Officer Ruisi to read aloud the written statement (with appropriate portions redacted as requested by defense counsel) to the jury. We are aware of no authority holding that the declarant is the only party entitled to read aloud a prior consistent statement that corroborates their in-court testimony, and we decline to so hold. The defendant's third assignment of error is therefore overruled.

[8] The defendant's final assignment of error asserts that the trial court erred in preventing the defendant from introducing evidence of a prior bad act performed by Ms. Wall. In an effort to impeach Ms. Wall's credibility, the defendant sought to introduce extrinsic evidence showing that in February 1998, Ms. Wall let the air out of the tires of the defendant's vehicle. The defendant sought to elicit testimony to this effect on direct examination from the sister of the defendant, who was testifying as a defense witness. At no time did the defendant question Ms. Wall concerning this incident on cross-examination. The trial court held a *voir dire* hearing and declined to admit this evidence. We note that N.C.R. Evid. 608(b) prohibits such use of evidence of specific instances of conduct. *See* N.C.R. Evid. 608(b) (1992). We conclude that the trial court did not commit reversible or plain error by excluding this evidence.

Based upon our finding that the firearm enhancement statute, N.C. Gen. Stat. § 15A-1340.16A, is unconstitutional pursuant to the United States Supreme Court's decision in *Apprendi*, we vacate the defendant's sentence and remand in part to the trial court for resentencing.

No error in part, vacated and remanded in part for resentencing.

Judges LEWIS and HUNTER concur.

TERRY P. SMITH, ADMINISTRATOR OF THE ESTATE OF MARY G. SMITH, DECEASED; TERRY P. SMITH, INDIVIDUALLY; AND MARISSA TIERRA SMITH, PLAINTIFFS V. BEAUFORT COUNTY HOSPITAL ASSOCIATION, INC., D/B/A BEAUFORT COUNTY HOSPITAL; NINA H. WARD, M.D.; BEAUFORT EMERGENCY MEDICAL ASSOCIATES, P.A.; FAMILY MEDICAL CARE, INC.; GEORGE KLEIN, M.D.; ELISABETH COOK, M.D.; AND DANNIE JONAS, PHYSICIAN ASSISTANT, P.A., DEFENDANTS

No. COA99-1575

(Filed 29 December 2000)

1. Appeal and Error— appealability—revocation of pro hac vice admission of counsel—interlocutory order—substantial right

The trial court's revocation of the pro hac vice admission of plaintiffs' counsel affects a substantial right and is immediately appealable.

2. Attorneys— revocation of pro hac vice admission—no abuse of discretion

The trial court did not abuse its discretion in a medical negligence case by concluding that it could summarily revoke previously granted pro hac vice admission of plaintiffs' counsel because the express language of N.C.G.S. § 84-4.2 allows a superior court judge the authority and discretion to summarily revoke an earlier order granting pro hac vice admission under N.C.G.S. § 84-4.1.

3. Evidence— judicial notice—number of highly skilled plaintiffs' attorneys engaged in the trial of medical negligence actions in our state—number of times a Florida law firm participated in litigation in North Carolina

The trial court properly took judicial notice under N.C.G.S. § 8C-1, Rule 201(b) and (c) of the number of highly skilled plaintiffs' attorneys engaged in the trial of medical negligence actions in our state and of information provided by the North Carolina Bar Association about the number of times a particular Florida law firm participated in litigation in North Carolina, because: (1) the information about the attorneys in our state is generally known within the jurisdiction of the trial courts of this state; (2) the information provided by the North Carolina Bar Association is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned; (3)

plaintiffs failed to timely request an opportunity to be heard under N.C.G.S. § 8C-1, Rule 201(e); and (4) plaintiffs had the opportunity and failed to object at the hearing to the list of nineteen cases that the Florida law firm was involved with in North Carolina.

4. Attorneys— revocation of pro hac vice admission—no requirement of change in circumstances, misconduct, or other evidence to warrant revocation

The trial court did not abuse its discretion by revoking previously granted pro hac vice admission to plaintiffs' counsel even though plaintiffs contend there was no change in circumstances, no misconduct, and no other evidence to warrant the revocation, because: (1) plaintiffs failed to cite North Carolina authority to show that a previously granted pro hac vice admission can only be revoked when there is a change in circumstances, misconduct, or other evidence to warrant the revocation, and no such standard exists in North Carolina; and (2) N.C.G.S. § 84-4.2 grants wide discretionary authority to summarily revoke a prior pro hac vice admission.

5. Attorneys— revocation of pro hac vice admission—trial court's misapprehension of reciprocity statutes not prejudicial error

Although the trial court may have misapprehended North Carolina's and Florida's reciprocity statutes and incorrectly concluded that reciprocity does not exist between the two states, plaintiffs have not shown how this conclusion affected the ultimate result and the trial court still properly concluded that it had discretion to make its ruling to revoke a prior pro hac vice admission under N.C.G.S. § 84-4.2.

6. Attorneys— revocation of pro hac vice admission—misapprehension of letter or spirit of statute not prejudicial error

Although the trial court erred in a medical negligence case by its conclusion of law that neither the letter nor spirit of N.C.G.S. § 84-4.1(2) for pro hac vice admission had been complied with, the misapprehensions did not alter the prior result by overcoming the discretion allotted to the trial court under N.C.G.S. § 84-4.2 to revoke a prior pro hac vice admission.

7. Attorneys— revocation of pro hac vice admission—habitual practice of law

The trial court did not err in a medical negligence case by concluding that the conduct of a Florida law firm constituted the habitual practice of law, because: (1) there is competent evidence in the record to support the trial court's findings and conclusions based on the sixteen to nineteen prior pro hac vice admissions of the Florida firm in North Carolina; (2) an entire law firm can be treated as if it were a single lawyer for purposes of pro hac vice admission; (3) the trial court did not rely on a numeric limitation on pro hac vice appearances of out-of-state counsel as a basis for its decision; and (4) plaintiffs did not object to the evidence provided in an article that the Florida firm solicited business in this state.

Judge WYNN dissenting.

Appeal by plaintiffs from an order entered 13 September 1999 by Judge William C. Griffin, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 18 October 2000.

White and Crumpler, by Dudley A. Witt, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., Mark A. Davis and Charles L. Becker, for defendant-appellees Beaufort County Hospital Association, Inc., d/b/a Beaufort County Hospital; Nina H. Ward, M.D.; Beaufort Emergency Medical Associates, P.A.; and Elisabeth Cook, M.D.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Robert M. Clay and Charles George, for defendant-appellees Family Medical Care, Inc., George Klein, M.D. and Dannie Jonas, P.A.

HUNTER, Judge.

Terry P. Smith, individually and as administrator of the Estate of Mary G. Smith, and Marissa Tierra Smith (collectively, "plaintiffs") appeal from a court order revoking and abrogating the original order granting *pro hac vice* admission to Bruce M. Wilkinson and Gloretta H. Hall (collectively, "plaintiffs' counsel").

In the assignments of error in their brief, plaintiffs claim the trial court (1) erred in concluding that it could summarily revoke previously granted *pro hac vice* admissions on the grounds that said

conclusion is contrary to existing law and an abuse of discretion, (2) abused its discretion by revoking the *pro hac vice* admission previously granted to plaintiffs' counsel when there was no change in circumstances, no misconduct, and no other evidence to warrant the revocation, (3) erred in entering its conclusion of law where it concluded that reciprocity of admission does not exist between Florida and North Carolina because Florida's *pro hac vice* requirements differ from North Carolina's on the grounds that said conclusion is contrary to existing law, (4) erred in its conclusion of law that neither the letter nor the spirit of N.C. Gen. Stat. § 84-4.1(2) had been complied with as said conclusion of law is based upon improper findings of fact and is contrary to existing law, and (5) erred in concluding that the conduct of the law firm Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando (hereinafter, "the Gary Law Firm") constituted the habitual practice of law as said conclusion was based upon improper findings of fact and is contrary to existing law. After a careful review of the records and briefs, we find plaintiffs' arguments to be without merit, and we hereby affirm the trial court.

In May 1997, after having several headaches, Mary G. Smith, plaintiff Terry P. Smith's wife, made a series of trips to the hospital and her personal doctor's office. Beaufort County Hospital Association, Inc., Nina H. Ward, M.D., Beaufort Emergency Medical Associates, P.A., Family Medical Care, Inc., George Klein, M.D., Elisabeth Cook, M.D., and Dannie Jonas, P.A. (collectively, "defendants"), all health care providers, each had a role in the care of Mrs. Smith, and each allegedly failed to diagnose her ailment. Subsequently, Mrs. Smith died on 14 June 1997. As a result, plaintiffs brought forth a medical negligence suit against defendants.

Prior to instituting the action, plaintiff Terry P. Smith approached attorney Mark V. L. Gray in regards to the suit. Having no experience in trying medical negligence cases, Mr. Gray solicited the assistance of at least two Greensboro, North Carolina attorneys; both of which declined to assist. Mr. Gray then sought the assistance of the Gary Law Firm, which is based in Stuart, Florida. Plaintiffs' counsel are members of that firm, and are not licensed to practice law in North Carolina. In fact, the Gary Law Firm does not have any attorney admitted to practice law in our state. Plaintiffs' counsel agreed to aid plaintiffs in their case, and they subsequently assisted Mr. Gray in complying with some preliminary matters involved in filing the complaint.

On 3 May 1999, Mr. Gray initiated the suit on plaintiffs' behalf, and on the same date, he filed motions to have plaintiffs' counsel admitted *pro hac vice* pursuant to N.C. Gen. Stat. § 84-4.1. The motions were heard *ex parte* before the Honorable Richard B. Allsbrook in Beaufort County Superior Court. On that very day, Judge Allsbrook entered an order allowing the motions for *pro hac vice* admission of plaintiffs' counsel, however defendants were never served with the motions or orders. Shortly thereafter, plaintiffs' counsel filed a notice of appearance with the superior court on 14 June 1999. Then on 16 July and 6 August 1999, defendants filed motions to strike, rescind and reconsider, and vacate Judge Allsbrook's order of 3 May 1999.

A hearing was held before the Honorable William C. Griffin, Jr., in Beaufort County Superior Court on 11 August 1999. At that hearing, defendants, arguing to have plaintiffs' counsel's *pro hac vice* status revoked, contended that the Gary Law Firm habitually practices law in North Carolina, and that plaintiffs violated North Carolina Rule of Civil Procedure 5(a) by failing to serve the *pro hac vice* motions on defendants and by seeking an *ex parte* order.

To support their claims, defendants proffered a list that suggested various members of the Gary Law Firm had been admitted *pro hac vice* in the courts of North Carolina approximately nineteen times, an article that reported that a member of the Gary Law Firm distributed promotional materials to undertakers in our state, and a Lee County court order involving attorneys from the Gary Law Firm. Plaintiffs did not object or take exception to any of the submitted evidence. On 13 September 1999, Judge Griffin entered an order revoking and abrogating Judge Allsbrook's earlier order. Thereafter, plaintiffs filed their notice of appeal.

[1] In a preliminary matter to this appeal, plaintiffs contend that the trial court's revocation of plaintiffs' counsel's *pro hac vice* admission affects a substantial right and is immediately appealable. On this contention, we agree.

In the past, we have held that "once [an] attorney was admitted under [§ 84-4.1], [a] plaintiff acquired a substantial right to the continuation of representation by that attorney . . . ." *Goldston v. American Motors Corp.*, 326 N.C. 723, 727, 392 S.E.2d 735, 737 (1990). Furthermore, an order removing said counsel affects a substantial right of the plaintiff and is immediately appealable. *Id.*

We acknowledge defendants' argument in their briefs that plaintiffs' counsel had never been properly admitted *pro hac vice* under § 84-4.1. However defendants' claims that plaintiffs violated N.C.R. Civ. P. 5(a) by failing to serve the motions on defendants and by seeking an *ex parte* order are not properly before this Court. Defendants did not set forth their arguments as assignments or cross-assignments of error in the record on appeal, nor have they made a motion with this Court in that same vein.

"[T]he scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal." *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991); N.C.R. App. P. 10(a). These issues raised in defendants' briefs were not preserved for appeal, and therefore, we dismiss them. Accordingly, we find that plaintiffs' counsel was properly admitted *pro hac vice* for purposes of this appeal, and consequently, Judge Griffin's order removing counsel affected a substantial right of plaintiffs and is immediately appealable.

N.C. Gen. Stat. § 84-4.1 (1999), the statute that governs the limited practice of out-of-state attorneys in North Carolina, states in pertinent part:

> Any attorney domiciled in another state, and regularly admitted to practice in the courts of record of that state and in good standing therein, having been retained as attorney for a party to any civil or criminal legal proceeding pending in the General Court of Justice of North Carolina . . . may, on motion, be admitted to practice in that forum for the sole purpose of appearing for a client in the litigation. The motion required under this section shall contain or be accompanied by:
>
> . . .
>
> (2) A statement, signed by the client . . . declaring that the client has retained the attorney to represent the client in the proceeding.
>
> . . .
>
> (4) A statement that the state in which the attorney is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.
>
> . . .

> Compliance with the foregoing requirements does not deprive the court of the discretionary power to allow or reject the application.

The purpose of § 84-4.1 "is to afford [North Carolina] courts a means to control out-of-state counsel and to assure compliance with the duties and responsibilities of attorneys practicing in this State." *N.C.N.B. v. Virginia Carolina Builders*, 57 N.C. App. 628, 631, 292 S.E.2d 135, 137 (1982), *rev'd on other grounds*, 307 N.C. 563, 299 S.E.2d 629 (1983). " '. . . The statute forbids the courts from allowing non-resident counsel . . . from practicing habitually in our courts, and they cannot acquire the right to do so.' " *State v. Hunter*, 290 N.C. 556, 568, 227 S.E.2d 535, 543 (1976) (quoting *Manning v. R.R.*, 122 N.C. 824, 828, 28 S.E. 963, 964 (1898)).

"Admission of counsel in North Carolina pro hac vice is not a right but a discretionary privilege." *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 555, 291 S.E.2d 828, 829 (1982). " 'It is permissive and subject to the sound discretion of the Court.' " *Id.* (quoting *Hunter*, 290 N.C. at 568, 227 S.E.2d at 542).

[2] Having determined the nature and purpose of § 84-4.1, we proceed with our analysis of plaintiffs' specific assignments of error. We first address plaintiffs' assignment claiming that the trial court wrongfully revoked the *pro hac vice* admission of plaintiffs' counsel by improperly concluding that it could summarily revoke Judge Allsbrook's earlier order allowing the admission. Plaintiffs argue that this conclusion is contrary to existing law, as well as an abuse of discretion. We disagree with plaintiffs' contentions, and thus overrule this assignment of error.

Two primary arguments are incorporated in this assignment of error: (1) that the trial court's conclusion that it could summarily revoke plaintiffs' counsel's *pro hac vice* admission was contrary to existing law, and (2) that this conclusion was an abuse of discretion. Again, we disagree.

First, we recognize that, "ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). However, under the circumstances of § 84-4.1, as we have here, our Legislature has spoken directly on point.

Specifically, N.C. Gen. Stat. § 84-4.2 (1999) states, "[p]ermission granted under G.S. 84-4.1 may be summarily revoked by the General Court of Justice . . . on its own motion and in its discretion." "The General Court of Justice constitutes a unified judicial system for purposes of jurisdiction, operation and administration, and consists of an appellate division, a superior court division, and a district court division." N.C. Gen. Stat. § 7A-4 (1999).

In enacting § 84-4.2, our Legislature envisioned and addressed the revocability of previously granted *pro hac vice* admissions. In fact, the express language of N.C. Gen. Stat. § 84-4.2 allows a superior court judge the authority and discretion to summarily revoke an earlier order granting *pro hac vice* admission pursuant to § 84-4.1. Judges Allsbrook and Griffin are both judges of the General Court of Justice (superior court division), and therefore, through the authority granted by § 84-4.2, Judge Griffin had the discretion conferred by our Legislature to summarily revoke Judge Allsbrook's earlier *pro hac vice* admission of plaintiffs' counsel.

Plaintiffs' assignment of error also encompasses the argument that Judge Griffin's order summarily revoking the *pro hac vice* admission of plaintiffs' counsel was an abuse of discretion.

It is well settled that "[a]ppellate review of matters left to the discretion of the trial court is limited to a determination of whether there was a clear abuse of discretion." *Riviere v. Riviere*, 134 N.C. App. 302, 306, 517 S.E.2d 673, 676 (1999); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Furthermore, "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White*, 312 N.C. at 777, 324 S.E.2d at 833. "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Here, plaintiffs attack Judge Griffin's conclusion of law that he was "empowered by G.S. 84-4.2 in [his] discretion to summarily revoke *pro hac vice* admissions previously granted." Judge Griffin's conclusion of law is clearly the result of a reasoned decision, based expressly on the specific language of § 84-4.2, which gives Judge Griffin both the authority and the discretion to make such a determination. Therefore, we find that the language of N.C. Gen. Stat. § 84-4.2 manifestly supports Judge Griffin's conclusion of law, and we

hold that Judge Griffin committed no abuse of discretion. Thus, we reject plaintiffs' assignment of error.

[3] Plaintiffs further raise two sub-points here. Specifically, plaintiffs argue Judge Griffin erred in taking judicial notice of facts without providing plaintiffs an opportunity to be heard; for example, plaintiffs claim that Judge Griffin (1) took notice of the fact that there are a large number of highly skilled plaintiff's attorneys engaged in the trial of medical negligence actions in North Carolina, and (2) Judge Griffin relied on facts that he obtained from the North Carolina State Bar Association and plaintiffs had no opportunity to confirm or refute the information.

As to both sub-points, N.C.R. Evid. 201(b) states that a fact judicially noticeable by a trial court, "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (1999). Moreover, "[a] court may take judicial notice, whether requested or not." N.C. Gen. Stat. § 8C-1, Rule 201(c). However, "a party is entitled upon timely request to an opportunity to be heard . . . ." N.C. Gen. Stat. § 8C-1, Rule 201(e).

Based on N.C.R. Evid. 201(b) and (c), Judge Griffin, on his own accord, properly took judicial notice of (1) the number of highly skilled plaintiffs' attorneys engaged in the trial of medical negligence actions in our state as that information is generally known within the jurisdiction of the trial courts of this state, and (2) the number of times the Gary Law Firm participated in litigation in North Carolina by relying on information supplied by the North Carolina State Bar Association as that information is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Furthermore, plaintiffs failed to timely request an opportunity to be heard as per Rule 201(e). Also, we add that plaintiffs had the opportunity to object at the hearing to the list of nineteen cases that the Gary Law Firm was involved with in North Carolina, yet they failed to do so. Therefore, no reasonable dispute exists as to Judge Griffin's judicially noticed facts, and Judge Griffin did not abuse his discretion in allowing them.

[4] Analogous to plaintiffs' above arguments is plaintiffs' next assignment of error that claims the trial court abused its discretion

by revoking plaintiffs' counsel's previously granted *pro hac vice* admission when there was no change in circumstances, no misconduct, and no other evidence to warrant the revocation. We reject this assignment of error.

Plaintiffs cite no North Carolina authority for their supposition that a previously granted *pro hac vice* admission can only be revoked when there is a change in circumstances, misconduct, or other evidence to warrant the revocation. In fact, no such standard is recognized in North Carolina. As discussed *supra*, N.C. Gen. Stat. § 84-4.2 clearly empowers a superior court judge with the authority to summarily revoke a previously granted *pro hac vice* admission in its own discretion. Additionally, § 84-4.2 does not espouse the standard raised by plaintiffs, nor does it raise any standard whatsoever. Hence, as we found no abuse of discretion in plaintiffs' earlier assignment of error, we, too, find no abuse of discretion here, and thus overrule this assignment of error as well.

We note that based on N.C. Gen. Stat. § 84-4.2 and its grant of wide discretionary authority to summarily revoke a prior *pro hac vice* admission, we could end the analysis of plaintiffs' appeal here. However, in the interests of justice and fairness to plaintiffs, we feel compelled to address plaintiffs' remaining assignments of error.

[5] Thus, we consider plaintiffs' third assignment of error that the trial court erred in its conclusion of law that reciprocity of admission does not exist between Florida and North Carolina because Florida's *pro hac vice* requirements differ from North Carolina's. Plaintiffs argue that said conclusion is contrary to existing law. Again, we reject plaintiffs' assignment of error.

Judge Griffin may have misapprehended North Carolina's and Florida's reciprocity statutes and incorrectly concluded that reciprocity does not exist between the two states. However, if a court's ruling was based upon a misapprehension of law, "[i]f the misapprehension of the law does not affect the result . . . the judgment will not be reversed." *Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 348, 317 S.E.2d 684, 689 (1984).

Plaintiffs have not shown how this conclusion affected the ultimate result as, regardless of the error, Judge Griffin still properly concluded that he had the discretion to make his ruling pursuant to N.C. Gen. Stat. § 84-4.2. Thus, the misapprehension of Florida's and

North Carolina's reciprocity statutes does not affect the result below. Accordingly, we deny plaintiffs' third assignment of error.

Lastly, plaintiffs' final two assignments of error take issue with particular findings of fact and conclusions of law found in Judge Griffin's order. We note that N.C. Gen. Stat. §§ 84-4.1 and 84-4.2 do not require the trial court to make any findings of fact or conclusions of law, and the record reflects that neither party here requested them. Therefore, Judge Griffin's order incorporating them was on the side of prudence and caution.

We have long held that "appellate review of findings of fact and conclusions of law made by a trial judge . . . is limited to a determination of whether there is competent evidence to support his findings of fact and whether, in light of such findings, [the judge's] conclusions of law were proper." *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996). "[I]f the evidence tends to support the trial court's findings, these findings are binding on appeal, even though there may be some evidence to support findings to the contrary." *Id.* Moreover, "to obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *Id.*

In their final assignments of error, plaintiffs claim that the trial court erred (1) in its conclusion of law that neither the letter nor spirit of N.C. Gen. Stat. § 84-4.1(2) had been complied with, and (2) in concluding that the conduct of the Gary Law Firm constituted the habitual practice of law. Plaintiffs argue that both conclusions were based upon improper findings of fact and are contrary to existing law. We reject both assignments of error.

[6] In assignment of error four, plaintiffs take issue with Judge Griffin's findings that (1) the Gary Law Firm was not chosen by plaintiffs, and (2) the provisions of N.C. Gen. Stat. § 84-4.1(2) were not complied with.

First, as to Judge Griffin's finding that the Gary Law Firm was not chosen by plaintiffs, while there is some contrary evidence to the court's finding, competent evidence—i.e. the court's finding that Mr. Gray recruited the Gary Law Firm—exists in the record to support the trial court's initial finding. However, this finding has no bearing in the overall analysis of § 84-4.1(2).

More important is the court's finding that the provisions of § 84-4.1(2) were not complied with by plaintiffs as that finding is both a finding of fact and conclusion of law of Judge Griffin, as well as the basis of this assignment of error. N.C. Gen. Stat. § 84-4.1(2) requires, "[a] statement, signed by the client . . . declaring that the client has retained the attorney to represent the client in the proceeding." In his findings, Judge Griffin found that "[a]lthough plaintiff . . . signed the motions to admit, the provisions of G.S. 84-4.1(2) were not directly complied with."

In determining whether the requirements of § 84-4.1(2) were complied with by plaintiffs, Judge Griffin applied the statute to the facts of the case. In doing so, Judge Griffin's finding that plaintiffs did not directly comply with the requirements of § 84-4.1(2) was essentially a conclusion of law. We note that, "[i]f [a] finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable on appeal." *Bowles*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686. While Judge Griffin may have misapprehended the requirements of § 84-4.1(2), his misapprehensions again did not alter the prior result by overcoming the discretion allotted him under N.C. Gen. Stat. 84-4.2. Thus, Judge Griffin's conclusion of law that "[n]either the letter nor the spirit of G.S. 84-4.1(2) was complied with in this action," while in error, was not material and prejudicial, nor did it change the outcome.

[7] In their final assignment of error, plaintiffs assert that Judge Griffin held several incorrect notions, among them (1) that a law firm can be admitted to practice *pro hac vice* in this state, (2) that N.C. Gen. Stat. § 84-4.1 contains a numeric limitation on *pro hac vice* appearances by out-of-state counsel, and (3) that the Gary Law Firm has solicited business in this state. Plaintiffs' contentions are not supported by the record.

First, Judge Griffin's conclusion of law was that, "[t]he conduct of the Gary Law Firm *and its members* in North Carolina constitutes the habitual practice of law" (emphasis added). Judge Griffin does not find or conclude, as plaintiffs allege, that a law firm can be admitted *pro hac vice* or habitually practice law in this state. In his order, Judge Griffin found that "*various members of the Gary Law Firm* have repeatedly been admitted *pro hac vice*, at the least sixteen (16) times" and "[t]he Gary Law Firm *(and its members)* has habitually practiced law in North Carolina," (emphasis added). Judge Griffin made no findings of fact or conclusions of law as to the Gary Law Firm's individual practice of law, instead he continually referred to

the behavior at issue as involving the Gary Law Firm *and its members*. Thus, there is competent evidence in the record supporting Judge Griffin's findings and conclusion that the conduct of the Gary Law Firm *and its members* constituted the habitual practice of law in our state, therefore plaintiffs' claims are refuted.

As a side-note, we address the issue of the actions of a law firm being imputed to its member attorneys for purposes of *pro hac vice* admission in this state. We recognize that this issue is a matter of first impression in North Carolina, and rightfully we approach it with caution. After much consideration, we hold that for purposes of *pro hac vice* admission only, an entire law firm can be treated as if it were a single lawyer, and thus the actions of the firm imputed to its members (similar to the North Carolina ethical rule on imputed disqualification, Rule 1.10 of the Rules of Professional Conduct). Otherwise, a law firm could continually circumvent North Carolina's prohibition against the unauthorized practice of law by sending different attorneys into our state for different cases. Therefore, Judge Griffin could properly have based his decision on the imputation of the Gary Law Firm's sixteen to nineteen prior *pro hac vice* admissions in North Carolina to plaintiffs' counsel.

As to plaintiffs' contention that Judge Griffin concluded that N.C. Gen. Stat. § 84-4.1 contains a numeric limitation, Judge Griffin does not set such a limitation. In his discretion, Judge Griffin considered that members of the Gary Law Firm had been admitted *pro hac vice* at least sixteen times in our state, but he did not rely on this number as the basis for his decision. In fact, nowhere in his order does Judge Griffin raise a numeric limitation on *pro hac vice* appearances of out-of-state counsel. Plaintiffs' argument therefore is baseless, and Judge Griffin's discretionary decision is supported by the record.

Finally, Judge Griffin's finding that the Gary Law Firm solicited business in this state is based on the article submitted by defendants at the 11 August 1999 hearing. Plaintiffs had the chance and did not object to the article at the hearing. Thus, the record supports this finding of the trial court as well.

In summary as to these final assignments of error, Judge Griffin's findings of fact are supported by competent evidence in the record, even though some contrary evidence may also exist. Furthermore, although Judge Griffin may have misapprehended the law in part, his errors were not prejudicial, and his other conclusions were valid and

supported his decision. Therefore, the trial court did not abuse its discretion.

Moreover, plaintiffs have failed to show how the alleged errors made by the trial court can overcome the discretion allowed Judge Griffin pursuant to N.C. Gen. Stat. § 84-4.2. Hence, even if plaintiffs' arguments are accepted, plaintiffs have failed to make a showing that the errors were material and prejudicial, having affected the outcome. Plaintiffs' final two assignments of error are hereby rejected.

We conclude by stating that "parties do not have a right to be represented in the courts of North Carolina by counsel who are not duly licensed to practice in this state." *Leonard*, 57 N.C. App. 553, 555, 291 S.E.2d 828, 829. Unlike *Goldston* discussed *supra*, which involved litigation that had been ongoing for several years and an attorney who had a national reputation in handling products liability cases against a particular defendant, this litigation is still in its infancy, and plaintiffs' counsel does not hold any unique expertise that cannot be found elsewhere in our state bar. *Goldston*, 326 N.C. 723, 392 S.E.2d 735. Further, plaintiffs would not be prejudiced by seeking local counsel, as we are confident that the North Carolina State Bar has many competent attorneys, proficient in medical negligence cases, that would be able to continue plaintiffs' cause without any harm to plaintiffs.

In summary, plaintiffs' appeal affects a substantial right and is properly before this Court. Judge Griffin had the authority and discretion pursuant to N.C. Gen. Stat. § 84-4.2 to summarily revoke plaintiff's counsel's prior *pro hac vice* admission. While some of Judge Griffin's findings of fact and conclusions of law may have been in error, the errors were not shown to have affected the result. Regardless of the errors, N.C. Gen. Stat. § 84-4.2 allows the trial court wide discretionary authority. Therefore, we find no abuse of discretion here, and we affirm the decision of the trial court.

Affirmed.

Judge LEWIS concurs.

Judge WYNN dissents in a separate opinion.

Judge WYNN dissenting.

The gravamen of the plaintiffs' assignments of error is that the trial court improperly revoked Judge Allsbrook's order granting

pro hac vice admission to Bruce Wilkinson and Gloretta Hall of the Gary Law Firm. The majority correctly notes that "[a]dmission of counsel in North Carolina *pro hac vice* is not a right but a discretionary privilege." *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 555, 291 S.E.2d 828, 829 (1982). However, I believe it is critical to distinguish between the decision to grant admission, and a subsequent decision to revoke that privilege. I also believe it is important to stress the importance of the denial of the substantial rights of the represented party that results therefrom, in addition to the denial of the rights of its counsel.

As our Supreme Court has stated: "[O]nce [an] attorney [is] admitted under [N.C. Gen. Stat. § 84-4.1], plaintiff acquire[s] a substantial right to the continuation of representation by that attorney—just as with any other attorney duly admitted to practice law in the State of North Carolina." *Goldston v. American Motors Corp.*, 326 N.C. 723, 727, 392 S.E.2d 735, 737 (1990). In *Goldston*, a product liability case involving an AMC Jeep vehicle, the Court noted that "[d]epriving plaintiff of her counsel of choice, who is an alleged expert in cases of this nature, certainly exposed her to potential injury . . . ." *Id.*

In *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 420 S.E.2d 426 (1992), our Supreme Court discussed the appealable nature of an order granting a motion to disqualify counsel, stating that such orders,

> ha[ve] immediate and irreparable consequences for both the disqualified attorney and the individual who hired the attorney. The attorney is irreparably deprived of exercising his right to represent a client. The client, likewise, is irreparably deprived of exercising the right to be represented by counsel of the client's choice.

332 N.C. at 293, 420 S.E.2d at 429.

Therefore, upon the entry of Judge Allsbrook's order granting *pro hac vice* admission to Bruce Wilkinson and Gloretta Hall, the plaintiffs acquired "a substantial right to the continuation of representation by" them. *Goldston*, 326 N.C. at 727, 392 S.E.2d at 737. *Goldston* implies that a plaintiff has an equal right to continued representation whether counsel is admitted to practice in this State or is granted admission *pro hac vice* pursuant to N.C. Gen. Stat. § 84-4.1. *See id.*

In *Travco*, our Supreme Court held that "[d]ecisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal." *Travco*, 332 N.C. at 295, 420 S.E.2d at 430 (citing *In re Lee*, 85 N.C. App. 302, 310, 354 S.E.2d 759, 764-65, *disc. review denied*, 320 N.C. 513, 358 S.E.2d 520 (1987)). The plaintiffs, therefore, contend that Judge Griffin's order revoking the *pro hac vice* admission of plaintiffs' counsel constituted an abuse of discretion. The majority rejects this contention; I, however, believe the contention has merit.

The majority recognizes that "ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). While N.C. Gen. Stat. § 84-4.2 grants permission to "the General Court of Justice" to summarily revoke, "on its own motion and in its discretion," admission previously granted pursuant to N.C. Gen. Stat. § 84-4.1, I believe that the exercise of such discretion must be based upon *some* change in circumstance subsequent to the initial grant of *pro hac vice* admission sufficient to warrant the denial of plaintiffs' substantial right to the continued representation by their counsel of choice. Otherwise, there appears to be nothing to prevent the plaintiffs from again seeking to have Bruce Wilkinson and Gloretta Hall admitted *pro hac vice* by motion before yet another judge. In other words, there must be some basis for changing the determination to grant or deny *pro hac vice* admission; otherwise, I see no basis for one court modifying or overruling another equivalent court.

I disagree further with the majority's holding that, for purposes of *pro hac vice* admission under N.C. Gen. Stat. § 84-4.1 and the prohibition of "habitual practice" in our courts by nonresident counsel, a law firm may be treated as though it were a single lawyer, and therefore the actions of the firm may be imputed to the individual firm members. I believe this conclusion to be inequitable and unsupported by law.

In *State v. Hunter*, 290 N.C. 556, 227 S.E.2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L. Ed. 2d 539 (1977), our Supreme Court quoted with approval language from *Manning v. Railroad*, 122 N.C. 824, 828, 28 S.E. 963, 964 (1898), stating that North Carolina law "forbids the courts from allowing non-resident counsel . . . from practicing habitually in our courts." Furthermore, N.C. Gen. Stat. § 84-4.1

speaks of the admission *pro hac vice* of attorneys, not law firms. Neither this language in *Hunter* nor the statutory language indicates an intent to summarily deprive all members of an out-of-state law firm—whether present or future—the opportunity to appear in our state courts on a *pro hac vice* basis, where a single member of the firm may have appeared in our courts on multiple occasions such that a determination is made that the *individual* has habitually practiced law in this state. I believe the quoted language speaks to the individual "non-resident counsel," and should not impugn to the firm the disqualification of the individual.

Judge Griffin's order was based at least in part on his finding that "[t]he Gary Law Firm (and its members) has habitually practiced law in North Carolina," and Judge Griffin concluded that "[t]he conduct of the Gary Law Firm and its members in North Carolina constitutes the habitual practice of law." I disagree with the implication that a law firm, as opposed to an individual member of a law firm, may be admitted *pro hac vice* to practice before our courts, or that a law firm can be found to have habitually practiced law in North Carolina. To the extent Judge Griffin's order was based upon this conclusion of law, I believe the order constitutes an abuse of discretion.

Furthermore, the majority concedes that Judge Griffin's order was based in part on the erroneous conclusion that "[n]either the letter nor the spirit of G.S. 84-4.1(2) was complied with in this action," and that Judge Griffin misapprehended Florida's and North Carolina's reciprocity statutes in concluding that "reciprocity of admission does not exist" between Florida and North Carolina. The sole remaining conclusion of law upon which Judge Griffin's order can stand is that "[t]he Court is empowered by G.S. 84-4.2 in its discretion to summarily revoke *pro hac vice* admissions previously granted." As noted above, I believe such discretion is not unfettered, but instead is limited to instances of changed circumstances. For the foregoing reasons, I respectfully dissent.

STATE OF NORTH CAROLINA v. TIMOTHY WAYNE YOUNGS

No. COA99-1449

(Filed 29 December 2000)

1. Evidence— expert testimony—minor victim suffered from major depressive disorder partly caused by defendant's sexual abuse—proper for diagnosis and treatment

The trial court did not err in a prosecution for first-degree rape, first-degree sexual offense, incest, and indecent liberties by admitting an expert's opinion, based on the minor victim's statements, that the victim suffered from major depressive disorder partly as a result of her sexual abuse, because: (1) the expert's testimony was not admitted to prove that defendant was the perpetrator, but only to establish the victim's condition accompanied by the expert's resulting opinion under N.C.G.S. § 8C-1, Rule 702 that the child was the victim of sexual abuse; (2) the victim's statement identifying defendant father as the perpetrator is important for diagnosis and treatment, and the expert's statement was properly admitted to corroborate the victim's statements to the expert; and (3) defendant's contention that the expert's opinion was scientifically unreliable has no merit in light of the expert's experience and extensive work with the victim in this case, coupled with the results of the victim's physical examination made available to the expert.

2. Sexual Offenses— indecent liberties—first-degree sexual offense—short-form indictments valid

The trial court did not commit plain error by concluding that the short-form indictments for taking indecent liberties with a minor and first-degree sexual offense were valid even though the indictments did not set out each element of the offenses. N.C.G.S. §§ 14-27.4, 14-202.1, and 15-144.2(b).

3. Sexual Offenses— bill of particulars—failure to show lack of information significantly impaired defense

The trial court did not abuse its discretion in a prosecution for first-degree rape, first-degree sexual offense, incest, and indecent liberties by denying defendant's motion for a bill of particulars, because: (1) defendant has not shown that the lack of information requested in his motion significantly impaired his defense; (2) the short-form indictments provided defendant with

sufficient notice of the alleged offenses; (3) all discoverable information was made available to defendant; (4) the specificity as to details of the offenses was unavailable based on the age of the victim at the time of the offenses and could not be cured by a bill of particulars; and (5) the State was not required to prove which particular form of abuse defendant committed.

4. Sexual Offenses— first-degree—jury instruction on which sex act defendant committed not required

The trial court did not commit plain error by failing to instruct the jury that it must be unanimous as to which sex act defendant committed in order to convict him of first-degree sexual offense, because: (1) the trial court's instructions were consistent with N.C.G.S. § 14-27.1(4); and (2) the single wrong of engaging in a sexual act with a minor may be established by a finding of the commission of any one of a number of acts.

5. Sexual Offenses— indecent liberties—jury instruction on actus reus not required

The trial court did not commit plain error by failing to instruct the jury on the actus reus to support the charge of taking indecent liberties with a minor, because: (1) the instruction given by the court is consistent with our Supreme Court's prior holding that the gravamen of the offense is defendant's purpose for committing such act and the particular act performed is immaterial; and (2) the instruction given is consistent with N.C.G.S. § 14-202.1.

6. Sexual Offenses— indecent liberties—statute sufficient to give a defendant notice

N.C.G.S. § 14-202.1 sufficiently gives a defendant notice of the sexual conduct our legislature considers immoral, improper, and indecent liberties.

Appeal by defendant from judgments entered 15 April 1999 by Judge William C. Gore, Jr., in Brunswick County Superior Court. Heard in the Court of Appeals 17 October 2000.

Michael F. Easley, Attorney General, by Sarah Y. Meacham, Assistant Attorney General, for the State.

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

EDMUNDS, Judge.

Defendant appeals his convictions of first-degree rape, first-degree sexual offense, incest, and indecent liberties with a child. We find no error.

At defendant's trial, the State presented evidence that defendant and his three children moved to North Carolina in January 1994, along with defendant's girlfriend, Tuesday Bancroft (Tuesday), and Tuesday's daughter. At this time, the victim in the case, one of defendant's daughters, was in kindergarten or first grade. We shall refer to her in this opinion as "A."

When "A" was in the first or second grade, Tuesday and her daughter temporarily moved out of the residence after a dispute with defendant. During their absence, defendant engaged in vaginal, anal and oral intercourse with "A." "A" testified that on several occasions while the children were taking their naps, defendant would ask her to come into his room and undress. After instructing "A" to get on the bed, he would assault her. Defendant instructed "A" not to tell anyone about the assaults. In particular, "A" testified of an incident in December 1995 when social service worker Diane Setaro (Setaro) visited the Youngs' residence, and defendant told "A" not to tell Setaro about the assaults.

"A" first told Tuesday's daughter about the incidents but asked her not to tell anyone. "A" also confided to a girl next door about what defendant had done to her, and two years later she told Tuesday about the assaults. On 16 January 1998, when "A" was in the fourth grade, she visited her school counselor Carolyn Cogsdale (Cogsdale) and described her living situation, her assigned chores, and the whippings she received daily. Although "A" visited Cogsdale on her own volition, she had also been referred to Cogsdale by her teacher because of her sadness and unkempt appearance. After this meeting, Cogsdale notified the Department of Social Services of the possibility of child neglect and abuse. During meetings between 16 January 1998 and 21 January 1998, "A" revealed to Cogsdale that defendant had sexually abused her. Cogsdale again contacted the Department of Social Services and continued to see "A" on a daily basis until the end of the school year.

Setaro visited the Youngs' residence a second time on 22 January 1998 to discuss allegations of abuse and neglect. The next day, Setaro visited "A" at school, where "A" revealed that defendant had

sexually abused her. "A" also described the sexual abuse to Investigator Leslie Moore of the Brunswick County Sheriff's Department on 13 March 1998.

On 3 February 1998, "A" was examined by Dr. James Forstner (Dr. Forstner). He determined that "A" 's hymen was abnormal. His examination results were consistent with vaginal and oral penetration and suggestive of anal penetration. On 19 February 1998, "A" met with psychologist Diane Lattimer (Dr. Lattimer) and continued to visit her at least forty-five times prior to trial. Dr. Lattimer observed that "A" was disheveled, shy, avoided eye contact, and exhibited anxiety, sadness, decreased appetite, insomnia, decreased energy level, and decreased ability to concentrate. Dr. Lattimer diagnosed "A" with dysthymic disorder and major depressive disorder and determined that "A" exhibited symptoms typical of post-traumatic stress syndrome. At trial, Dr. Lattimer testified that in her opinion "A" had been sexually abused.

On the basis of this evidence, defendant was indicted for three counts of first-degree rape in violation of N.C. Gen. Stat. § 14-27.2 (1999), three counts of indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1 (1999), three counts of first-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4 (1999), and three counts of incest in violation of N.C. Gen. Stat. § 14-178 (1999). Prior to trial, defendant filed a motion for a bill of particulars requesting the precise date, time and place of the crimes charged and the specific sexual acts constituting the indecent liberties and first-degree sexual offense charges. This motion was denied, and the cases were joined for trial.

At the close of the State's evidence, eight charges were dismissed, leaving one count of first-degree rape, one count of indecent liberties with a child, one count of first-degree sex offense and one count of incest, all of which occurred between 17 August 1996 and 17 August 1997. Defendant presented evidence consisting only of his testimony denying the allegations. Thereafter, the jury found defendant guilty of all charges. He was sentenced to a minimum of 240 months and a maximum of 297 months for first-degree rape, and a minimum of 192 months and a maximum of 240 months for first-degree sexual offense, incest, and indecent liberties with a child, to be served at the conclusion of his rape sentence. Defendant appeals.

I.

[1] Defendant's first assignment of error relates to the admission of Dr. Lattimer's expert opinion that "A" suffered from major depressive disorder as a result, in part, from sexual abuse. Defendant presents a three-part argument, first asserting that Dr. Lattimer's opinion was inadmissible to prove abuse by defendant. Next, defendant contends that Dr. Lattimer's opinion lacked adequate foundation, because an expert witness may not testify that a complainant has been sexually abused on the basis of the complainant's history. Finally, defendant argues that Dr. Lattimer's opinion was scientifically unreliable. We will address these contentions *seriatim*.

A. Dr. Lattimer's diagnosis

Defendant argues that Dr. Lattimer's diagnosis of the victim's psychological disorder was admitted to prove that she had been abused by defendant. However, our review of the record indicates that Dr. Lattimer's testimony described "A" 's condition and her resulting expert diagnosis. The testimony was not admitted to prove that defendant was the perpetrator, but only to establish the victim's condition, accompanied by Dr. Lattimer's resulting opinion that "A" was the victim of sexual abuse. Dr. Lattimer only once discussed defendant as the perpetrator, and in this instance, she merely relayed the information given to her by "A" during treatment. Dr. Lattimer testified, in part:

> Q: And at some point during a later meeting did you have an opportunity to discuss anything that ["A"] would have told you about herself and her father, Timothy Youngs?
>
> A: Yes, on February 23rd ["A"] was playing with the dollhouse and initially she did not want to talk about the abuse. Typically I would introduce that by saying, you know, tell me about you and your daddy and leave it very open-ended and see how she responds. After about a half-an-hour I asked her again to show me with the dolls what had happened and she did move the dolls around in the dollhouse and then she began talking and she said that, "He did it to me a couple of times in the house on Walker Street." That it happened in her dad's bedroom during an afternoon on the weekend while her siblings were asleep. ["A"] told me that her father told her to come in to his bedroom and take off her clothes. She said that he was on top of her and that she was on top of him. That she felt she couldn't ask him to stop because

> she was afraid she would get into trouble. She reported oral, anal, and vaginal penetration. She stated that she would get bad feelings and that she was afraid that the whole world would end and that everyone would hate her because of this.

This Court has previously held that "[w]here children are examined by physicians for diagnosis and treatment of alleged sexual abuse, details of the offense, *including the identity of the offender*, provided by the child during such examination are generally admissible at trial." *State v. Rogers*, 109 N.C. App. 491, 501-02, 428 S.E.2d 220, 226 (1993) (emphasis added) (citations omitted); *see also State v. Smith*, 315 N.C. 76, 85, 337 S.E.2d 833, 840 (1985) (noting that when identification of a perpetrator is disclosed to aid in medical diagnosis or treatment, "the trustworthiness remains intact," and the identification is thus admissible).

The Supreme Court has held that the identity of a perpetrator is important for diagnosis in child sexual abuse cases for two reasons:

> First, a proper diagnosis of a child's psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home.

State v. Aguallo, 318 N.C. 590, 597, 350 S.E.2d 76, 80 (1986) (citation omitted). Our courts have consistently affirmed these principles. *See, e.g., State v. Hughes*, 114 N.C. App. 742, 443 S.E.2d 76 (1994) (finding no error in allowing physician to testify that child victim identified her father as the perpetrator); *Rogers*, 109 N.C. App. 491, 428 S.E.2d 220 (holding that child victim's statements regarding the identity of her perpetrator made to her therapist and physician during treatment were admissible). "A" 's statements to Dr. Lattimer identifying her father as her assailant are admissible on grounds that the information was pertinent to "A" 's diagnosis and treatment. Accordingly, this evidence was not presented to establish that "A" 's condition was caused by defendant. "A" testified at trial and identified defendant as her perpetrator. Therefore, Dr. Lattimer's testimony corroborates "A" 's testimony and is also admissible on this ground.

B. Expert testimony that the victim had been sexually abused

At trial, after being qualified and accepted by the court as an expert in the field of child psychology, Dr. Lattimer testified that, in

her opinion, "A" had been sexually abused. Defendant contends that admission of this opinion was error, particularly because it was based on "A" 's statements to Dr. Lattimer.

Rule 702 of the North Carolina Rules of Evidence governs the admission of testimony by experts and states, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (1999). An expert may testify to the facts or data forming the basis of his opinion pursuant to N.C. Gen. Stat. § 8C-1, Rule 703 (1999), and an expert opinion as to an ultimate issue is admissible under N.C. Gen. Stat. § 8C-1, Rule 704 (1999).

Our courts have consistently upheld the admission of expert testimony that a victim was sexually abused. *See Smith*, 315 N.C. 76, 337 S.E.2d 833; *State v. Crumbley*, 135 N.C. App. 59, 519 S.E.2d 94 (1999); *State v. Figured*, 116 N.C. App. 1, 446 S.E.2d 838 (1994); *Hughes*, 114 N.C. App. 742, 443 S.E.2d 76; *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993); *State v. Reeder*, 105 N.C. App. 343, 413 S.E.2d 580 (1992); *State v. Speller*, 102 N.C. App. 697, 404 S.E.2d 15, *appeal dismissed*, 329 N.C. 503, 407 S.E.2d 548 (1991); *State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988). Moreover, " 'where the expert's testimony relates to a diagnosis derived from the expert's examination of the [child] witness in the course of treatment, it is not objectionable because it supports the credibility of the witness or . . . *states an opinion that abuse has occurred.*' " *Reeder*, 105 N.C. App. at 349-50, 413 S.E.2d at 583 (emphasis added) (citation omitted).

Although defendant cites *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) for the proposition that Dr. Lattimer's testimony was inadmissible, these cases have recently been distinguished by this Court:

> Defendant's reliance on [*Trent* and *Parker*] to support his argument is misplaced. Those cases did not hold that an expert's opinion that a child had been sexually abused was inadmissible because it merely attests to the truthfulness of the child witness. Rather, in those cases the Court found the opinions inadmissible because the State failed to lay sufficient foundation for the opinions.

Figured, 116 N.C. App. at 8, 446 S.E.2d at 842. Accordingly, an expert may testify to his opinion that a child has been sexually abused as long as this conclusion relates to a diagnosis based on the expert's examination of the child during the course of treatment. *See id.*; *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90 (1997) (distinguishing *Trent* and *Parker* by noting that "[i]n both cases, the Courts found that since the experts found no clinical evidence that would support a diagnosis of sexual abuse, their opinions that sexual abuse had occurred merely attested to the truthfulness of the child witness").

The facts of the present case are distinguishable from *Trent* and *Parker*. Dr. Lattimer testified that she is a professional psychologist in private practice in Wilmington, North Carolina, specializing in children and adolescents. She was accepted as an expert witness in the field of child psychology. She stated that after "A" was referred to her by the Department of Social Services, she treated "A" on at least forty-five occasions prior to trial. Based on her observations during treatment, her professional experience, and the report of Dr. Forstner, Dr. Lattimer testified that in her opinion "A" had been sexually abused. Specifically, she stated:

> Q: And you stated that under that same Axis 1 you had noted sexual abuse of a child.
>
> A: Yes.
>
> Q: What does that mean?
>
> A: That is another condition which may be a focus of treatment but it is not a medical diagnosis. I based that on my interview with "A", what she told me, and on the report which I reviewed from Dr. Forstner.
>
> Q: And were the symptoms you have just described and the way that she presented herself also factored into that diagnosis?
>
> A: They were but I wouldn't base the diagnosis of Major Depression solely on a history of sexual abuse. When anyone experiences a major depression we look at many factors, both physiological factors and environmental factors to meet that.
>
> Q: Is it fair to say that during the course of your conversations with "A" that environmental factors were part of the things she expressed concerns over?
>
> A: Yes.

> Q: Based on your years of study in this field and your practical application of your studies and your treatment of patients in your office over the years, were you able to form an opinion as to whether or not this child had been sexually abused?
>
> A: Yes, I did.
>
> Q: What was your opinion?
>
> A: My opinion was that she had been sexually abused.

This testimony established a sufficient foundation to permit the trial court to allow Dr. Lattimer's expert opinion to be admitted into evidence. Her opinions were based on adequate data obtained during and for the purposes of treatment of "A" and were admissible as expert testimony under Rule 702.

C. Reliability of expert testimony identifying sexual abuse in victim

Finally, defendant argues that "there was no showing that Dr. Lattimer had any such experience" in identifying children who have been sexually abused. Defendant's contention that Dr. Lattimer's opinion was scientifically unreliable, however, is without merit.

Rule 702 of the North Carolina Rules of Evidence has been interpreted "to admit expert testimony when it will assist the jury 'in drawing certain inferences from facts, and the expert is better qualified than the jury to draw such inferences.' " *State v. Parks*, 96 N.C. App. 589, 592, 386 S.E.2d 748, 750 (1989) (citation omitted). In the context of the case at bar, "[t]he nature of the sexual abuse of children . . . places lay jurors at a disadvantage. Common experience generally does not provide a background for understanding the special traits of these witnesses." *State v. Oliver*, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533 (1987).

> A trial court is afforded wide latitude in applying Rule 702 and will be reversed only for an abuse of discretion. Moreover, the determination whether the witness has the requisite level of skill to qualify as an expert witness is ordinarily within the exclusive province of the trial judge, and "[a] finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it."

Parks, 96 N.C. App. at 592, 386 S.E.2d at 750 (internal citations omitted). In light of Dr. Lattimer's experience and her extensive work with

the victim in this case, coupled with the results of Dr. Forstner's physical examination that had been made available to Dr. Lattimer, the trial court did not abuse its discretion in qualifying Dr. Lattimer as an expert in child psychology or in admitting her opinion relating to her treatment and diagnosis of "A". Defendant's assignments of error relating to the admission of Dr. Lattimer's testimony are overruled.

II.

[2] Defendant next contends that the indictments in the case were impermissibly vague. Specifically, defendant argues that "[t]he indictments for taking indecent liberties with a minor and first degree sexual offense are defective as a matter of law in not setting out each element of the offenses, in violation of [his] state and federal constitutional rights to due process of law." We begin by noting that defendant properly concedes that he did not make an objection to this issue below. Appellate courts will not consider constitutional questions that were not raised and decided at trial. *See State v. Waddell*, 130 N.C. App. 488, 504 S.E.2d 84 (1998), *aff'd as modified*, 351 N.C. 413, 527 S.E.2d 644 (2000). Nevertheless, we will address defendant's arguments and review for plain error pursuant to the discretionary authority accorded us by N.C. R. App. P. 2.

Defendant's argument requires that we examine the applicable statutes. Section 14-27.4 of the North Carolina General Statutes, entitled First-Degree Sexual Offense, provides in pertinent part:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> > (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim . . . .

N.C. Gen. Stat. § 14-27.4. Section 14-202.1, entitled Taking Indecent Liberties with Children, states:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> > (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1.

In interpreting these statutes, our courts have noted that:

> In general, an indictment couched in the language of the statute is sufficient to charge the statutory offense. It is also generally true tha[t] an indictment need only allege the ultimate facts constituting the elements of the criminal offense and that evidentiary matters need not be alleged.
>
> Regarding an indictment drafted under N.C.G.S. § 14-27.4, our Supreme Court has held that such an indictment is sufficient to charge the crime of first-degree sexual offense and to inform the defendant of such an accusation without specifying which "sexual act" was committed. Similarly, . . . an indictment charging a defendant under N.C.G.S. § 14-202.1 [is] sufficiently specific without indicating exactly which of defendant's acts constitute[s] the "immoral, improper and indecent liberty."

State v. Blackmon, 130 N.C. App. 692, 699, 507 S.E.2d 42, 46-47 (internal citations omitted), *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998).

In the case at bar, the indictment for first-degree sexual offense stated:

> THE JURORS for the State upon their oath present that between the 17th day of August, 1995, and the 17th day of August 1996 and in the county named above the defendant named above unlawfully, willfully and feloniously did engage in a sex offense with ["A"], a child under the age of 13 years, against the form of the statute in such case made and provided and against the peace and dignity of the State.

This indictment complies with the statutory language and principles set forth above. Virtually identical indictments have been upheld by our courts in *Blackmon* and *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982) (noting that "an indictment without specifying which 'sexual act' was committed is sufficient to charge the crime of first-degree sexual offense and to inform a defendant of such accusation"). The indictment also satisfies section 15-144.2 of the North Carolina General Statutes, which provides, in part:

> If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years and all lesser included offenses.

N.C. Gen. Stat. § 15-144.2(b) (1999).

The indictment against defendant for indecent liberties with a child, provided:

> THE JURORS for the State upon their oath present that between the 17th day of August, 1995, and the 17th day of August 1996, and in the county named above the defendant named above unlawfully, willfully and feloniously did take and attempt to take immoral, improper, and indecent liberties with the child named below for the purpose of arousing and gratifying sexual desire and did commit a lewd and lascivious act upon the body of the child named below. At the time of this offense, the child named below was under the age of 16 years and the defendant named above was over 16 years of age and at least five years older than the child. The name of the child is ["A"], against the form of the statute in such case made and provided and against the peace and dignity of the State.

This indictment also complies with the principles set out above. Similar indictments have been upheld by this Court in *Blackmon* and *State v. Singleton*, 85 N.C. App. 123, 354 S.E.2d 259 (1987). Accordingly, this assignment of error is overruled.

III.

[3] Defendant also argues that the trial court erred by not granting his motion for a bill of particulars. Specifically, he contends that the trial court's ruling deprived him of his state and federal constitutional rights to due process of law and to a fair opportunity to defend himself.

"An appellate court should reverse the denial of a motion for a bill of particulars only if it clearly appears that the 'lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case.' " *State v. Hines*, 122 N.C.

App. 545, 551, 471 S.E.2d 109, 113 (citation omitted), *disc. review allowed*, 344 N.C. 634, 477 S.E.2d 47 (1996), *disc. review improvidently allowed*, 344 N.C. 627, 481 S.E.2d 85 (1997). Indeed, "[a] motion for a bill of particulars is within the sound discretion of the trial court, and we will reverse only upon a showing of palpable and gross abuse of that discretion." *State v. Stallings*, 107 N.C. App. 241, 246, 419 S.E.2d 586, 589 (1992) (citation omitted), *disc. review allowed*, 333 N.C. 348, 426 S.E.2d 713, *disc. review improvidently allowed*, 333 N.C. 784, 426 S.E.2d 717 (1993).

Here, defendant has not shown that the lack of information requested in his motion significantly impaired his defense. As set forth in section II above, short-form indictments for first-degree sexual offense and indecent liberties with a child meet the statutory requirements and provide defendant with sufficient notice of the alleged offenses. All discoverable information was made available to defendant; while some specificity as to the details of the offenses was unavailable because of the age of the victim at the time of the offenses, this difficulty could not have been cured by a bill of particulars. The missing details related to the particular form of sexual abuse inflicted on the victim and, as noted above, the State was not required to prove which particular form of abuse defendant committed. Because defendant has shown no impairment of his defense, the trial court did not abuse its discretion in denying his motion for a bill of particulars. *See Blackmon*, 130 N.C. App. 692, 507 S.E.2d 42; *Stallings*, 107 N.C. App. 241, 419 S.E.2d 586.

IV.

[4] Defendant next contends that the trial court erred in not instructing the jury that it must be unanimous as to which sex act defendant committed in order to convict him of first-degree sexual offense. Defendant's position is that the failure to give the requested instruction violated his state and federal constitutional rights to a unanimous jury verdict and to due process of law. Defendant again concedes that he did not object to this issue at trial. As noted above, although appellate courts will not consider constitutional questions that were not raised and decided at trial, *see Waddell*, 130 N.C. App. 488, 504 S.E.2d 84, we nevertheless will review for plain error pursuant to the discretionary authority accorded us by N.C. R. App. P. 2.

The issue raised by defendant in this assignment of error has already been analyzed and decided by this Court. In *State v. Petty*,

132 N.C. App. 453, 512 S.E.2d 428, *appeal dismissed*, 350 N.C. 598, 537 S.E.2d 490 (1999), we stated:

> The statutory definition of "sexual act" does not create disparate offenses, rather it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown. Furthermore, our Supreme Court has expressly determined that disjunctive jury instructions do not risk nonunanimous verdicts in first-degree sexual offense cases.

Id. at 462, 512 S.E.2d at 434 (citations omitted).

In *Petty*,

> the trial court instructed the jury that it could find Defendant guilty of a first-degree sexual offense if, in addition to the other elements of first-degree sexual offense, it found that Defendant had "engaged in a sexual act which was cunnilingus, with—or any penetration, however slight, by an object into the genital area of a person's body."

Id. at 462-63, 512 S.E.2d at 434. This Court held that:

> [t]his charge was not error, because the single wrong of engaging in a sexual act with a minor may be established by a finding of various alternatives, including cunnilingus and penetration. Cunnilingus and penetration are not disparate crimes, but are merely alternative ways of showing the commission of a sexual act. The trial court's disjunctive instruction therefore did not risk a nonunanimous verdict. As in *Hartness*, "[e]ven if we assume that some jurors found that [cunnilingus] occurred and others found that [penetration] transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct" constituting the single crime of engaging in a sexual act with a child.

Id. at 463, 512 S.E.2d at 434-35 (citation omitted).

In the case at bar, the court instructed the jury in accordance with the pattern instruction:

> The defendant has been charged in 98-CRS-1787 with the charge of first degree sexual offense. I charge that for you to find the defendant guilty of first degree sexual offense the State must prove three things beyond a reasonable doubt. First, that the defendant engaged in a sexual act with the victim. A sexual act

> means fellatio, which is any touching by the tongue or by the lips or tongue of one person of the male sex organ of another. It also means a sex act anal intercourse, which is any penetration, however slight, of the anus of any person by the male sexual organ of another. Second, the State must prove that at the time of the acts alleged the victim was a child under the age of 13. Third, the State must prove that at the time of the alleged offense the defendant was at least 12 years old and was four years older than the victim . . . .

"Sexual act" is defined by our statutes as, "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.1(4) (1999). The court's instructions were consistent with the statute and with this Court's holding in *Petty*. As such, this assignment of error is overruled.

V.

[5] In his next assignment of error, defendant argues that the trial court did not instruct the jury on the *actus reus* to support the charge of taking indecent liberties with a minor, denying him his state and federal rights to a unanimous jury verdict and to due process of law. Although defendant concedes that the trial court's instructions "accord with the current caselaw of North Carolina," he asserts that the instructions are in conflict with federal constitutional law. Again, defendant did not raise these constitutional arguments at trial, and as a result, this assignment of error is subject to dismissal. *See Waddell*, 130 N.C. App. 488, 504 S.E.2d 84 (dismissing defendant's argument that the trial court erred by declining to instruct the jury on the *actus reus* for each criminal charge where defendant raised no constitutional argument regarding this issue at trial). As before, however, we will exercise the discretionary authority accorded us by N.C. R. App. P. 2 to review this assignment of error under the plain error standard.

As defendant correctly points out in his appellate brief, our Supreme Court has previously addressed this issue, holding that:

> [a]s the statute indicates, the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts. The evil the legislature sought to prevent in this context was the defendant's performance of any

> immoral, improper, or indecent act in the presence of a child "for the purpose of arousing or gratifying sexual desire." Defendant's purpose for committing such act is the gravamen of this offense; *the particular act performed is immaterial.* It is important to note that the statute does not contain any language requiring a showing of intent to commit an unnatural sexual act. Nor is there any requirement that the State prove that a touching occurred. Rather, the State need only prove the taking of any of the described liberties for the purpose of arousing or gratifying sexual desire.

State v. Hartness, 326 N.C. 561, 567, 391 S.E.2d 177, 180-81 (1990) (emphasis added) (citation omitted).

The trial court again instructed the jury in accordance with the pattern instructions:

> In 98-CRS-1784 the defendant has been accused of taking an indecent liberty with a child. I charge that for you to find the defendant guilty of taking an indecent liberty with a child the State must prove three things beyond a reasonable doubt. First, that the defendant willfully took an indecent liberty with a child for the purpose of arousing or gratifying sexual desire. An indecent liberty is an immoral, improper or indecent touching by the defendant upon the child or you may find that the defendant committed a lewd or lascivious act upon a child. Second, the State must prove that the child had not reached her sixteenth birthday at the time in question, that is, as of August 17th, 1996. Third, that the defendant was at least five years older than the child and had reached his sixteenth birthday at that time.

This instruction is consistent with *Hartness* and the applicable statute cited in section II above. Accordingly, there is no error in the trial court's instruction in this case.

VI.

[6] Finally, defendant argues that the indecent liberties statute is unconstitutionally vague as applied to him. However, defendant did not assign error to this constitutional issue in the record on appeal. Moreover, our Supreme Court previously addressed this issue and held that "[t]he language of G.S. 14-202.1 provides a defendant with sufficient notice of what is criminal conduct. The statute clearly prohibits sexual conduct with a minor child and describes with reasonable specificity the proscribed conduct." *State v. Elam*, 302 N.C. 157,

162, 273 S.E.2d 661, 665 (1981); *see also Blackmon*, 130 N.C. App. at 700, 507 S.E.2d at 47 (stating that "[b]ecause the holding in *Elam* controls, we conclude that N.C.G.S. § 14-202.1 sufficiently [apprises] a defendant of the sexual conduct our legislature considers 'immoral, improper, and indecent liberties' "). This assignment of error is overruled.

No error.

Judges GREENE and MARTIN concur.

RENEE TAYLOR STEWART, PLAINTIFF v. CHARLES STEWART, DEFENDANT

No. COA99-1482

(Filed 29 December 2000)

1. Appeal and Error— appealability—construction of premarital agreement—equitable distribution issues remaining

A trial court order construing a premarital agreement and granting summary judgment on claims for postseparation support and alimony, and partial summary judgment on the equitable distribution of property addressed by the agreement, was immediately appealable even though it left undetermined the equitable distribution of property not identified in the agreement because it completely disposed of the gravamen of the issues raised.

2. Divorce— premarital agreement—contract principles

The North Carolina Uniform Premarital Agreement Act, N.C.G.S. § 52B-1 et seq., governs premarital agreements in North Carolina and alimony, postseparation support, and counsel fees may be barred by an express provision so long as the agreement is performed. Generally, contract construction principles apply to premarital agreements.

3. Divorce— premarital agreement—waiver of alimony—language sufficiently express

The language in a premarital agreement was sufficiently express to constitute a valid and enforceable waiver of a wife's claims for postseparation support and alimony.

4. Divorce— premarital agreement—waiver of retirement account rights—ERISA

ERISA's spousal waiver restrictions apply to waivers of survivor benefits but do not apply to waivers of an interest in a spouse's retirement accounts.

5. Divorce— premarital agreement—waiver of retirement account rights—state law

A waiver of any rights in retirement accounts under a premarital agreement was valid under North Carolina law. North Carolina's version of the Uniform Premarital Agreement Act provides that the parties to a premarital agreement may contract with respect to the disposition of retirement accounts and the unambiguous language of the agreement in this case provides that the parties' retirement accounts are to remain their separate property.

6. Divorce— premarital agreement—appreciation of medical license

The trial court did not err in construing a premarital agreement by concluding that any appreciation in the husband's medical license during the marriage, active or passive, was the husband's separate property where the agreement provided that the parties would retain the title, management, and control of the property they owned and all increases or additions, and it was undisputed that the husband owned his medical license as his separate property at the time the agreement was executed.

7. Divorce— premarital agreement—appreciation of interest in medical clinic

The trial court did not err when construing a premarital agreement by concluding that any increase in the husband's interest in his medical clinic, active or passive, was to remain his separate property where it was undisputed that his interest in the clinic constituted his separate property when the agreement was executed and the language of the agreement evinces the parties' intent that any increases or additions to his interest in the clinic were to remain his separate property.

Appeal by plaintiff from judgment entered 2 July 1999 and order entered 5 August 1999 by Judge Spencer Byron Ennis in District Court, Alamance County. Heard in the Court of Appeals 18 October 2000.

Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by Wiley P. Wooten and Thomas R. Peake, II, for the plaintiff-appellant.

Wishart, Norris, Henninger & Pittman, P.A., by Pamela S. Duffy and Hillary D. Whitaker, for the defendant-appellee.

WYNN, Judge.

Renee Taylor Stewart appeals from a 2 July 1999 trial court judgment concluding that she and her husband, Charles Stewart, waived claims for postseparation support, alimony, and certain property under a valid premarital agreement. She also appeals from a 5 August 1999 order holding that her husband's medical license is his separate property and therefore not subject to equitable distribution. We find no error.

On 25 June 1992, the marital parties signed a written Premarital Agreement under the North Carolina Uniform Premarital Agreement Act, N.C. Gen. Stat. §§ 52B-1 *et seq.* Neither party challenges the validity of the Agreement; rather, they dispute the interpretation of certain terms under the Agreement.

At the time of the parties' marriage in 1992, the husband held a medical license and owned an interest in Kernodle Clinic, a medical clinic. The parties separated in January 1998.

Pertinent to this appeal, in February 1998, the wife brought an action seeking postseparation support, alimony and equitable distribution. In response, the husband affirmatively pled that the terms of the Agreement barred his wife's claims for postseparation support, alimony and equitable distribution.

Following a motion hearing, the trial court granted summary judgment on 2 July 1999 in favor of the husband on the wife's claims for postseparation support and alimony. The trial court also granted to the husband partial summary judgment on his wife's claim for equitable distribution of certain property excluded by the terms of the agreement—the parties' respective retirement accounts and the husband's interest in Kernodle Clinic. The wife appeals to us from that 2 July 1999 judgment.

A second appealed from judgment arises from pretrial discovery issues. In March 1999, the wife served her husband with discovery requests, including interrogatories and a request for production of

documents, seeking information related to his medical license and his interest in Kernodle Clinic. In response, her husband opposed her discovery requests by moving for a protective order; and, he moved under N.C. Gen. Stat. § 50-20(i1) for a declaration that his medical license and interest in Kernodle Clinic were his separate property. On 5 August 1999, the trial court declared the husband's medical license to be his separate property and therefore not subject to equitable distribution. The trial court also denied the wife's motion to compel her husband to respond to the discovery requests concerning his medical license and the value of his interest in Kernodle Clinic. The wife appeals to us from that 5 August 1999 order.

[1] The wife first argues on appeal that the trial court erred under the 2 July 1999 order in construing the Agreement to waive her rights to postseparation support and alimony. Upon a careful review of the Agreement and the record as a whole, we find no error.

Under the 2 July 1999 order, the trial court granted the husband summary judgment only as to the wife's claims for postseparation support and alimony, and partial summary judgment on the wife's claim for equitable distribution regarding property specifically addressed by the Agreement—the parties' retirement accounts and the husband's interest in Kernodle Clinic. On appeal, the husband asserts that since this order leaves further matters to be judicially determined between the parties at the trial court level (i.e., the matter of equitable distribution of property not specifically identified in the Agreement), it is interlocutory and therefore not appealable. *See Rowe v. Rowe*, 131 N.C. App. 409, 410, 507 S.E.2d 317, 318 (1998). However, we hold that because the trial court's order completely disposed of the gravamen of the issues raised, the order is immediately appealable. *See Atassi v. Atassi*, 117 N.C. App. 506, 509, 451 S.E.2d 371, 373, *disc. review denied*, 340 N.C. 109, 456 S.E.2d 310 (1995) (citations omitted); N.C. Gen. Stat. § 1-277 (1996).

[2] The standard of review from summary judgment is "whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted). To make this determination, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Id.* Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c)(1990). Accordingly, the initial issue in this case is whether the Agreement irrefutably bars the wife's claims for postseparation support, alimony and equitable distribution.

The North Carolina Uniform Premarital Agreement Act governs premarital agreements in this state. N.C. Gen. Stat. §§ 52B-1 *et seq.* (1987 and Supp. 1996). The parties acknowledge that the Act governs their Agreement. *See* N.C. Gen. Stat. § 52B-5 (1987). Under the Act, a premarital agreement may be used by parties to contract as to "[t]he modification or elimination of spousal support." N.C. Gen. Stat. § 52B-4(a)(4) (1987). Elsewhere, N.C. Gen. Stat. § 50-16.6(b) provides that "Alimony, postseparation support, and counsel fees may be barred by an express provision of a valid separation agreement or premarital agreement so long as the agreement is performed." N.C. Gen. Stat. § 50-16.6(b) (1995).

Generally, 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); *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987) ("When the language of a contract is clear and unambiguous, construction of the contract is a matter of law for the court.") *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (citations omitted) (In interpreting contract language, the presumption is that the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.)

In this case, Paragraph 13 of the Agreement provides:

> Each of the parties forever waives, releases and relinquishes any right or claim of any kind, character, or nature whatsoever that either may have, or later acquire, in and to the estate, property, assets or other effects of the other party under any present or future law of any state; *and each of the parties forever waives, releases and relinquishes any right or claim that he or she now has, or may hereafter acquire, pursuant to the provisions of G.S. 28A, 29, 30, 31 and 50 as such sections now exist or may hereafter be amended*, or pursuant to any present or future law of the State of North Carolina.

(Emphasis added). Chapter 50 of the North Carolina General Statutes encompasses divorce, alimony and child support. This includes N.C. Gen. Stat. §§ 50-16.2A and -16.3A, which provide for postseparation support and alimony, respectively. *See* N.C. Gen. Stat. §§ 50-16.2A, -16.3A (1995).

[3] The wife relies upon this Court's recent decision in *Napier v. Napier*, 135 N.C. App. 364, 520 S.E.2d 312 (1999), *disc. review denied*, 351 N.C. 358, — S.E.2d — (2000), to support her contention that the waiver provision in Paragraph 13 of the Agreement is vague and is therefore an unenforceable release of her rights to postseparation support and alimony. In *Napier*, at issue was a release term under a separation agreement that provided:

> L. *Mutual release*: Subject to the rights and privileges provided for in this Agreement, each party does hereby release and discharge the other of and from all causes of action, claims, rights or demands whatsoever, at law or in equity, which either of the parties ever had or now has against the other, known or unknown, by reason of any matter, cause or thing up to the date of the execution of this Agreement, except the cause of action for divorce based upon the separation of the parties.

135 N.C. App. at 365-66, 520 S.E.2d at 313. This Court concluded that this broad language was not sufficiently "express" to constitute a valid waiver of alimony under N.C. Gen. Stat. § 50-16.6(b), as it did not "specifically, particularly, or explicitly refer to the waiver, release, or settlement of 'alimony' or use some other similar language having specific reference to the waiver, release, or settlement of a spouse's support rights." *Id.* at 367, 520 S.E.2d at 314. The wife argues in the instant case that the waiver provision in Paragraph 13 of the Agreement is likewise overly ambiguous. We disagree.

Whereas the waiver in *Napier* was a mere blanket release of "all causes of action, claims, rights or demands whatsoever, at law or in equity," the waiver provision in Paragraph 13 of the Agreement in this case specifically and unambiguously waives all rights pursuant to Chapter 50 of the North Carolina General Statutes, which explicitly encompasses postseparation support and alimony. We, therefore, conclude that the language in the subject Agreement—drafted by the wife's attorney—was sufficiently "express" to constitute a valid and enforceable waiver of the wife's claims for postseparation support pursuant to N.C. Gen. Stat. § 50-16.2A and alimony pursuant to N.C. Gen. Stat. § 50-16.3A.

[4] The wife next argues that the trial court erred in concluding in the 2 July 1999 judgment that the parties waived any rights to each other's retirement accounts under the terms of the Agreement. The wife asserts that the Agreement was ineffective to waive the parties' interests in each other's retirement accounts as the Agreement failed to comply with the waiver requirements of the federal Employee Retirement Income and Security Act (ERISA). *See* 29 U.S.C.A. §§ 1001 *et seq.* (1999). We find no error.

The question presented, whether rights to retirement account benefits may be waived pursuant to a valid premarital agreement in light of ERISA, is one of first impression for our state courts. However, although not directly on point, the United States Court of Appeals for the Fourth Circuit addressed a similar issue in *Estate of Altobelli v. International Bus. Machines Corp.*, 77 F.3d 78 (4th Cir. 1996). In that case, the Fourth Circuit considered whether the ex-spouse of a participant in an ERISA-governed plan could waive her interest as a beneficiary in any pension-plan proceeds pursuant to a valid separation agreement incorporated into a divorce decree. ERISA's anti-alienation clause stated that "[e]ach pension plan shall provide that benefits under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1988). IBM argued that its pension plans comply with this ERISA requirement, and that this language prohibits a pension-plan beneficiary from waiving his or her benefits. 77 F.3d at 80-81. Noting a split among several circuits as to whether the anti-alienation clause of ERISA applies to a waiver of benefits by a beneficiary, the Fourth Circuit agreed with the Seventh Circuit, concluding that the anti-alienation provision does not apply to a beneficiary's waiver, but instead applies only to waivers by a plan participant. *Id.* at 81 (citing *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 280-81 (7th Cir.) (*en banc*), *cert. denied*, 498 U.S. 820, 112 L. Ed. 2d 41 (1990) (finding that a nonparticipant beneficiary may waive her benefits pursuant to specific language in a divorce settlement); *cf. Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693-94 (8th Cir. 1989) (holding, without addressing the anti-alienation clause, that an ex-spouse beneficiary can waive her pension benefits in a divorce settlement if the waiver specifically refers to and modifies the beneficiary interest); *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904, 907 (10th Cir. 1991) (holding, without construing the anti-alienation clause, that the beneficiary designation on file with the plan administrator controls only in the absence of a divorce decree which dictates otherwise)); *but see McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990) (holding that a divorce settlement may

not waive a beneficiary's pension plan benefits, as the plan administrator is only to consider the designation on file); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993) (stating that it would be counterproductive to require the plan administrator to delve into state law concerning domestic relations to determine plan beneficiaries). The Fourth Circuit found in *Altobelli* that an interpretation of the anti-alienation provision which allows for a waiver of benefits by a beneficiary pursuant to a separation agreement comports with the purpose of the clause, which is " 'to safeguard a stream of income for pensioners (and their dependents) . . .).' " 77 F.3d at 81 (quoting *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376, 107 L. Ed. 2d 782, 795 (1990)).

While neither North Carolina nor the Fourth Circuit has directly addressed whether retirement account benefits may be waived under a premarital agreement, other state courts have addressed that question and concluded that rights to pension benefits may be waived under a valid premarital agreement.

In *Ryan v. Ryan*, 659 N.E.2d 1088 (Ind. Ct. App. 1995), the Court of Appeals of Indiana considered a premarital agreement wherein, as in the instant case, the parties purportedly agreed that any property owned by the individual parties prior to the marriage, or which was purchased, accumulated or acquired separately during the marriage, would remain the separate property of the individual parties. The trial court in *Ryan* concluded that the premarital agreement further provided that the husband's separate property included his pension benefits which existed prior to the marriage, as well as those benefits which accrued during the marriage. *Id.* at 1094. Therefore, those pension benefits were the separate property of the husband and his wife had no claim thereto. *Id.*

In *Ryan*, at the time of the parties' marriage in 1971, pension rights were not included within the definition of marital property under Indiana law. *Id.* In 1980, however, the Indiana legislature amended the statutory definition of property in dissolution actions to include the right to withdraw retirement or pension benefits and vested benefits. *Id.* (citing Ind. Code § 31-1-11.5-2(d) (1993)). The wife argued that she could not have waived her spousal interest in her husband's vested retirement benefits, as her statutorily-created interest was not in existence at the time the premarital agreement was executed in 1971. *Id.* The Indiana Court of Appeals rejected this argument, finding that the premarital agreement made clear the parties' intention to exclude their individual assets, including pension

benefits, from the definition of marital property. *Id.* at 1095. As the parties' intentions concerning their separate property was clear, and they acknowledged in the agreement that they would be bound by Indiana law, including a waiver of their statutory rights thereunder, the court found the wife's argument to be without merit. *Id.* The court also distinguished the Seventh Circuit's decision in *Pedro Enters., Inc. v. Perdue*, 998 F.2d 491 (7th Cir. 1993), finding that the wife in *Ryan* could point to no statutory requirements for the waiver of pension rights. *Ryan*, 659 N.E.2d at 1095; *see Pedro Enters., Inc.* (holding that premarital agreement did not waive surviving spouse's rights in deceased husband's pension plan where waiver did not comply with ERISA's waiver requirements).

In *Moor-Jankowski v. Moor-Jankowski*, 222 A.D.2d 422 (N.Y. App. Div. 1995), the New York Supreme Court, Appellate Division, Second Department, considered a premarital agreement much like the one at issue in the instant case. There,

> the parties entered into an antenuptial agreement prepared by the plaintiff's attorney which provided that each party was to retain absolute ownership of his or her separate property, including increments in such property which were "a direct result of the personal efforts, skills, or services of the party owning said assets". Each party waived any right "which he or she may acquire in the separately owned property, whether now owned or hereafter acquired, of the other by reason of such marriage".

222 A.D.2d at 422. Prior to trial in that case on issues of equitable distribution, the trial court granted partial summary judgment to the husband on the basis of the premarital agreement, dismissing the wife's claim for equitable distribution insofar as it concerned the husband's retirement funds. *Id.* As in the instant case, the wife argued on appeal that the premarital agreement was unenforceable as it failed to comply with the spousal consent provisions of ERISA. *Id.* at 423; *see* 29 U.S.C. § 1055(c)(2)(A) (1999). The New York Supreme Court, Appellate Division, found this contention to be without merit, stating that ERISA's spousal consent provisions only "apply to the plan participant's *current* spouse." *Moor-Jankowski*, 222 A.D.2d at 422 (emphasis added). The court concluded that the husband's pension benefits which had accrued prior to the marriage, as well as those which accrued following the commencement of the matrimonial action, constituted his separate property. *Id.* Moreover, as the wife had waived any claim to the husband's pension benefits accruing dur-

ing the marriage pursuant to the unambiguous terms of the premarital agreement, the trial court's entry of partial summary judgment as to the husband's retirement funds was found to be proper. *Id.*

More recently, in *Edmonds v. Edmonds*, 710 N.Y.S.2d 765 (N.Y. Sup. Ct. 2000), the New York Supreme Court, Onondaga County, construed a provision in a valid premarital agreement which stated that the husband and wife each retained the right to dispose of all property which he or she "now owns or is possessed of, or may hereafter acquire, or receive, as his or her own absolute property in like manner as if he or she had remained unmarried." *Edmonds*, 710 N.Y.S.2d at 767. The court noted that the husband, who sought a determination that his wife's pension and deferred compensation plan were marital assets subject to distribution, was represented by counsel in connection with the premarital agreement, while the wife, who brought the divorce action, had specifically acknowledged and waived her right to counsel. *Id.* The husband in that case contended that ERISA provides that spousal benefits can only be effectively waived by a spouse; as he was not the spouse of the plaintiff at the time the premarital agreement was signed, the husband argued that the purported waiver was invalid. *Id.* The husband in that case further contended that the waiver failed to comply with ERISA's specific waiver requirements, and was therefore invalid. *Id.* at 767-68. The New York court noted that ERISA was enacted in 1974 and amended effective 1 January 1985 by the Retirement Equity Act of 1984 (REA), which added a "requirement that all qualified pension plans provide automatic benefits to surviving spouses in the form of a survivor's annuity (Pub. L. No. 98-397, 98 Stat. 1426 (1984)." *Id.* at 768. The REA also outlined the strict requirements for the waiver of such benefits. *See* 29 U.S.C. § 1055(c)(1), (2). The court noted that, "Apart from the survivor benefit of REA, ERISA does not mandate that other benefits be provided to a participant's spouse. *In fact, ERISA expressly prohibits alienation of benefits by the plan participant*," other than pursuant to a qualified domestic relations order pursuant to 29 U.S.C. § 1056(d). *Edmonds*, 710 N.Y.S.2d at 768 (emphasis added).

The court in *Edmonds* rejected the contentions of the husband in that case, stating that his argument failed to recognize "the distinction between his interest in [his wife's] pension as created by REA, the waiver of which is restricted by 29 U.S.C. § 1055(c)(2) [i.e. survivorship benefits], and his interest in [his wife's] pension as marital property" pursuant to applicable state law. *Id.* at 769. Citing the decision in *Moor-Jankowski*, the New York court in *Edmonds* concluded

that "spousal benefits" under ERISA are limited to survivor benefits, and that the waiver restrictions of 29 U.S.C. § 1055(c)(2) are likewise limited to survivor benefits. 710 N.Y.S.2d at 770. That is, the spousal benefit waiver requirements outlined in 29 U.S.C. § 1055(c)(2) do not apply to a waiver of an interest in a spouse's pension plan(s) as such interest arises under state law. *Id.* The court quoted a Colorado state court decision, stating:

> "[w]hile we recognize that a waiver of spousal death benefits in a prenuptial agreement is not effective when the spouse later dies while the parties are still married, ERISA does not, in our view, preempt or preclude the recognition, implementation or enforcement of an otherwise valid prenuptial agreement with regard to, as here, a dissolution of marriage proceeding."

Id. (quoting *In re Marriage of Rahn*, 914 P.2d 463, 468 (Colo. Ct. App. 1995)).

We find the logic of *Moor-Jankowski*, *Edmonds* and *In re Rahn* persuasive. As in *Edmonds*, the federal court cases cited by the wife in the instant case in opposition to the enforcement of the premarital agreement are inapposite as they concern the payment of *survivor* benefits after the death of the plan participant while the parties were still married. *See Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992) (holding that a premarital agreement which failed to comply with 29 U.S.C. § 1055 was ineffective to waive spousal *death* benefits), *cert. denied*, 508 U.S. 912, 124 L. Ed. 2d 255 (1993); *National Auto. Dealers and Assocs. Retirement Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996) (holding that a premarital agreement failing to comply with ERISA's spousal waiver requirements was insufficient to waive spouse's rights to *survivor* annuity benefits under deceased spouse's pension plans); *Pedro Enters., Inc.*, 998 F.2d 491. We conclude that ERISA's spousal waiver restrictions in 29 U.S.C. § 1055(c)(2) apply to waivers of survivor benefits but do not apply to waivers of an interest in a spouse's retirement account(s) as in the case at bar. *See Edmonds*, 710 N.Y.S.2d 765.

Paragraph 4 of the Agreement in the case at bar states:

> The parties herein agree that any and all retirement accounts, including but not limited to, pensions, annuities, IRAs, Keoghs, etc., owned prior to the marriage, or obtained after the marriage, is and shall remain the sole and separate property of the individual in whose name the account is titled. The parties herein agree

> that neither will make claim on any of the retirement accounts held by the other, whether acquired prior to the marriage or subsequent to the marriage.

Having determined that this waiver was not subject to the spousal waiver requirements of ERISA, we must now turn to the question of whether the purported waiver was effective under our state law.

[5] As previously noted, North Carolina's version of the Uniform Premarital Agreement Act provides that the parties to a premarital agreement may contract respecting the disposition of their property upon separation or marital dissolution. N.C. Gen. Stat. § 52B-4(a)(3). The Act defines "property" as "an interest, present or future" in "property, including income and earnings." N.C. Gen. Stat. § 52B-2(2) (1987). The official comment to N.C. Gen. Stat. § 52B-2 states that the term "property" is intended to encompass "all forms of property and interests therein," including pension and retirement accounts. *Id.* Under the language of the Act, the parties to a premarital agreement may contract therein with respect to the disposition of retirement accounts. The unambiguous language of Paragraph 4 of the Agreement in this case provides that the parties' retirement accounts are to remain their separate property. We find that this waiver was valid under our state law as well as ERISA, and the wife's second assignment of error is therefore overruled.

[6] In her third assignment of error, the wife contends that the trial court erred in concluding that any active appreciation to her husband's interest in Kernodle Clinic and in his medical license acquired during the marriage was his separate property not subject to equitable distribution, pursuant to the terms of the Agreement. Both with respect to the husband's interest in Kernodle Clinic as well as his interest in his medical license, we find no error.

This Court will not disturb a trial court's determination that certain property is to be labeled separate property as long as there is competent evidence to support that determination. *Holterman v. Holterman*, 127 N.C. App. 109, 113, 488 S.E.2d 265, 268 (citation omitted), *disc. review denied*, 347 N.C. 267, 493 S.E.2d 455 (1997). On appeal, we review the record to determine whether the trial court's findings of fact are supported by any competent evidence, regardless of the existence of evidence which may support a contrary finding. *Mrozek v. Mrozek*, 129 N.C. App. 43, 48, 496 S.E.2d 836, 840 (1998) (quoting *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986)).

The Act provides that a premarital agreement may be used to contract with respect to "[t]he rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located." N.C. Gen. Stat. § 52B-4(a)(1). Thus, the husband's interest in Kernodle Clinic and his medical license, including any appreciation thereto (whether active or passive) acquired during the marriage, was not an invalid subject of the Agreement under the Act. We must determine, however, whether the language of the Agreement was sufficient to waive the wife's interest in any appreciation accrued during the marriage to either the husband's interest in Kernodle Clinic or his medical license, such that any such appreciation became the separate property of the husband not subject to equitable distribution.

As to the defendant's medical license, N.C. Gen. Stat. § 50-20(b)(2) defines "separate property" for purposes of equitable distribution to include "[a]ll professional licenses" and states that "[t]he increase in value of separate property and the income derived from separate property shall be considered separate property." N.C. Gen. Stat. § 50-20(b)(2); *see Poore v. Poore*, 75 N.C. App. 414, 423, 331 S.E.2d 266, 272 (holding that a license to practice dentistry is the licensee's separate property pursuant to N.C. Gen. Stat. § 50-20(b)(2)), *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985); *Caudill v. Caudill*, 131 N.C. App. 854, 855, 509 S.E.2d 246, 248 (1998) (holding that separate property not considered for purposes of marital asset distribution includes income derived from and increases in the value of separate property).

Nonetheless, as the wife correctly notes, our courts distinguish between "active" and "passive" appreciation of separate property. "Active appreciation refers to financial or managerial contributions of one of the spouses to the separate property during the marriage; whereas, passive appreciation refers to enhancement of the value of separate property due solely to inflation, changing economic conditions or other such circumstances beyond the control of either spouse." *O'Brien v. O'Brien*, 131 N.C. App. 411, 420, 508 S.E.2d 300, 306 (1998) (citations omitted), *disc. review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999). This Court has held that any increase in the value of separate property "is presumptively marital property unless it is shown to be the result of passive appreciation." *Conway v. Conway*, 131 N.C. App. 609, 616, 508 S.E.2d 812, 817 (1998) (citation omitted), *disc. review denied*, 350 N.C. 593, —— S.E.2d —— (1999).

Paragraph 14 of the Agreement in this case provides that "[e]ach of the parties shall retain the title, management and control of the property or estate now owned by each of them, *and all increase or addition thereto*" (emphasis added). It is undisputed that at the time the Agreement was executed the defendant solely owned his medical license as his separate property. In the 5 August 1999 order, the trial court made the finding that "[t]he defendant owned his medical license prior to the marriage. The medical license is titled in the name of the defendant and is his separate property." The trial court then concluded that, "Under the terms of the Pre-Marital Agreement, the defendant's medical license is the defendant's separate property including any increases and additions thereto. This is the case whether those increases or additions are active or passive." We find that this conclusion of law is supported by the trial court's findings of fact, which in turn are supported by competent evidence in the record, including the plain language of the Agreement. As such, the trial court did not commit error in concluding as a matter of law that the husband's medical license, including any increases or additions thereto, whether active or passive, constituted his separate property.

[7] As to the husband's interest in Kernodle Clinic, the parties do not dispute that the husband's interest in the clinic as of the date of execution of the Agreement constituted his separate property. Paragraph 2 of the Agreement specifically acknowledged that the husband "is the owner of . . . (a) A vested interest in Kernodle Clinic." Paragraph 3 of the Agreement states the parties' agreement that "the property as set forth above is and shall remain the sole and separate property of each of the parties and that neither shall claim an interest in the property of the other . . . ." In Paragraph 5 of the Agreement, the parties agree further "that any interest which [the husband] may obtain in a private practice similar to the interest he currently owns in Kernodle Clinic, shall be his sole and separate property and [the wife] shall have no interest therein or make any claim thereon."

In the 2 July 1999 judgment, the trial court made the finding that the property specifically addressed in the Agreement was not subject to equitable distribution, which property specifically included the "defendant's interest in Kernodle Clinic or any private practice similar to the interest he holds in Kernodle Clinic, . . . and all increases and additions thereto . . . ." The trial court concluded that "the defendant's entire interest in Kernodle Clinic including any interest acquired during the marriage is the separate property of the defend-

ant" pursuant to the terms of Paragraphs 2, 3, 5 and 14 of the Agreement. We find that the language of Paragraphs 2, 3 and 5, in conjunction with the language of Paragraph 14 quoted above, evinces the parties' intent that any increases or additions to the husband's interest in Kernodle Clinic, whether active or passive, were to remain his separate property. The trial court's conclusion regarding the husband's interest in Kernodle Clinic is supported by its findings of fact, which are supported by competent evidence in the record. The wife's third assignment of error is therefore overruled.

As the parties do not dispute the existence and validity of the Agreement, we conclude that the trial court committed no error in construing the Agreement and finding that there existed no genuine issue of material fact as to the issues of postseparation support, alimony and the defendant's retirement accounts. Having carefully reviewed the record, we further conclude that the trial court committed no error in its conclusions of law and findings of fact in the 2 July 1999 judgment and 5 August 1999 order with respect to the defendant's medical license and interest in Kernodle Clinic. The 2 July 1999 judgment and the 5 August 1999 order entered by the trial court are therefore,

Affirmed.

Judges LEWIS and HUNTER concur.

LEONARD LARRAMORE, EMPLOYEE, PLAINTIFF-APPELLEE v. RICHARDSON SPORTS LIMITED PARTNERS, D/B/A CAROLINA PANTHERS, EMPLOYER, AND LEGION INSURANCE COMPANY, CARRIER, DEFENDANT-APPELLANTS

No. COA99-1578

(Filed 29 December 2000)

1. Workers' Compensation— average weekly wage—football player

The Industrial Commission did not err in a Workers' Compensation action in its determination of the average weekly wage of a professional football player where plaintiff signed a contract which provided a signing bonus of $1,000 and a salary of

$85,000 for the period 27 April 1995 to 28 February 1996; the contract specified that plaintiff was not entitled to the contract amount until he was added to the active roster; plaintiff was injured during the preseason camp and was not added to the roster; and the Commission computed plaintiff's average weekly wage by adding the signing bonus and contract amount and dividing by 52 weeks. At least some competent evidence supported the Commission's conclusion that this method was the only appropriate method under the circumstances and would most nearly approximate the amount the injured employee would be earning were it not for the injury.

2. Workers' Compensation— football player—continued employment without injury—question of fact for Commission

An Industrial Commission finding of fact in a workers' compensation action that plaintiff-football player would have played for the Carolina Panthers during his contract year but for his injury was supported by circumstantial evidence in the record. The determination of whether plaintiff would have continued in his employment is a question of fact most appropriately resolved by the Industrial Commission.

3. Workers' Compensation— medical treatment—request for approval—time frame

An Industrial Commission award for medical expenses in a workers' compensation action was remanded where the Commission's order lacked any finding as to the reasonableness of the time frame within which plaintiff requested treatment approval.

4. Workers' Compensation— temporary partial disability—football player

There was evidence in the record in a workers' compensation action to support the Industrial Commission's conclusion that plaintiff-football player was entitled to temporary partial disability where there was evidence to support the conclusion that his injury resulted in loss of his wage earning capacity; that evidence shifted the burden to the employer to establish that the employee could have obtained higher earnings; defendants made no such showing; and, while no doctor expressly prohibited plaintiff from playing professional football, plaintiff's treating physicians noted

that a symptomatic disc would contraindicate playing professional football.

Judge GREENE dissenting.

Appeal by defendants from opinion and award entered 4 August 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 November 2000.

Lore & McClearen, by R. James Lore for plaintiff-appellee.

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

FULLER, Judge.

Defendant Richardson Sports Limited Partners, d/b/a Carolina Panthers, and Legion Insurance Company appeal an order and award of the Industrial Commission awarding plaintiff Leonard Larramore temporary partial disability compensation, temporary permanent disability compensation, and reimbursement for medical expenses.

On 27 April 1995 plaintiff signed a contract with the Carolina Panthers professional football team to play football during the Panthers' 1995-96 season. The contract provided for a $1,000.00 signing bonus and a salary of $85,000.00 for the period 27 April 1995 to 28 February 1996. The contract further specified that plaintiff was not entitled to the contract amount until plaintiff was officially added to the Panthers' active roster. Under the standard National Football League players contract which constituted part of the agreement, in the event plaintiff was injured during the professional season and could not play for the remainder of the year, the contract specified that plaintiff would still receive the full contract amount. The contract expressly provided the Panthers with discretion to unilaterally terminate plaintiff if his football skills were unsatisfactory.

Prior to a determination of which players would make the active roster, contract players, including plaintiff, participated in pre-season football camps for which they were paid a per diem amount for expenses and work performed. Plaintiff participated in such a camp lasting from 30 May 1995 to 9 June 1995. However, on 8 June 1995 plaintiff injured his back when he slipped and fell during practice. Plaintiff was excused from the final day of the camp, and he returned home to Jacksonville, Florida.

On 14 July 1995 plaintiff again reported to the Panthers' training camp where team doctor Donald D'Alessandro performed a pre-season physical on plaintiff. Dr. D'Alessandro noted that plaintiff's lumbar strain had begun to resolve, and he released plaintiff for practice. The following day, 15 July 1995, Panthers management cut the team roster, and various contract players were excused from the team without having made the active roster. Plaintiff was one of the players excused from employment. Upon plaintiff's dismissal, Dr. D'Alessandro performed an exit examination on plaintiff and recommended plaintiff rest his lower back and consult a spine surgeon should he experience continued symptoms.

Plaintiff returned to Jacksonville, and on 4 August 1995 plaintiff was examined by orthopaedist Fady El-Bahri. Dr. El-Bahri performed an MRI on plaintiff which revealed slight disc herniations and evidence of degenerative disc disease. Dr. El-Bahri recommended plaintiff undergo conservative treatments of physical therapy, nerve studies, and epidural injections for two to three months. Plaintiff submitted Dr. El-Bahri's bill to the Panthers' team trainer, but defendants refused to pay.

Plaintiff returned to Dr. El-Bahri on 25 July 1996 complaining of increased pain and constant numbness and tingling in both legs. Dr. El-Bahri diagnosed plaintiff as having a "bilateral sacroiliac joint sprain," and recommended plaintiff undergo a microdiscectomy.

Following his dismissal from the Panthers, plaintiff did not obtain any other employment in football for the 1995-96 season. Plaintiff received unemployment assistance for approximately three months until beginning work as a teacher's assistant. Plaintiff also worked as a temporary service employee. Plaintiff tried out for a player position with the Dallas Cowboys in January 1997, but was not selected for the team.

In an opinion and award filed 4 August 1999, the Full Commission concluded plaintiff suffered a compensable injury when he fell and injured his back during practice on 8 June 1995. The Commission determined plaintiff was temporarily totally disabled from 9 June 1995 through 14 July 1995. The Commission calculated plaintiff's average weekly wage as $1,653.85, yielding a weekly compensation rate of $478.00, minus appropriate credits to defendants. The Commission further concluded plaintiff was entitled to temporary partial disability from 8 June 1995 to the time of the order, for a total of 300 weeks, at a rate two-thirds of the difference between $1,653.85

and plaintiff's post-injury wages. Defendants were additionally ordered to reimburse plaintiff for expenses incurred or to be incurred for treatment by Dr. El-Bahri. Defendants appeal.

Defendants bring forth three assignments of error on appeal: (1) the Commission erred in determining plaintiff's average weekly wage as $1,653.85, yielding a maximum compensation rate of $478.00; (2) the Commission erred in awarding plaintiff payment for medical expenses incurred or to be incurred for plaintiff's treatment by Dr. El-Bahri; and (3) the Commission erred in awarding plaintiff temporary partial disability compensation under N.C. Gen. Stat. § 97-30 (1999).

It is well-established that our standard of review of an opinion and award of the 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 findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000) (citation omitted). " '[T]he Industrial Commission is the fact finding body and . . . the findings of fact made by the Commission are conclusive on appeal, . . . if supported by competent evidence. . . . This is so even though there is evidence which would support a finding to the contrary.' " *Hunter v. Perquimans County Bd. of Educ.*, 139 N.C. App. 352, 355, 533 S.E.2d 562, 564, (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981)), *cert. denied*, 352 N.C. 674, — S.E.2d —, No. 415P00 (N.C. Supreme Court 6 Oct. 2000).

I.

[1] By their first assignment of error, defendants allege the Commission erred in determining plaintiff's average weekly wage under the Worker's Compensation Act to be $1,653.85. N.C. Gen. Stat. § 97-2(5) (1999) defines "average weekly wage" and enumerates procedures for its computation:

> 'Average weekly wages' shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury. . . . Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both

> parties will be thereby obtained . . . . *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.*

G.S. § 97-2(5) (Emphasis added).

The Commission concluded that, given the circumstances and short duration of plaintiff's employment, it was appropriate "to resort to such other method of computing average weekly wages as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." Pursuant to G.S. § 97-2(5), the Commission determined this method would be to add the contract amount of $85,000.00 and the $1,000.00 signing bonus, and divide the total by fifty-two weeks, yielding an average weekly wage of $1,653.85.

Defendants first argue that the Commission's conclusion was erroneous in that the Commission should not have used the final "exceptional reasons" method of calculating plaintiff's average weekly wage. Specifically, defendants contend no such exceptional circumstances existed to permit the use of an alternative method.

This Court addressed an identical argument in *Hendricks v. Hill Realty Group, Inc.*, 131 N.C. App. 859, 861-62, 509 S.E.2d 801, 803 (1998), *disc. review denied*, 350 N.C. 379, 536 S.E.2d 73 (1999). The appellant in *Hendricks* argued there was insufficient evidence of exceptional circumstances to justify the Commission's use of an alternative method to determining average weekly wages. *Id.* In upholding the Commission's use of an alternative method, this Court noted that "[t]he intent of [G. S. § 97-2(5)] is to make certain that the results reached are fair and just to both parties. . . . 'Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls the decision.' " *Id.* at 862, 509 S.E.2d at 803 (quoting *McAninch v. Buncombe County Schools*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997)).

The Commission in *Hendricks* determined that an "exceptional reasons" approach was " 'the only method which is fair and which would result in a calculation of decedent's average weekly wage

which most nearly approximates the amount of wages she would be earning were it not for her injury and resulting death.' " *Id.* at 863, 509 S.E.2d at 803. Finding competent evidence to support this finding, this Court held the Commission's determination binding on appeal. *Id.* at 863-64, 509 S.E.2d 801, 803-804.

In the present case, the Commission likewise concluded that under the circumstances, the only appropriate method, and that which would "most nearly approximate the amount which the injured employee would be earning were it not for the injury," would be to divide plaintiff's $86,000.00 contract amount by fifty-two. We hold this determination to be supported by at least some competent evidence in the record, and thus, binding upon this Court. Plaintiff's contract and the circumstances of this appeal are indeed exceptional, and we therefore will not substitute our judgment for that of the Commission. *See, e.g., Christian v. Riddle & Mendenhall Logging*, 117 N.C. App. 261, 264, 450 S.E.2d 510, 513 (1994) ("due to the unique nature of [plaintiff's] employment, it is difficult to make a precise calculation of his income, and the Commission was therefore justified in resorting to an alternative method of determining his average weekly wage as provided by G. S. § 97-2(5).").

[2] Defendants further argue that the Commission's computation of plaintiff's average weekly wage is erroneous because it was based on an unsupported finding of fact. Defendants assert the computation was based on the Commission's finding that the "reasonable inference from the facts is that, but for plaintiff's injury, plaintiff would have played for the Carolina Panthers during the contract year and would have earned the contract pay of $85,000.00 plus a $1,000.00 signing bonus." Defendants contend this finding was not supported by any competent evidence, and thus, the conclusion that plaintiff's average weekly wage is $1,653.85 was unsupported.

We acknowledge as true defendants' argument that the record does not contain direct evidence establishing to a certainty that, but for plaintiff's injury, he would have made the Panthers' active roster. However, just as the Commission is entitled to use circumstantial evidence in determining the existence of a causal link between an injury and a worker's employment, we believe the Commission is entitled to the use of circumstantial evidence here. *See Brafford v. Brafford's Construction Co.*, 125 N.C. App. 643, 647, 482 S.E.2d 34, 37 (1997) ("Circumstantial evidence of the causal connection between the occupation and the disease is sufficient.").

The record here contains circumstantial evidence which could lead to an inference that plaintiff's injury caused his dismissal from the Panthers. The Commission made findings of fact, which are supported by the record, that plaintiff played semi-professional football after college, and that one year later, plaintiff was signed to play for the Buffalo Bills professional football team. Plaintiff suffered an ankle injury while with the Buffalo Bills, and he was placed on an inactive roster. Moreover, the Commission found that once dismissed from the second pre-season training camp on 8 June 1995, plaintiff was given a conditioning goal of weight loss to 300 pounds by the next camp. Although the Commission made no specific findings, record evidence suggests plaintiff was unable to meet this weight loss goal due to an inability to perform proper conditioning.

While this Court may disagree with the inference which the Commission drew, the determination of whether, but for his injury, plaintiff would have continued in his employment with the Panthers is a question of fact most appropriately resolved by the Commission. *See, e.g., Young v. Hickory Bus. Furn.*, 137 N.C. App. 51, 55, 527 S.E.2d 344, 348 (2000) (citation omitted) (Commission vested "with full authority to find the essential facts in a workers' compensation case. . . and it is the responsibility of the Commission, not the reviewing court, to weigh the evidence of causation and to assess its credibility."). Given the circumstantial evidence present in the record, we decline to substitute our judgment for that of the Commission, and we therefore uphold its finding that plaintiff's injury prevented him from maintaining his employment with the Panthers. This assignment of error is overruled.

II.

[3] By their second assignment of error, defendants argue the Commission erroneously awarded plaintiff payment for medical expenses incurred or to be incurred for plaintiff's treatment by Dr. El-Bahri. Specifically, defendants assert plaintiff failed to request the Commission's approval for treatment by Dr. El-Bahri within a reasonable time, and the Commission failed to make any relevant findings on the issue.

Under the Worker's Compensation Act, an injured employee has the right to procure his own physician so long as the Commission approves such treatment. N.C. Gen. Stat. § 97-25 (1999); *Schofield v. Tea Co.*, 299 N.C. 582, 586, 264 S.E.2d 56, 60 (1980) (citations omit-

ted). A request for the Commission's approval must be made within a reasonable time after the employee seeks the treatment. *Schofield*, at 593, 264 S.E.2d at 63. The Commission is required to make specific findings as to whether the employee requested approval within a reasonable time. *Scurlock v. Durham County Gen. Hosp.*, 136 N.C. App. 144, 152, 523 S.E.2d 439, 444 (1999) (citation omitted).

In *Scurlock*, this Court observed that the Commission's failure to make findings as to the reasonableness of the time within which a request for treatment approval is made constitutes grounds for remand on the issue:

> Here, plaintiff began seeing Dr. Scott in June of 1991, but made no specific request for authorization with the Commission until 15 August 1994, more than three years after her visits began. Though we profess doubts as to how a three-year delay could be reasonable, ultimately this is not for us to determine. Rather, the Industrial Commission must make specific findings as to whether approval was sought within a reasonable time after her treatments with Dr. Scott began. The Full Commission made no such findings here, requiring a remand for that determination.

Id. at 152, 523 S.E.2d at 444 (citations omitted); *see also*, *Braswell v. Pitt County Mem. Hosp.*, 106 N.C. App. 1, 7, 415 S.E.2d 86, 89 (1992) ("Insofar as the Commission in this case failed to address whether plaintiff requested a change of physician within a reasonable time, we remand this matter to the Commission for further findings on this issue.").

Clearly, the decision as to whether plaintiff in this case requested treatment approval within a reasonable time under the circumstances is within the sole province of the Commission. While the Commission determined plaintiff's treatment by Dr. El-Bahri to be reasonably necessary, the order of the Commission lacks any finding as to the reasonableness of the time frame within which plaintiff requested any such approval. While plaintiff's request may have been reasonably timely in light of defendants' protracted denial of the Commission's jurisdiction over this matter, only the Commission may make such findings. We therefore remand this issue to the Commission to make proper findings as to whether plaintiff requested approval of Dr. El-Bahri's treatment in a reasonably timely fashion as required by statute.

III.

[4] Defendants' third and final assignment of error alleges the Commission erred in awarding plaintiff temporary partial disability compensation under G.S. § 97-30. Defendants contend plaintiff failed to meet his burden of establishing his disability past 14 July 1995. While defendants correctly assert that the record contains competent evidence tending to support a conclusion that plaintiff was not disabled for the length of time determined by the Commission, we must defer to the Commission's finding of disability where supported by *any* competent evidence in the record. *See, e.g., Dancy v. Abbott Labs.*, 139 N.C. App. 553, 534 S.E.2d 601 (2000).

This Court recently noted that an injured employee is disabled for purposes of the Worker's Compensation Act if the injury results in an " 'incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' " *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 131, 532 S.E.2d 583, 588 (2000) (quoting *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). Thus, disability under the Act is defined as " 'the impairment of the injured employee's earning capacity rather than physical disablement.' " *Id.* (quoting *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457). The *Bond* court further observed that an injured employee may establish disability by producing evidence that he has obtained other employment at a wage less than that earned prior to the injury. *Id.*

In the present case, there is evidence in the record which would support a conclusion that plaintiff's injury resulted in the loss of his wage-earning capacity. We have previously upheld as supported by competent evidence the Commission's determination that, but for his injury, plaintiff would have received the Panthers contract amount of $86,000.00. The Commission also found plaintiff was unable to obtain other professional football employment for the remainder of the 1995-96 season. Plaintiff attempted similar employment with the Dallas Cowboys in January 1997, but was not selected for the team.

Rather, the Commission found, and the record supports, that subsequent to his injury and dismissal from the Panthers, plaintiff performed various low-paying jobs, including work as a teacher's assistant at the pay rate of $6.50 per hour, and as a temporary service employee at the rate of $8.10 per hour. Such evidence, while not dispositive of disability, shifts the burden to the employer to establish

that the employee could have obtained higher earnings. *Bond*, 139 N.C. App. at 131, 532 S.E.2d at 588 (post-injury earnings from delivering automobiles competent evidence of earning capacity where employer presented no evidence that claimant could obtain employment with higher earnings). Defendants made no such showing. Moreover, although defendants argue that no doctor expressly prohibited plaintiff from playing professional football, all three of plaintiff's treating physicians noted that a symptomatic disc would contraindicate plaintiff's playing professional football. Indeed, on 25 July 1996, Dr. El-Bahri diagnosed plaintiff as suffering from "a bilateral sacroiliac joint sprain" for which Dr. El-Bahri sought to perform a microdiscectomy on plaintiff.

Again, while the judgment of this Court may differ from that of the Commission, it is the Commission that is wholly vested with authority to find the essential facts, weigh the evidence, and assess its credibility. *Young*, 137 N.C. App. at 55, 527 S.E.2d at 348. The record contains some competent evidence which would support the Commission's conclusion that plaintiff was entitled to temporary partial disability, and we therefore will not disturb this determination on appeal.

The order of the Commission awarding plaintiff disability compensation is hereby affirmed; this matter is remanded to the Commission for further findings as to whether plaintiff's request for approval for treatment by Dr. El-Bahri was reasonably timely.

Affirmed in part, reversed and remanded in part.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority that plaintiff met his burden of proving a "temporary partial disability" within the meaning of the Workers' Compensation Act. I, therefore, dissent.

"The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9) (1999). Disability refers to "a diminished capacity to earn money rather than physical infirmity." *Arrington v. Texfi Indus.*, 123 N.C. App. 476, 478,

473 S.E.2d 403, 405 (1996). To establish a disability, a claimant must prove:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that [plaintiff's] incapacity to earn was caused by [his] injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). A plaintiff may meet this burden by producing "evidence that he has obtained other employment at a wage less than that earned prior to the injury." *Russell v. Lowes Pro. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

In this case, the Commission concluded "plaintiff is entitled to temporary partial disability compensation for the period from June 8, 1995, to the present and continuing for a total of 300 weeks." The Commission made findings of fact regarding the wages earned by plaintiff subsequent to his injury; however, the Commission did not make any findings of fact comparing plaintiff's post-injury wages to any pre-injury wages. The Commission's findings of fact, therefore, do not support a conclusion that plaintiff was disabled under the Workers' Compensation Act due to his inability to earn after his injury "the same wages he had earned before his injury in the same employment . . . [or] any other employment." Accordingly, I would reverse the opinion and award of the Commission.

Even assuming plaintiff is disabled under the Workers' Compensation Act, I disagree with the majority that the record contains competent evidence to support the trial court's finding of fact that "but for plaintiff's injury, plaintiff would have played for the Carolina Panthers during the contract year and would have earned the contract pay of $85,000.00 plus a $1,000.00 signing bonus." The record shows plaintiff would have earned the contract pay of $85,000.00 only if plaintiff was officially added to the active roster of the Carolina Panthers. Plaintiff, however, was excused from the team without having made the active roster. There is no evidence in the record that plaintiff was excused as a result of his injury. Evidence of plaintiff's prior employment record as a professional football player and his attendance at the pre-season training camp of the Carolina Panthers is not "circumstantial evidence which could lead to an inference that plaintiff's injury caused his dismissal from the Panthers." I,

therefore, would hold the Commission's finding of fact that "but for plaintiff's injury, plaintiff would have played for the Carolina Panthers during the contract year and would have earned the contract pay of $85,000.00 plus a $1,000.00 signing bonus" is not supported by competent evidence in the record. *See Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 126, 532 S.E.2d 583, 585 (2000) (appellate review of Commission's findings of fact is limited to whether findings of fact are supported by competent evidence). Accordingly, the Commission erroneously relied on this finding of fact when computing the amount of plaintiff's compensation under N.C. Gen. Stat. § 97-2(5) and N.C. Gen. Stat. § 97-30.

BERNICE B. PRINCE, AS GUARDIAN AD LITEM FOR BRITTANY HINSON, A MINOR CHILD AND AS PERSONAL REPRESENTATIVE FOR JOSHUA HINSON, DECEASED, PLAINTIFF V. O. RICHARD WRIGHT, JR., MICHAEL KENT JONES, WALL STREET INVESTMENT CORPORATION, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, DEFENDANTS

No. COA99-1528

(Filed 29 December 2000)

1. Appeal and Error— appealability—action arising from house fire—partial dismissal—right to one proceeding

In an action arising from a fire in a rented house, the trial court's interlocutory order dismissing all claims against an insurance company but only some of the claims against defendant-landlords was immediately appealable by plaintiff. Plaintiff has the right to have all her claims adjudicated in a single proceeding.

2. Negligence— house fire—inspection by insurance company—creation of duty

The trial court erred in a negligence action arising from a fire in a rented house by granting the insurance company's (USF&G) Rule 12(b)(6) motion to dismiss where plaintiff alleged that USF&G undertook to inspect the property and gave the impression to the family living there that it would determine whether the premises were suitable for residential purposes; the tenant, Ms. Strictland, cooperated with USF&G inspectors and alleged reliance on USF&G's representation; and one child was injured and one died in a fire. USF&G may have created for itself a duty to plaintiff which it then breached by expressly undertaking to

conduct an inspection of the suitability of the house for residential purposes and then failing to warn tenants of the dangerous conditions it discovered during that inspection.

3. Unfair Trade Practices— insurance company inspection of rental house—not in commerce—tenant not third-party beneficiary

The trial court properly granted an insurance company's motion for a Rule (12)(b)(6) dismissal of an unfair and deceptive practices claim arising from the company's inspection of a rental house which subsequently burned, killing one child and injuring another. The actions of USF&G in this case cannot be said to be in or affecting commerce; the tenants were not encouraged to act in any commercial manner as a result of the inspection report, they did not change their position in reliance on the report, there was no commercial relationship between the tenants and USF&G, and plaintiff (the guardian and personal representative of the children) was not an intended third-party beneficiary of the actions taken by USF&G because the report was intended to fulfill contractual obligations to the property owners.

4. Landlord and Tenant— house fire—landlord's knowledge of hazard—Rule 12(b)(6) dismissal

The trial court erred by granting a Rule 12(b)(6) dismissal of a claim against landlords resulting from a house fire where plaintiff alleged that the fire was caused by unsafe conditions in the home which defendants knew or should have known existed; that defendants never warned the tenants of the hazard; and that defendants failed to advise the tenants to vacate the premises.

Judge GREENE concurring.

Appeal by plaintiff from orders entered 17 May 1999 and 31 May 1999 by Judge William C. Gore, Jr., in Columbus County Superior Court. Heard in the Court of Appeals 17 October 2000.

Kathleen Shannon Glancy, and Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer, for plaintiff-appellant.

Crossley, McIntosh, Prior & Collier, by Clay A. Collier and Samuel H. MacRae, for defendant-appellees O. Richard Wright, Jr., Michael Kent Jones, and Wall Street Investment Company.

Hedrick & Blackwell, L.L.P., by Jeffrey H. Blackwell, for defendant-appellee United States Fidelity and Guaranty Company.

MARTIN, Judge.

On 1 May 1996, Rodney Strickland (Mr. Strickland) entered into a residential lease agreement with Wall Street Investment Corporation, which was co-owned by O. Richard Wright and Michael Kent Jones, (defendant-landlords). Mr. Strickland moved into the house with Terri Strickland (Ms. Strickland) and her two children, Brittany and Joshua Hinson. On 5 September 1996, Hurricane Fran caused significant damage to the roof which resulted in water leaks. Three days later, a heavy rainstorm caused further water damage. Mr. Strickland notified defendant-landlords of the damage to the house on 13 September 1996. On 16 October 1996, defendant United States Fidelity and Guaranty Company (USF&G), which insured the property for defendant-landlords, undertook to inspect the house and, according to the complaint, claimed to conduct a thorough investigation. After the inspection, however, no repairs were made, nor were the tenants warned of any dangerous conditions on the premises. Four days following the inspection, on 20 October 1996, a fire broke out in the house, killing seventeen-month-old Joshua and injuring Brittany. At the time of the fire, no smoke detectors had been installed in the rental house. On 21 October 1996, USF&G caused to be prepared through NEMAX Claims Services an "Origin & Cause Investigation" report. Bernice Prince (plaintiff), the guardian *ad litem* for Brittany and the personal representative for the estate of Joshua, alleges that USF&G intentionally or negligently misrepresented or concealed facts and evidence regarding the fire in this report. Ms. Strickland was subsequently arrested and charged with the murder of her son, the attempted murder of her daughter, and first-degree arson; as a result of these charges, Brittany was taken from her mother and placed with the Department of Social Services. The charges were later dropped, and Brittany was returned to her mother. Finally, on 16 October 1998, Ms. Strickland filed an action on behalf of herself and her children against defendants; she subsequently filed a voluntary dismissal and resigned as guardian *ad litem* for Brittany and as personal representative for Joshua's estate. On 8 February 1999, plaintiff filed a First Amended Complaint representing Brittany Hinson and the estate of Joshua Hinson. In May 1999, the trial judge granted defendants' motions to dismiss. Plaintiff appeals.

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[1] We first note that plaintiff has appealed from an interlocutory order. The trial court's order dismisses all claims against defendant USF&G and some but not all claims against defendant-landlords.

Further, there is no certification in the order that there is "no just reason for delay" which would facilitate an immediate appeal. N.C. Gen. Stat. § 1A-1, Rule 54(b). Generally, no immediate appeal lies from an interlocutory order. *Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979). However, when the order appealed from affects a substantial right, a party has a right to an immediate appeal. N.C. Gen. Stat. § 1-277(a); 7A-27(d)(1). An interlocutory order affects a substantial right when the order "deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991) (citation omitted). In *Driver v. Burlington Aviation, Inc.*, this Court held that the trial court's dismissal of plaintiff's claims against one defendant affected "a substantial right to have determined in a single proceeding whether plaintiffs have been damaged by the actions of one, some or all defendants where their claims arise upon the same series of transactions." 110 N.C. App. 519, 524, 430 S.E.2d 476, 480 (1993) (citation omitted). Similarly, in this case, plaintiff seeks relief against multiple defendants based on negligence, violation of the statutory duty of a landlord to repair premises, unfair and deceptive trade practices, and wrongful death, all arising from the single occurrence of a fire in a rental home. Plaintiff has the right to have all her claims adjudicated in a single proceeding. We therefore consider plaintiff's appeal.

I.

[2] Plaintiff first assigns error to the trial court's grant of USF&G's motion to dismiss plaintiff's negligence claim. Plaintiff alleges that USF&G assumed responsibility for inspecting the home for hazards and thus violated a duty of care owed to plaintiff by failing to warn the family that a dangerous condition existed on the premises.

In reviewing a trial court's dismissal pursuant to N.C.R. Civ. P. 12(b)(6), "[t]he 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." *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 300, 435 S.E.2d 537, 541 (1993) (citation omitted), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994). Under this rule, a claim is properly dismissed " 'if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.' " *Claggett v. Wake Forest University*, 126 N.C. App. 602, 608, 486 S.E.2d 443, 446 (1997) (citation omitted). In actions for negli-

gence, the plaintiff must allege that the defendant breached a duty owed the plaintiff, and that this breach caused actual injury to the plaintiff. *Davis v. North Carolina Dept. of Human Resources*, 121 N.C. App. 105, 465 S.E.2d 2 (1995). Negligence " 'presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty which either arises out of a contract or by operation of law.' " *Sinning v. Clark*, 119 N.C. App. 515, 518, 459 S.E.2d 71, 73, *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995) (citation omitted). "If there is no duty, there can be no liability." *Id.* (citation omitted).

In *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 363 S.E.2d 367, *disc. review denied*, 321 N.C. 744, 366 S.E.2d 862 (1988), this Court held that privity of contract is not required to recover against a person "who negligently performs services for another and thus injures a third party." *Id.* at 322, 363 S.E.2d at 371-72. In *Olympic Products*, the plaintiff entered into a contract with Roof Systems to install a roof. Roof Systems then entered into a contract with manufacturer Carlisle to install a "Carlisle" roof. Carlisle, in its contract with Roof Systems, required that the installer comply with all Carlisle specifications; further, Carlisle committed itself to inspect the roof to ensure that the installer adhered to all necessary specifications and procedures. Shortly after the job was completed, the roof collapsed. Under these facts, this Court held that Carlisle owed a duty to the property owner to use reasonable care. *Id.* at 324-25, 363 S.E.2d at 373.

> "[U]nder certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to liability to the third person for injuries resulting from his failure to exercise reasonable care in such undertaking."

Id. at 323, 363 S.E.2d at 372 (quoting *Quail Hollow East Condominium Ass'n v. Donald A. Scholz Co.*, 47 N.C. App. 518, 522, 268 S.E.2d 12, 15, *disc. review denied*, 301 N.C. 527, 273 S.E.2d 454 (1980)).

> This duty to protect third parties from harm arises under circumstances where the party is in a position so that "anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or property of the other."

Id. (quoting *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 666, 255 S.E.2d 580, 584, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979)).

In the case *sub judice*, USF&G contracted to provide insurance coverage for defendant-landlords. In her complaint, plaintiff alleges that USF&G, on 16 October 1996, expressly undertook to conduct an inspection "for the purpose of detecting and detailing the suitability of the house for residential purposes, including but not limited to, damage or potential damage to the electrical system due to the presence of wind driven water or moisture." During this inspection, the complaint alleges that Ms. Strickland fully cooperated with USF&G and "requested notice of any dangerous conditions discovered as a result of said inspection." The complaint alleges that plaintiff "relied upon USF&G's express undertaking of the inspection to warn them of any dangerous conditions, including fire hazards, as a result of the presence of moisture and wind driven water and possible damage to the electrical system." Finally, plaintiff alleges that USF&G failed to warn the residents of the potential fire hazard created by the water damage to the electrical wiring. Taking these factual allegations in plaintiff's complaint as true, as we are required to do in reviewing motions to dismiss, we conclude that the trial court's grant of USF&G's motion to dismiss was error. Plaintiff's complaint alleges that USF&G undertook to inspect the property and gave the impression to the family living therein that it would determine whether the premises was suitable for residential purposes; further, Ms. Strickland cooperated with USF&G inspectors and alleges reliance on USF&G's alleged representation that it would advise her of any dangerous condition existing. As mentioned above, there is no requirement that plaintiff and defendant be in privity of contract when defendant explicitly holds itself out to perform a duty which it then breaches. Under these facts, USF&G may have created for itself a duty to plaintiff which it breached by first expressly undertaking to conduct an inspection of the suitability of the house for residential purposes and then by failing to warn tenants of the dangerous conditions it discovered during that inspection. We therefore reverse the dismissal of plaintiff's negligence claim against USF&G.

II.

[3] Plaintiff next alleges the trial court erred when it dismissed plaintiff's claim against USF&G for unfair and deceptive practices in or affecting commerce. We disagree.

To establish a *prima facie* claim for unfair and deceptive practices, plaintiff must show that: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, N.C. Gen. Stat. § 75-1.1 and (3) the act proximately caused injury to the plaintiff." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995) (citation omitted). Unfair and deceptive practices tend to involve buyer and seller relationships. *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E.2d 1, *disc. review denied*, 298 N.C. 806, 261 S.E.2d 919 (1979). Nevertheless, courts have also recognized actions based on other types of commercial relationships, including those outside of contract. *J.M. Westall & Co., Inc. v. Windswept View of Asheville, Inc.*, 97 N.C. App. 71, 387 S.E.2d 67, *disc. review denied*, 327 N.C. 139, 394 S.E.2d 175 (1990).

In *Westall*, the defendant-developer entered into a contract with a builder-contractor to construct condominiums. *Id.* at 72, 387 S.E.2d at 67-68. The plaintiff supplied materials for the contractor. When the contractor was delinquent in making payments to the supplier, the supplier contacted the developer, who assured the supplier that the job was bonded and thus the supplier would be paid even if the contractor failed to pay. *Id.* at 72-73, 387 S.E.2d at 68. The developer then asked the plaintiff to continue supplying materials. *Id.* at 73, 387 S.E.2d at 68. The contractor, as it turned out, was not bonded, and the supplier was not paid for the materials. *Id.* This Court held that the supplier could bring an action under G.S. § 75-1.1 against the developer even though the supplier had no contract with the developer: "In this case, the defendants' alleged misrepresentations to the plaintiff related to the delivery of building materials to a third party, and as such the misrepresentations at least affect commerce while arguably they are also 'in commerce.' " *Id.* at 75, 387 S.E.2d at 69. The proper inquiry, therefore, "is not whether a contractual relationship existed between the parties, but rather whether the defendants' allegedly deceptive acts *affected* commerce. A contractual relationship is not required in order to affect commerce." *Id.* at 75, 387 S.E.2d at 69 (citations omitted).

" 'Commerce' in its broadest sense comprehends intercourse for the purpose of trade in any form." *Id.* (quoting *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980)). The unfair and deceptive practices statute provides that commerce "includes all business activities, however denominated." N.C. Gen. Stat. § 75-1.1(b). Nevertheless, the fundamental purpose of G.S.

§ 75-1.1 is to "protect the consuming public." *Skinner v. E.F. Hutton & Co., Inc.*, 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985) (quoting *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 167-68 (4th Cir. 1985)). North Carolina courts have defined the insurance business as affecting commerce, "when an insurer provides insurance to a consumer purchasing a policy." *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 10, 472 S.E.2d 358, 363 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172 (1997).

The actions of USF&G in the case *sub judice* cannot be said to be "in or affecting commerce." USF&G's actions are distinguishable from the actions of the developer giving rise to a claim under G.S. § 75-1.1 in *Westall*. USF&G contracted through NEMAX Claims Services to prepare a fire investigation report. This report was prepared for the mutual benefit of USF&G and its insured: defendant-landlords. Although plaintiff's allegations, taken as true, indicate that USF&G may have acted in bad faith in having the report prepared, these actions cannot be construed as "intercourse for the purpose of trade" with plaintiff. *Westall*, 97 N.C. App. at 75, 387 S.E.2d at 69. The tenants in this case were not encouraged to act in any commercial manner as a result of the report, nor did they change their position in reliance on the report. Indeed, there was no commercial relationship between the tenants and USF&G which can be said to have affected commerce. Plaintiff argues that Brittany Hinson was removed from her mother's home and placed with the Department of Social Services as a consequence of the false report, but there is no indication in the complaint how this outcome, even if taken as true, involved or affected commerce. Under these facts, USF&G's alleged actions, as they relate to plaintiff, cannot be characterized as "in or affecting commerce."

Additionally, in *Wilson v. Wilson*, 121 N.C. App. 662, 468 S.E.2d 495 (1996), this Court held that "North Carolina does not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive trade practices under N.C.G.S. § 75-1.1." *Id.* at 665, 468 S.E.2d at 497. This is true, however, only when the plaintiff is neither an insured nor in privity with the insurer. *See Murray v. Nationwide*, 123 N.C. App. at 15, 472 S.E.2d at 367 (allowing plaintiff's unfair and deceptive practices claim because "[t]he injured party in an automobile accident is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party," and was thus in contractual privity with the insurance company). Accordingly, while

a plaintiff generally cannot sue the insurance company of an adverse party under G.S. § 75-1.1, if the plaintiff achieves the status of an intended third-party beneficiary arising from the contractual relationship between the adverse party and the adverse party's insurance company, the plaintiff may then bring a claim against the insurance company for violating the unfair and deceptive practices statute.

In the present case, USF&G contracted for an "Origin & Cause Investigation" report to be prepared as a result of the house fire which occurred on 20 October 1996. Plaintiff contends USF&G made intentional misrepresentations, concealed facts and evidence, and acted in bad faith in the investigation and reporting of the causes of the house fire. Plaintiff, however, was not the intended third-party beneficiary of the contractual relationship between defendant-landlords and USF&G. USF&G insured the property against loss or damage for the benefit of the owners of the property. As part of its contractual obligations to its insured, USF&G contracted with NEMAX Claims Services to produce a report on the house fire. This report was not intended to benefit the tenants living on the property, but to fulfill contractual obligations with the property owners. Additionally, defendant-landlords did not enter into the insurance policy with USF&G with the intent to benefit potential tenants living in the residence, but rather paid for the coverage to reduce or eliminate loss caused by circumstances such as a house fire. Because plaintiff was not an intended third-party beneficiary in the actions taken by USF&G, there is no privity between USF&G and plaintiff, and plaintiff may not assert a claim against USF&G for unfair and deceptive trade practices. This assignment of error is overruled, and we affirm the trial court's order dismissing plaintiff's claim under G.S. § 75-1.1.

III.

[4] Finally, plaintiff asserts the trial court erred when it dismissed plaintiff's claim against defendant-landlords. Because landlords have a common law duty to warn tenants of hazardous conditions of which they know or should know, we reverse the trial court's order.

Landlords owe a statutory duty of care to tenants. According to the Residential Rental Agreement Act, landlords shall "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." N.C. Gen. Stat. § 42-42(a)(2). This Act, however, was not intended to supplant existing common law remedies available to tenants. *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 68, 376 S.E.2d 425, 428 (1989). "The com-

mon-law standard of care is a generalized one of 'due care' on the part of the defendant. The standard of due care is always the conduct of a reasonably prudent person under the circumstances." *Id.* (citation omitted). Although the North Carolina Supreme Court has recently disposed of the traditional invitee-licensee distinctions in premises liability cases in favor of the reasonably prudent person standard, *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), North Carolina case law has consistently held that tenants were invitees of landlords and that landlords had a duty to warn invitees of hazardous conditions. "A tenant is normally seen as an invitee and the liability of a landlord for physical harm to its tenant depends on if it knows of the danger." *Shepard v. Drucker & Falk*, 63 N.C. App. 667, 669, 306 S.E.2d 199, 201 (1983). Thus, "[a] landlord owes a duty to an invitee to use reasonable care to keep the premises safe and *to warn of hidden dangers*, but he is not an insurer of the invitee's safety." *Clary v. Alexander County Board of Education*, 19 N.C. App. 637, 639, 199 S.E.2d 738, 739 (1973), *rev'd on other grounds*, 286 N.C. 525, 212 S.E.2d 160 (1975) (emphasis added).

In the instant case, a fire broke out in the leased home on 20 October 1996, killing Joshua Hinson and injuring Brittany Hinson. Plaintiff alleges the fire was caused by unsafe conditions in the home which defendant-landlords knew or should have known existed. Prior to this house fire, defendant-landlords never warned the tenants of the potential fire hazard; they also failed to advise the tenants to vacate the premises because of the hazardous conditions. Defendant-landlords had a duty to warn tenants of any danger about which they knew or had reason to know. We therefore find the trial court's order granting defendants' motion to dismiss on this issue was improper, and we reverse.

Reversed in part, affirmed in part.

Judge EDMUNDS concurs.

Judge GREENE concurs in a separate opinion.

Judge GREENE concurring.

Unfair or deceptive trade practices claim

A claim for unfair or deceptive trade practices "may not be asserted by a third-party claimant against the insurer of an adverse

party." *Wilson v. Wilson*, 121 N.C. App. 662, 665, 468 S.E.2d 495, 497 (1996); *see also Lee v. Mutual Community Sav. Bank*, 136 N.C. App. 808, 811, 525 S.E.2d 854, 857 (2000). I, therefore, agree with the majority for this reason that plaintiff, a third-party, may not assert an unfair or deceptive trade practices claim against USF&G, the insurer of an adverse party. Accordingly, the trial court properly dismissed plaintiff's claim against USF&G for unfair or deceptive trade practices.

Failure to warn claim against landlords

In *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), the North Carolina Supreme Court "eliminated the distinctions between licensees and invitees, and established 'a standard of reasonable care toward all lawful visitors.' " *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 646 (quoting *Nelson*, 349 N.C. at 631, 507 S.E.2d at 892), *cert. denied*, 351 N.C. 107, —— S.E.2d —— (1999). Pursuant to *Nelson*, a landowner is "required to exercise reasonable care to provide for the safety of all lawful visitors on his property." *Id.* A landowner, therefore, must "take reasonable precautions to ascertain the condition of the property *and* to either make it reasonably safe or give warnings as may be reasonably necessary to inform the [lawful visitor] of any foreseeable danger." *Id.* at 161-62, 516 S.E.2d at 646.

In this case, Joshua Hinson and Brittany Hinson, as tenants of the landlords, were lawful visitors on the landlords' property. The landlords, therefore, had a duty to make the property reasonably safe or to warn the Hinsons of any forseeable dangers. Accordingly, I agree with the majority for this reason that the trial court erred by dismissing plaintiff's claim against the landlords for failure to warn.

I otherwise fully concur with the majority.

RAYMOND H. BLOCK AND DOROTHY M. BLOCK, PLAINTIFFS v. COUNTY OF PERSON; PERSON COUNTY HEALTH DEPARTMENT; THOMAS D. BRIDGES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE PERSON COUNTY HEALTH DEPARTMENT; MARC KOLMAN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE PERSON COUNTY HEALTH DEPARTMENT; CONNIE PIXLEY, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ENVIRONMENTAL HEALTH SUPERVISOR WITH THE PERSON COUNTY HEALTH DEPARTMENT; WILL DUNN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ENVIRONMENTAL HEALTH SUPERVISOR WITH THE PERSON COUNTY HEALTH DEPARTMENT; RANDALL BARNETT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ENVIRONMENTAL HEALTH SPECIALIST WITH THE PERSON COUNTY HEALTH DEPARTMENT, DEFENDANTS

No. COA99-1306

(Filed 29 December 2000)

1. **Appeal and Error— appealability—denial of motion to dismiss—interlocutory order—substantial right—defense of governmental immunity**

Although generally the denial of a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) is an interlocutory order from which no appeal may be taken immediately, orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right.

2. **Public Officers and Employees— health department employees—environmental health specialist and supervisor—individual capacities—statement of claims**

Plaintiffs' complaint stated claims against a Health Department environmental health specialist and the supervisor of the Health Department in their individual capacities, because: (1) plaintiffs are seeking to recover monetary damages, and the complaint's caption shows such damages are sought from the health specialist and the supervisor in their individual and official capacities; and (2) even though a particular paragraph of the complaint states the actions were taken by defendants in the course and scope of their agency or employment, plaintiffs' complaint taken as a whole shows an unmistakable intent by plaintiffs to sue the health specialist and the supervisor in their individual and official capacities.

3. **Public Officers and Employees— health department employees—director of Health Department—individual capacity**

The trial court erred in a suit against defendants Person County, the Health Department, and individual defendants in

their individual and official capacities by failing to dismiss plaintiffs' negligence claims brought against the director of the Health Department individually, because: (1) plaintiffs have not sued the director individually when the complaint lists the director in his official capacity; and (2) the allegations and prayer for relief in the complaint state a claim against the director in his official capacity.

4. Public Officers and Employees— health department employees—environmental health specialist and supervisor—public employees

The trial court properly denied defendants' motion to dismiss the negligence claims against the environmental health specialist and the supervisor with the Health Department in their individual capacities, because these positions fall under the category of public employees instead of public officials based on the facts that: (1) only the position of director of a county health department is set forth by statute; (2) neither defendant exercises any sovereign power and their duties are ministerial; and (3) our courts have already held that a supervisor of the Department of Social Services is a public employee, and similarly, a supervisor for the Health Department is a public employee as is a specialist, who is a subordinate of the supervisor.

5. Cities and Towns— public duty doctrine—inapplicable to health department

The trial court did not err by failing to dismiss plaintiffs' negligence claims against defendants Person County, the Health Department, or the individual defendants in their official capacities based on the public duty doctrine, because: (1) the public duty doctrine will not be expanded to local government agencies other than law enforcement departments exercising their general duty to protect the public; and (2) plaintiffs have not alleged that defendants negligently failed to protect them from a crime.

Appeal by defendants from order entered 23 June 1999 by Judge Mark E. Galloway in Person County District Court. Heard in the Court of Appeals 12 September 2000.

Alan S. Hicks, P.A., by Alan S. Hicks, for plaintiff-appellees.

Faison & Gillespie, by Reginald B. Gillespie, Jr., for defendant-appellants.

EDMUNDS, Judge.

Defendants appeal from an order denying their motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We affirm.

Because this appeal is based on defendants' motion to dismiss, we treat plaintiffs' factual allegations as true. *See Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000). According to these allegations, on 16 January 1995, plaintiffs Raymond and Dorothy Block purchased a 1.37 acre residential building lot in Person County, North Carolina. The lot had been approved for installation of a conventional septic system on 4 August 1994 by defendant Randall Barnett (Barnett), an Environmental Health Specialist with defendant Person County Health Department (the Health Department). Plaintiffs thereafter constructed a residence on the property. The construction included a conventional septic system in accordance with the requirements of the permit, and on 29 February 1996, Barnett approved the septic system.

After occupying the residence for approximately one year, plaintiffs observed wastewater effluent surfacing on the property in the area of the septic system's drain field. Barnett inspected the area and recommended that plaintiffs spread additional dirt in the drain field area to remedy the problem. Plaintiffs also contacted defendant Connie Pixley (Pixley), an Environmental Health Supervisor for the Health Department, who visited the property along with soil scientist Fred Smith (Smith) of the North Carolina Department of Environmental and Natural Resources. Although test pits were dug both on and off plaintiffs' property, no suitable soil could be found for a conventional septic system. As such, Pixley and Smith advised plaintiffs to consult a private soil scientist.

On 24 September 1997, the Health Department issued a wastewater violation notice to plaintiffs, giving them thirty days to remedy the noncompliant septic system; in addition, any repairs had to be approved by the Health Department. Accordingly, in October 1997, plaintiffs consulted soil scientist Neal Floyd (Floyd) who recommended a new low pressure pipe system. Floyd forwarded a preliminary design of the new system to the Health Department where defendant Will Dunn (Dunn), who had replaced Pixley as Environmental Health Supervisor with the Health Department, preliminarily approved the design, subject to receipt of a more detailed

description. Dunn advised plaintiffs that the new system would be constructed without cost to them. In April 1998, Jimmy Lewis Contracting, Inc. presented to the Health Department an estimate of $9,180 to construct the new system. Plaintiffs obtained a second estimate of $8,805 from Carrington Brothers, Inc. after Dunn advised that the initial estimate was too high. At this time, Smith and defendant Thomas Bridges (Bridges), then Director of the Health Department, advised plaintiffs to hire an attorney, which led plaintiffs to conclude that defendant Person County (Person County) would not pay for the new system after all. Plaintiffs purchased an additional .33 acre of land in June 1998 to be used as a future repair area. The new septic system was constructed by Carrington Brothers, Inc. in July 1998 at plaintiffs' expense and was approved by Dunn on 17 July 1998.

Plaintiffs filed suit on 29 March 1999 against defendants Person County; the Health Department; Bridges, individually and in his official capacity as Director of the Health Department;[1] Marc Kolman, in his official capacity as Director of the Health Department (Bridges and Kolman were directors of the Health Department at different times); Pixley, individually and in her official capacity as Environmental Health Supervisor with the Health Department; Dunn, individually and in his official capacity as Environmental Health Supervisor with the Health Department; and Barnett, individually and in his official capacity as Environmental Health Specialist with the Health Department. Plaintiffs asserted claims for negligence against Barnett, negligent misrepresentation against Dunn, negligent supervision and retention against Pixley and Bridges, and vicarious liability against Person County, the Health Department, Bridges, and Kolman pursuant to the theory of respondeat superior. On or about 3 May 1999, defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1999). The motion was granted on 23 July 1999 as to defendant Bridges in his individual capacity and defendant Dunn in his individual and official capacities. The motion was denied as to all other defendants, who now appeal.

[1] Preliminarily, we note that in general "a denial of a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) [], is an interlocutory order from which no appeal may be taken immediately." *Bardolph v. Arnold*, 112 N.C. App. 190, 192, 435 S.E.2d 109, 112 (1993) (citation omitted). The rationale behind this rule is that "no final judgment is

1. On 12 May 1999, plaintiffs acknowledged in open court that the designation in the caption of their complaint that defendant Thomas D. Bridges was being sued in his individual capacity was erroneous and unintended.

involved in such a denial and the movant is not deprived of any substantial right that cannot be protected by a timely appeal from a final judgment which resolves the controversy on its merits." *Flaherty v. Hunt*, 82 N.C. App. 112, 113, 345 S.E.2d 426, 427 (1986) (citation omitted). However, this Court has reviewed an interlocutory appeal when the case involves a legal issue of public importance or where the issue presented would expedite the administration of justice. *See id.* at 113-14, 345 S.E.2d at 427; *Stanback v. Stanback*, 287 N.C. 448, 215 S.E.2d 30 (1975). Additionally, this Court has held that "orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right." *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, *aff'd*, 344 N.C. 729, 477 S.E.2d 171 (1996) (citations omitted). This exception has been applied in cases where a defendant has asserted governmental immunity from suit through the public duty doctrine. *See id*; *Derwort v. Polk County*, 129 N.C. App. 789, 501 S.E.2d 379 (1998). The reason for the exception "stems from the nature of the immunity defense." *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 403, 442 S.E.2d 75, 77 (1994). "A valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit. Were the case to be erroneously permitted to proceed to trial, immunity would be effectively lost." *Slade v. Vernon*, 110 N.C. App. 422, 425, 429 S.E.2d 744, 746 (1993) (citation omitted).

Accordingly, we will address defendants' second and third assignments of error, which pertain to qualified immunity and the public duty doctrine. In the interest of judicial economy, we also will address defendants' first assignment of error, which relates to the sufficiency of the complaint. *See Houpe v. City of Statesville*, 128 N.C. App. 334, 340, 497 S.E.2d 82, 87 (1998) (in case where court considered interlocutory appeal based on defense of governmental immunity, "where it would be in the interests of judicial economy to do so . . . we will in our discretion address defendants' alternative arguments").

On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review 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." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted). The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of

facts to support his claim which would entitle him to relief. *See Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987).

I.

[2] Defendants first argue that the trial court erred in failing to dismiss plaintiffs' claims brought against defendants Barnett, Pixley, and Kolman in their individual capacities, contending that the complaint only stated a claim against these defendants in their official capacities. Our Supreme Court previously has analyzed the distinction between official and individual capacity claims.

> The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Meyer v. Walls, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997) (citation omitted).

Accordingly, we begin our analysis by examining the type of relief requested. The record reveals that plaintiffs are seeking to recover monetary damages; therefore, we must determine whether the complaint indicates that these damages are sought from the government or from the pockets of the individual defendants. In conducting this analysis, it is appropriate to consider the allegations contained in the pleading, including the caption and prayer for relief. *See Mullis v. Sechrest*, 347 N.C. 548, 553, 495 S.E.2d 721, 724 (1998). Indeed,

> [i]t is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable. For example, including the words 'in his official capacity' or 'in his individual capacity' after a defendant's name obviously clarifies the defendant's status. In addition, the allegations as to the extent of liability claimed should provide further evidence of capacity. Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover dam-

> ages from the defendant individually or as an agent of the governmental entity.

Id. at 554, 495 S.E.2d at 724-25.

In the complaint's caption, plaintiffs state that Barnett and Pixley are being sued in their individual and official capacities. The caption named "Connie Pixley, *Individually* and in her official capacity as Environmental Health Supervisor with the Person County Health Department," and "Randall Barnett, *Individually* and in his official capacity as Environmental Health Specialist with the Person County Health Department." (Emphasis added.) Plaintiffs' prayer for relief also specifically asserts claims against Barnett and Pixley in their individual and official capacities, asking "[f]or judgment, in an amount not less than $9,466.00 . . . [a]gainst the Defendants Barnett, Pixley [] in both their *individual* and official capacities." (Emphasis added.) In addition, plaintiffs use the words "jointly and severally" in their prayer for relief, further indicating that damages are being sought from the pockets of Barnett and Pixley as individuals. *See Schmidt v. Breeden*, 134 N.C. App. 248, 517 S.E.2d 171 (1999).

Defendants argue that plaintiffs' complaint fails to state a claim against defendants Barnett and Pixley in their individual capacities because plaintiffs do not allege that these defendants acted outside the course and scope of their duties. However, our Supreme Court has stated:

> " '[o]fficial capacity' is not synonymous with 'official duties'; the phrase is a legal term of art with a narrow meaning—the suit is in effect one against the entity." Whether the allegations relate to actions outside the scope of defendant's official duties is not relevant in determining whether the defendant is being sued in his or her official or individual capacity. To hold otherwise would contradict North Carolina Supreme Court cases that have held or stated that public employees may be held individually liable for mere negligence in the performance of their duties.

Meyer, 347 N.C. at 111, 489 S.E.2d at 888 (internal citations omitted); *see also Isenhour v. Hutto*, 350 N.C. 601, 609, 517 S.E.2d 121, 127 (1999). Defendants additionally argue that paragraph 40 of plaintiffs' complaint, which states, "[a]ll of the actions and inactions of the above named Defendants complained of in Counts 1, 2, and 3 hereof occurred or were taken by said Defendants in the course and scope of their agency or employment," illustrates plaintiffs' intent to sue defendants Barnett and Pixley in their official capacities only.

However, taken as a whole, plaintiffs' complaint shows an unmistakable intent by plaintiffs to sue defendants Barnett and Pixley in *both* their individual and official capacities. *Cf. Reid v. Town of Madison*, 137 N.C. App. 168, 527 S.E.2d 87 (2000); *Johnson v. York*, 134 N.C. App. 332, 517 S.E.2d 670 (1999); *Warren v. Guilford County*, 129 N.C. App. 836, 500 S.E.2d 470 (1998) (all finding that because the captions, allegations and prayers for relief of plaintiffs' complaints contained no reference that defendants were being sued in their individual capacities, defendants could only be liable in their official capacities). As to defendants Barnett and Pixley, this assignment of error is overruled.

[3] By contrast, plaintiffs have not sued defendant Kolman individually. In the caption of the complaint, Kolman is listed only in his official capacity. Moreover, the allegations and prayer for relief in the complaint state a claim against Kolman in his official and not individual capacity. Accordingly, defendants' argument as to suit being brought against defendant Kolman in his individual capacity is dismissed.

II.

[4] Having determined that plaintiffs brought suit against defendants Barnett and Pixley in their individual capacities, we next must determine whether the trial court properly denied defendants' motion to dismiss these claims on the ground that plaintiffs failed to state a claim upon which relief can be granted. This determination turns on whether Barnett and Pixley are public officials or public employees.

North Carolina courts have held that "public officers and public employees are generally afforded different protections under the law when sued in their individual capacities." *Schmidt*, 134 N.C. App. at 258, 517 S.E.2d at 177-78. Specifically, "a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952). The official may be held liable only if it is "alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties." *Id.* (internal citations omitted). The rationale behind this rule is that:

> [I]t would be difficult to find those who would accept public office or engage in the administration of public affairs if they

> were to be held personally liable for acts or omissions involved in the exercise of discretion and sound judgment which they had performed to the best of their ability, and without any malevolent intention toward anyone who might be affected thereby.

Miller v. Jones, 224 N.C. 783, 787, 32 S.E.2d 594, 597 (1945).

By contrast, a public employee " 'is personally liable for negligence in the performance of his or her duties proximately causing an injury.' " *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 128 (quoting *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119 (1993)). Here, "the compelling reasons for the nonliability of a public officer, clothed with discretion, are entirely absent." *Miller*, 224 N.C. at 787, 32 S.E.2d at 597.

Our courts have recognized several distinctions between a public official and a public employee, noting:

> "A public officer is someone whose position is created by the constitution or statutes of the sovereign. 'An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of sovereign power.' Officers exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are 'absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.' "

Meyer, 347 N.C. at 113, 489 S.E.2d at 889 (internal citations omitted) (quoting *Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236 (1990)); *see also Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127 (recognizing three distinctions between public officials and public employees: "(1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties").

We now apply these principles to the case at bar. Because this Court has not determined whether an Environmental Health Specialist and an Environmental Health Supervisor are public employees or public officials, we begin our analysis by considering whether these positions were created by constitution or statute. Although defendants cite a number of statutes contained in Chapter 130A (Public Health) of the North Carolina General Statutes, there is

no statutory or constitutional scheme that creates the positions of Environmental Health Specialist or Environmental Health Supervisor for a county health department. Only the position of Director of a county health department is set forth by statute. *See* N.C. Gen. Stat. § 130A-41 (1999); *cf.*, *Isenhour*, 350 N.C. 601, 517 S.E.2d 121 (position of police officer created by N.C. Gen. Stat. § 160A-281 (1999)); *Hare*, 99 N.C. App. 693, 394 S.E.2d 231 (position of director of county department of social services created by N.C. Gen. Stat. § 108A-12 (1999)); *Thompson Cadillac-Oldsmobile, Inc. v. Silk Hope Automobile, Inc.*, 87 N.C. App. 467, 361 S.E.2d 418 (1987) (State Commissioner of Division of Motor Vehicles created by N.C. Gen. Stat. § 20-2 (1999)); *Pigott v. City of Wilmington*, 50 N.C. App. 401, 273 S.E.2d 752 (1981) (position of chief building inspector created by N.C. Gen. Stat. § 160A-411 (1999)). Nor does it appear that defendants Barnett and Pixley exercise any sovereign power; rather, their duties are ministerial. Our courts have held that a supervisor of the Department of Social Services is a public employee. *See Meyer*, 347 N.C. 97, 489 S.E.2d 880; *Hare*, 99 N.C. App. 693, 394 S.E.2d 231. Similarly, a supervisor for the Health Department is a public employee, as is a specialist, who is a subordinate of the supervisor. As such, these employees may be held personally liable "for the negligent performance of their duties that proximately caused foreseeable injury." *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236. This assignment of error is overruled.

III.

[5] Finally, defendants argue that the trial court erred by failing to dismiss plaintiffs' claims, contending that these claims are barred by the public duty doctrine. The public duty doctrine was first applied in *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2 (1988) and was adopted by our Supreme Court in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), in which the Court stated:

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

Braswell, 330 N.C. at 370-71, 410 S.E.2d at 901 (citation omitted). In *Braswell*, the Court also adopted two exceptions to the doctrine,

first, where there is a special relationship between the injured party and the governmental entity; and second, where the governmental entity creates a special duty by "promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered." *Id.* at 371, 410 S.E.2d at 902 (citation omitted).

However, our Supreme Court has held that the public duty doctrine, as it applies to local government, is limited to the facts of *Braswell* and will not be expanded to local government agencies other than law enforcement departments exercising their general duty to protect the public. *See Lovelace*, 351 N.C. 458, 526 S.E.2d 652 (declining to extend the public duty doctrine to insulate the City of Shelby from liability for the negligence of an emergency operator for the city); *Thompson v. Waters*, 351 N.C. 462, 526 S.E.2d 650 (2000) (holding that the public duty doctrine does not bar plaintiffs' claim against Lee County for negligent inspection of plaintiffs' private residence); *Isenhour*, 350 N.C. 601, 517 S.E.2d 121 (refusing to extend the public duty doctrine to shield a city from liability for the allegedly negligent acts of a school crossing guard). Subsequent opinions of this Court have followed the Supreme Court's holdings. *See Cucina v. City of Jacksonville*, 138 N.C. App. 99, 530 S.E.2d 353, *disc. review denied*, 352 N.C. 588, 544 S.E.2d 778 (2000) (holding that the public duty doctrine does not bar plaintiff's claim against the City of Jacksonville for negligently failing to repair a stop sign); *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 529 S.E.2d 693 (2000) (finding that the public duty doctrine does not shield the City of Louisburg from liability for injuries plaintiff sustained as a result of a dynamite explosion during construction of a sewer line).

Because plaintiffs have not alleged that defendants negligently failed to protect them from a crime, the public duty doctrine cannot bar plaintiffs' claims against defendants Person County or the Health Department. Nor does it bar plaintiffs' claims against the individual defendants in their official capacities. *See Mullis*, 347 N.C. at 554, 495 S.E.2d at 725 ("official-capacity suits are merely another way of pleading an action against the governmental entity"). This assignment of error is overruled.

Affirmed.

Judges GREENE and SMITH concur.

JIMMY ALLEN, INDIVIDUALLY AND AS A DIRECTOR OF ALLEN & BROCK CONSTRUCTION, INC. ON BEHALF OF ALLEN & BROCK CONSTRUCTION COMPANY, INC., PLAINTIFF-APPELLANT v. MARLENE FERRERA, J. HAROLD BROCK, EDDIE T. BROCK, JR., BROCK REALTY, INC. AND ALLEN & BROCK CONSTRUCTION COMPANY, INC., DEFENDANT-APPELLEES

No. COA99-1253

(Filed 29 December 2000)

1. Corporations— derivative claims—demand requirements

The trial court did not err by dismissing plaintiff's shareholder derivative claims under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff did not satisfy the demand requirements of N.C.G.S. § 55-7-42. The futility exception was abolished by that statute; a letter from two directors and a shareholder to plaintiff did not satisfy the rejection requirement because they did not sign the letter in their corporate capacities and plaintiff does not allege that they had actual or apparent authority; and plaintiff filed his complaint 82 days after his demand letter (assuming the letter was sufficient to serve as a demand) rather than waiting the required 90 days.

2. Corporations— derivative claims—falling stock price—individual claim

The trial court properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) individual claims by a plaintiff against a corporation concerning losses suffered from falling stock values, loss of investment (which was in exchange for shares), and personal guaranties. A shareholder may not recover individually for injury to a corporation that results in diminution of the value of the corporation's stock, a guarantor cannot recover individually for injury to the corporation, and, while the fiduciary duty owed to a minority shareholder by a majority shareholder may satisfy the special duty requirement, this plaintiff was a fifty percent owner of the corporation.

3. Declaratory Judgments— validity of guaranty—determination under Act

The trial court erred by granting a Rule 12(b)(6) dismissal of plaintiff's claim for declaratory judgment that his personal guaranty is unenforceable. An actual controversy exists because defendant has demanded repayment of the guaranteed loans and, while defendant contends that a declaratory judgment is unavail-

able where a plaintiff seeks to have his personal guaranty declared invalid rather than merely interpreted, a trial court may determine the validity and enforceability of a contract under the Declaratory Judgment Act.

4. Conspiracy— fraud—inducement to invest

The trial court erred by dismissing under Rule 12(b)(6) a claim for civil conspiracy to defraud plaintiff and the corporation in which plaintiff was induced to invest.

5. Fiduciary Relationship— investment in corporation— derivative claim

The trial court did not err by granting a Rule 12(b)(6) dismissal of a claim for relief based upon a fiduciary duty owed by two of the defendants to a corporation in which plaintiff invested. Plaintiff alleged no breach of fiduciary duty to him personally in his capacity as a shareholder or as a guarantor of the corporation's loans and the claim was entirely derivative.

6. Unfair Trade Practices— investment in corporation—no present monetary damage—securities transactions

The trial court did not err by dismissing under Rule 12(b)(6) plaintiff's claim for unfair and deceptive trade practices arising from his investment in a corporation. Plaintiff alleges no present monetary injury to his personal guaranty of loans to the corporation, and his initial investment was provided in exchange for fifty percent of the stock in the corporation. Securities transactions do not satisfy the "in or affecting commerce" requirement of N.C.G.S. § 75-1.1.

Appeal by plaintiff from order of dismissal entered 7 June 1999 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 25 August 2000.

Garris Neil Yarborough for plaintiff-appellant.

Beaver Holt Richardson Sternlicht Burge & Glazier, P.A., by Lonnie M. Player, Jr., and Gregory B. Thompson for defendant-appellees.

McGEE, Judge.

The issue in this case is whether the trial court erred in dismissing plaintiff's claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)

for failure to satisfy the shareholder derivative action demand requirement of N.C. Gen. Stat. § 55-7-42.

Plaintiff alleges in his complaint that he, an employee of the City of Raeford's utility department with some residential construction experience, formed a company along with defendants Eddie and Harold Brock, realtors, to build and sell residential houses. The three named their corporation Allen & Brock Construction Company, Inc. (A&B) and funded it with $10,000 from plaintiff, $5,000 from defendant Harold Brock, and $5,000 from defendant Brock Realty, Inc., the real estate business run by defendants Eddie and Harold Brock. The stock in A&B was owned fifty percent by plaintiff and fifty percent by defendant Brock Realty. The officers of the corporation were plaintiff as president, defendant Eddie Brock as vice-president, and defendant Harold Brock as secretary/treasurer. A checking account for A&B was opened and both plaintiff and defendant Eddie Brock were authorized to sign checks. Although plaintiff and defendants Eddie and Harold Brock did not promise to devote their exclusive time and talents to A&B, each agreed to devote "sweat equity" to the corporation, and as field supervisor and general contractor for A&B's construction projects, plaintiff gave up his job with the City of Raeford.

Plaintiff alleges that defendants Eddie and Harold Brock controlled the company books and internal management, and that plaintiff relied on defendant Harold Brock when he told plaintiff that A&B needed additional funds. Plaintiff therefore agreed to co-guarantee with defendant Harold Brock a series of loans to A&B made by defendant Marlene Ferrera. Plaintiff subsequently became concerned about the management of A&B and demanded to see the check register maintained by defendants Eddie and Harold Brock. After examining the check register, plaintiff became convinced that defendants Eddie and Harold Brock and defendant Ferrera had conspired to divert corporate opportunities from A&B to their own benefit.

Plaintiff alleges he demanded $50,000 in individual compensation for injuries to A&B in a letter written by plaintiff's attorney on 12 August 1998 to defendants Eddie and Harold Brock and defendant Brock Realty. Defendants Eddie and Harold Brock responded on 21 August 1998 denying plaintiff's claims and raising allegations of their own against plaintiff. Defendants' letter was signed by defendants Eddie and Harold Brock in their individual capacities, and by defendant Harold Brock as president of defendant Brock Realty.

Plaintiff filed a complaint against defendants on 2 November 1998 seeking four claims for relief, on behalf of both himself and A&B: (1) a declaratory judgment that his personal guarantee on the loans from defendant Ferrera was unenforceable; (2) recovery for civil conspiracy by all of the defendants; (3) recovery for breach of the fiduciary duty owed by defendants Eddie and Harold Brock to A&B; and (4) recovery for unfair and deceptive trade practices by all of the defendants. The trial court dismissed plaintiff's claims on 7 June 1999 pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Plaintiff appeals.

I.

[1] Plaintiff's four claims for relief were each raised as both individual claims and as shareholder derivative claims brought in the name of A&B. We begin by examining the shareholder derivative action demand requirements of N.C. Gen. Stat. § 55-7-42 (1999). We find that plaintiff did not satisfy those requirements, and we affirm the trial court's dismissal of plaintiff's derivative claims.

N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1999) " 'generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.' " *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) (citation omitted). A plaintiff's failure to fulfill the statutory requirements for bringing a shareholder derivative action would be one such insurmountable bar. *See Roney v. Joyner*, 86 N.C. App. 81, 356 S.E.2d 401 (1987).

N.C. Gen. Stat. § 55-7-42 states:

> 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.

N.C. Gen. Stat. § 55-7-42 replaced the former N.C. Gen. Stat. § 55-7-40(b) (1990) (repealed), which stated, in principal part:

> (b) The complaint [in a shareholder derivative action] 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) replaced in 1989 the former N.C. Gen. Stat. § 55-55(b) (1982), which was identical to the above quoted portion of N.C. Gen. Stat. § 55-7-40(b).

N.C. Gen. Stat. § 55-55(b) was a codification of prior North Carolina case law which required a shareholder to exhaust his intra-corporate remedies through a demand upon the corporation to take suitable action before the shareholder could file a derivative action. *See Alford v. Shaw*, 320 N.C. 465, 471, 358 S.E.2d 323, 327 (1987). However, that prior case law recognized that

> [a]n equitable exception to the demand requirement may be invoked when the directors who are in control of the corporation are the same ones (or under the control of the same ones) as were initially responsible for the breaches of duty alleged. In such case, the demand of a shareholder upon directors to sue themselves or their principals would be futile and as such is not required for the maintenance of the action.

Id. at 471-72, 358 S.E.2d at 327 (citations omitted). Thus, under N.C. Gen. Stat. § 55-55(b), demand was required, unless the futility exception was met.

Plaintiff contends that the futility exception remains valid law under the present N.C. Gen. Stat. § 55-7-42. If he were correct, a failure by plaintiff to follow the demand requirements of N.C. Gen. Stat. § 55-7-42 might have been excused. However, we have previously held that the enactment of N.C. Gen. Stat. § 55-7-42 abolished the futility exception under North Carolina law.

In statutory construction, "[t]he 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 . . . the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). In its enactment of N.C. Gen. Stat. § 55-7-42, the General Assembly chose to state explicitly the requirement for demand in shareholder derivative actions and the limits of that

requirement. Our Court has recently held that the 1995 revision of N.C. Gen. Stat. § 55-7-42 "has eliminated the futility exception to the demand requirement." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 537 S.E.2d 248 (2000); *accord Dunn v. Ceccarelli*, 227 Ga. App. 505, 489 S.E.2d 563 (1997) (considering OCGA § 14-2-742, a statute virtually identical to N.C. Gen. Stat. § 55-7-42). In *Norman*, we cited a quote from a leading North Carolina corporation law commentator 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.' " *Norman*, 140 N.C. App. at 411, 537 S.E.2d at 262 (quoting Russell M. Robinson, II, *Robinson on North Carolina Corporation Law §* 17-3 at 340 (5th ed. 1995)).

Alternately, plaintiff argues that the demand requirement of N.C. Gen. Stat. § 55-7-42 was satisfied by the letter he sent to defendants Eddie and Harold Brock and defendant Brock Realty, and by their written response rejecting his allegations. However, the response from defendants Eddie and Harold Brock and defendant Brock Realty cannot satisfy the rejection requirement of N.C. Gen. Stat. § 55-7-42 because it was not a rejection *by the corporation*. Defendants Eddie and Harold Brock and defendant Brock Realty, although respectively directors and a shareholder of A&B, did not sign the response letter in those corporate capacities. Plaintiff does not allege that defendants Eddie and Harold Brock and defendant Brock Realty held actual or apparent authority to bind A&B through their individual signatures. The principles of agency therefore dictate that the corporation did not act to reject plaintiff's demand. *See, e.g., Rowe v. Franklin County*, 318 N.C. 344, 349 S.E.2d 65 (1986).

Failing a rejection by the corporation, N.C. Gen. Stat. § 55-7-42 requires that a complaint be filed no fewer than ninety days after demand is made, unless irreparable injury would occur to the corporation. Plaintiff alleged no threat of irreparable injury to A&B upon filing his complaint. The letter to defendants Eddie and Harold Brock and defendant Brock Realty was dated 12 August and plaintiff's complaint was filed 2 November, eighty-two days later. Thus plaintiff failed to satisfy the demand requirements imposed by N.C. Gen. Stat. § 55-7-42, regardless of whether the 12 August letter was sufficient to serve as a written demand upon the corporation. The trial court did not err in dismissing plaintiff's derivative claims.

II.

[2] We next determine whether plaintiff's complaint supports any individual claims. The general rule is that a shareholder of a corporation may not recover individually for injury to the corporation that results in diminution of the value of the corporation's stock. *See Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997). Similarly, a guarantor of a corporation's debts cannot recover individually for injury to the corporation. *See id.* at 661, 488 S.E.2d at 221. However,

> [i]ndividual actions may be prosecuted . . . if the [shareholder or] guarantor can show either (1) that the wrongdoer owed him a special duty, or (2) that the injury suffered by the [shareholder or] guarantor is personal to him and distinct from the injury sustained by the [other shareholders (in the case of a shareholder) or the] corporation itself.

Id.

The injuries alleged by plaintiff include: plaintiff's $10,000 capital contribution and his labor contribution in giving up his "secure government job" as investments in the creation of A&B; the losses to A&B caused by defendants' usurpations of corporate opportunities, breaches of fiduciary duty and misrepresentations to plaintiff; and plaintiff's personal liability for the guarantees he signed for A&B loans from defendant Ferrera. The losses suffered by A&B injured plaintiff only insofar as the value of plaintiff's stock in A&B fell and were therefore not a personal injury to plaintiff. Similarly, plaintiff's investment in A&B was in exchange for shares in A&B, and thus plaintiff lost the investment only because the shares lost value. Not even plaintiff's liability for his personal guarantees is a personal injury, for

> one who pays a personally guaranteed corporate debt has not suffered an injury separate and distinct from that of the corporation because he is "made whole if the corporation recovers; and so the rule has the salutary effect of preventing the double counting of damages."

Barger v. McCoy Hillard & Parks, 120 N.C. App. 326, 334, 462 S.E.2d 252, 258, *reh'g in part*, 122 N.C. App. 391, 469 S.E.2d 593, *aff'd* 346 N.C. 650, 488 S.E.2d 215 (1997) (citations omitted).

Plaintiff must therefore show that he was owed a special duty as a shareholder or as a guarantor in order to recover individually. Our

Court held in *Howell v. Fisher*, 49 N.C. App. 488, 272 S.E.2d 19 (1981) that negligent misrepresentation by a third party which induced plaintiffs to become shareholders created such a special duty. Applying the same rule, our Supreme Court held in *Barger* that negligent misrepresentation by a third party that induced plaintiffs to personally guarantee a corporation's loans likewise created such a special duty. However, while our Court held in *Norman v. Nash Johnson & Sons' Farms*, supra, that the fiduciary duty owed to a minority shareholder by a majority shareholder may satisfy the special duty requirement of *Barger*, plaintiff was a fifty percent owner of A&B and hence was not a minority shareholder.

We conclude that plaintiff has alleged in his complaint two grounds for relief upon which individual recovery is possible: (1) plaintiff's claim that defendants' wrongful acts induced plaintiff to invest in A&B when it was formed, allowing recovery of that investment; and (2) plaintiff's claim that defendants' wrongful acts induced him to personally guarantee A&B's loans.

III.

Having established that certain injuries alleged by plaintiff could support an individual recovery, we must examine each of plaintiff's individual claims to determine if any were dismissed in error.

A.

[3] Plaintiff's first individual claim for relief seeks a declaratory judgment that his personal guaranty is unenforceable. As described in Part II above, plaintiff has an individual cause of action against defendant Ferrera insofar as the alleged wrongful behavior under which he seeks to invalidate the guaranty in fact induced him to sign the guaranty.

A motion to dismiss under N.C. Gen. Stat. § 1A-1 Rule 12(b)(6) "is seldom an appropriate pleading in actions for declaratory judgments, and . . . is allowed only when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy." *Consumers Power v. Power Co.*, 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974) (citations omitted). An actual controversy exists in this case because defendant Ferrera has demanded, under the terms of the guaranty, repayment by plaintiff of defendant Ferrera's loans to A&B. "There can be no doubt that litigation [is] forthcoming. Certainly plaintiff should not be required

to await suit, perhaps indefinitely[.]" *Insurance Co. v. Bank*, 11 N.C. App. 444, 449, 181 S.E.2d 799, 803 (1971).

Defendant Ferrera contends that a declaratory judgment is unavailable where, as here, plaintiff seeks to have his personal guaranty declared invalid instead of merely interpreted by the court. However, our Court has stated that a trial court "certainly may determine the validity and enforceability of a contract under the Declaratory Judgment Act. To interpret this Act otherwise would render it useless." *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 630, 518 S.E.2d 205, 208, *disc. review denied*, 351 N.C. 186, 541 S.E.2d 709 (1999). Plaintiff's first individual claim for relief was dismissed in error.

B.

[4] Plaintiff's second individual claim for relief alleges a civil conspiracy among the defendants to defraud both plaintiff and A&B. As described in Part II above, plaintiff is entitled to relief for his initial investment in A&B if defendants' alleged wrongful behavior in fact induced him to provide that initial investment. Thus plaintiff's second claim for relief, to the extent of his original investment in A&B, states a valid individual cause of action and was dismissed in error.

C.

[5] Plaintiff's third individual claim for relief is based on the fiduciary duty owed by defendants Eddie and Harold Brock to A&B. Because plaintiff alleges no breach of fiduciary duty owed to him personally in his capacity as a shareholder or as a guarantor of the corporation's loans, the claim is entirely derivative and, under Part I above, the trial court did not err in dismissing it. *See Barger*, supra.

D.

[6] Plaintiff's fourth individual claim for relief alleges that defendants' actions constituted unfair and deceptive trade practices. "In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000) (citation omitted). Plaintiff alleges no present monetary injury due to his personal guaranty of loans to A&B, and he therefore cannot recover under N.C. Gen. Stat. § 75-1.1. *See Mayton v. Hiatt's Used Cars*, 45 N.C. App. 206, 262 S.E.2d 860 (1980).

With respect to plaintiff's initial investment in A&B, our Supreme Court has held that securities transactions do not satisfy the "in or affecting commerce" requirement of N.C. Gen. Stat. § 75-1.1. *See HAJMM Co. v. House of Raeford Farms*, 328 N.C. 578, 594-95, 403 S.E.2d 483, 493 (1991). Plaintiff's initial investment was provided in exchange for fifty percent of the stock of A&B and was thus part of a security transaction. *See Stancil v. Stancil*, 326 N.C. 766, 768, 392 S.E.2d 373, 375 (1990) (defining stock in a closely-held corporation as a "security"). Plaintiff therefore has no individual grounds to pursue a claim of unfair and deceptive trade practices against defendants, and we accordingly affirm the trial court's dismissal of plaintiff's fourth claim for relief.

In review, we affirm the trial court's dismissal of plaintiff's derivative claims for relief, as well as plaintiff's third and fourth individual claims for relief. The trial court erred in dismissing plaintiff's first and second individual claims for relief. We therefore affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges WYNN and TIMMONS-GOODSON concur.

WILLIAM S. PILAND, PATRICIA P. PILAND, EUNICE CASTELOW, RUPERT E. LIVERMAN, RICHARD O. LIVERMAN, ALAN BAZEMORE, RAYMOND BATTON, LINDA BATTON, EARNEST CASTELOW, NELDA CASTELOW, TILGHMAN PHELPS, JR., WILLIAM E. BAZEMORE, FREDDIE STEVENS, BARBARA STEVENS, FRANCES CALLIS, R.V. CASTELLOE, WILLIAM COMBO, JOHNNY POWELL, E.P. BURBY AND DAWN BURBY, PLAINTIFFS v. HERTFORD COUNTY BOARD OF COMMISSIONERS, DEFENDANT

No. COA99-1173

(Filed 29 December 2000)

Pleadings— amended complaint—new party—no relation back

The trial court erred in a zoning case by denying defendant Board of Commissioners' motion to dismiss under N.C.G.S. § 1A-1, Rules 12(b)(1), (2), (4), (6), and (7) based on plaintiffs' error in bringing the suit against the Board of Commissioners rather than Hertford County and plaintiffs' attempts to amend the

complaint to substitute the county as the named defendant instead of the Board of Commissioners after the statute of limitations under N.C.G.S. § 1-54.1 had run, because: (1) the notice requirement of N.C.G.S. § 1A-1, Rule 15(c) cannot be met where an amendment has the effect of adding a new party to the action as opposed to correcting a misnomer; and (2) a county is a separate and distinct entity from its board of commissioners.

Appeal by plaintiffs and cross-appeal by defendant from judgment entered 10 June 1999 by Judge James E. Ragan, III, in Superior Court, Hertford County. Heard in the Court of Appeals 25 August 2000.

The Brough Law Firm, by Michael B. Brough and Robert E. Hornik, Jr., for plaintiffs-appellants-cross appellees.

Smith, Helms, Mulliss & Moore, L.L.P., by James G. Exum, Jr. and Robert R. Marcus, and Revelle, Burleson, Lee & Revelle by Charles L. Revelle, III, for defendant-appellee-cross appellant.

WYNN, Judge.

On 5 October 1998, the Hertford County Board of Commissioners held a public hearing following which it voted unanimously to rezone a 1,600 acre tract of undeveloped land located along the southern shore of the Chowan River east of Tunis. Before the rezoning, a portion of the property was zoned RA-20 (residential and agricultural use); and, the remainder of the property was zoned RR&C (residential and recreational use).

At the public hearing, the Board of Commissioners voted to rezone the property from RA-20 and RR&C to IH (heavy industrial use). The land lying to the west of the property is also zoned IH. At the same public hearing, the Board of Commissioners also voted to amend certain sections of the municipal zoning ordinance to allow steel mills and recycling facilities, in addition to related uses, within the IH zoning district.

On 4 December 1998, the plaintiffs brought an action against the Board of Commissioners challenging the rezoning of the property and the amending of the zoning ordinance. The Board of Commissioners answered the complaint on 7 January 1999; and on 5 February 1999, it moved to dismiss the action under Rules 12(b)(1), (2), (4), (6) and (7) on grounds that, among other things, the plaintiffs failed to name

or serve Hertford County as a defendant. *See* N.C.R. Civ. P. 12(b)(1), (2), (4), (6) and (7) (1990). In its motion to dismiss, the Board of Commissioners asserted that it was not a proper defendant, that Hertford County was the proper defendant, and that the complaint could not be amended to add or substitute Hertford County as a defendant as the two-month statute of limitations by that time had run.

On 15 February 1999, the plaintiffs moved to amend the summons and complaint by substituting "Hertford County" as the named defendant in place of the Board of Commissioners. On 4 and 5 May 1999, the Board of Commissioners and plaintiffs, respectively, moved for summary judgment.

On 10 June 1999, Superior Court Judge James E. Ragan, III entered an order (1) denying the Board of Commissioners' motion to dismiss, (2) denying the plaintiffs' motion for summary judgment, and (3) granting the Board of Commissioners' motion for summary judgment. It does not appear from the record on appeal that the trial court ever ruled on the plaintiffs' motion to amend the summons and complaint. From the 10 June 1999 order, plaintiffs appeal and the Board of Commissioners cross-appeals.

On appeal, we consider only the Board of Commissioners' cross-appeal as its disposition precludes us from considering the plaintiffs' appeal.

The Board of Commissioners asserts that the trial court erred in denying its motion to dismiss under N.C.R. Civ. P. 12(b)(1), (2), (4), (6) and (7). It contends that Hertford County, rather than the Board of Commissioners, was the only proper defendant to this action, and that it was error for the plaintiffs to bring the action solely against the Board of Commissioners. Furthermore, the Board of Commissioners argues that the plaintiffs' attempts to amend the complaint to substitute the county as the named defendant were ineffective as they occurred after the statute of limitations had run. The Board of Commissioners contends that the amendment could not relate back to the original complaint so as to circumvent the statute of limitations. Because the cause of action against the county was time-barred, the Board of Commissioners argues that the trial court erred in denying its motion to dismiss. We must agree.

N.C. Gen. Stat. § 153A-11 states in relevant part that "[t]he inhabitants of each county are a body politic and corporate . . . . Under that

name they . . . may sue and be sued . . . ." N.C. Gen. Stat. § 153A-11 (1991). In *Fountain v. Board of Comm'rs of Pitt County*, 171 N.C. 113, 87 S.E. 990 (1916), our Supreme Court considered Revisal 1905, § 1310 of the North Carolina General Statutes, a predecessor to the above-quoted language from N.C. Gen. Stat. § 153A-11, stating:

> Prior to the amendment by Revisal, § 1310, a suit, for a claim due by a county was required to be brought against its board of commissioners, as Code, § 704, provided that a county should "sue and be sued in the name of the board of commissioners," while Revisal, § 1310, provides that a county must "sue and be sued in the name of the county."

Id. at 114, 87 S.E. at 991-92. Thereafter, in *Johnson v. Marrow*, 228 N.C. 58, 44 S.E.2d 468 (1947), our Supreme Court stated that "[w]here a county is the real party in interest, it must sue and be sued in its name." *Id.* at 59, 44 S.E.2d at 470 (citing *Lenoir County v. Crabtree*, 158 N.C. 357, 74 S.E. 105 (1912); *Fountain*, 171 N.C. 113, 87 S.E. 990).

Undoubtedly, the real party in interest in this case is Hertford County, not the Board of Commissioners. The plaintiffs acknowledged as much by seeking to amend their complaint in the wake of the Board of Commissioners' motion to dismiss to substitute Hertford County as the named defendant, despite the plaintiffs' subsequent contentions that the amendment was filed merely out of an abundance of caution. The question then is whether the defect in the complaint by naming the Board of Commissioners as the defendant instead of Hertford County was sufficient to bar recovery by the plaintiffs and thereby support the defendant's motion to dismiss, or whether the defect was merely technical in nature and thereby subject to remedy.

In *Fountain*, the plaintiff brought a contract action against "The Board of County Commissioners of the County of Pitt." 171 N.C. 113, 87 S.E. 990. The defendant demurred to the complaint on grounds that the complaint should have been against the county itself rather than the board of commissioners, as the complaint alleged no personal liability of the commissioners. The defendant maintained that an action against the county commissioners was not authorized by law. The trial court overruled the demurrer and ordered that Pitt County be made a party. Following the issuance of a new summons naming the county as a defendant, the trial court entered judgment for the defendant county because the new summons was issued after the statute of limitations had run on the cause of action.

On appeal by the plaintiff, our Supreme Court noted that the county was indeed the proper party to be sued rather than the board of commissioners; nonetheless, the Court reversed the trial court's decision to dismiss the complaint as time-barred. *Id.* at 114-15, 87 S.E. at 992. In doing so, the Court noted that it was readily apparent from the pleadings, as well as the body of the original complaint itself, that the suit was in reality against the county instead of the board of commissioners. *Id.* at 115, 87 S.E. at 992. The original summons, while naming the wrong defendant, was properly served prior to the running of the statute of limitations, and "would have been just as good and valid if the suit had been, in form, one against the county of Pitt, *eo nomine*." *Id.* at 114, 87 S.E. at 992. The Court also noted that the body of the complaint referred to the defendant as "the county of Pitt." *Id.* The Court therefore determined that the phrase "the Board of County Commissioners of" in the caption of the complaint was mere surplusage which, if eliminated, would leave only the name of the true defendant, the county. *Id.* The Court held that the trial court, under the statute, had broad power to amend any pleading in furtherance of justice, "by adding or striking out the name of any party or by correcting a mistake in the name of a party." *Id.* The amendment to the complaint was therefore proper, as "the misnaming of the defendant could not have misled the defendant as to the nature of the action or the party who was sued." *Id.* at 115, 87 S.E. at 992. Furthermore, the Court found it unnecessary to serve fresh process on the county under the circumstances, as the original process was properly served and was adequate to bring the county into court. *Id.* The Court effectively allowed the amendment to relate back to the original complaint, which allowed the Court to work around the statute of limitations and permit the action to proceed against the county.

While the broad statutory power to amend cited by the Court in *Fountain* no longer exists, our current Rules of Civil Procedure allow for discretionary amendments to pleadings by leave of court "when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990). As this Court stated in *Thorpe v. Wilson*, 58 N.C. App. 292, 293 S.E.2d 675 (1982), in allowing a similar name change:

> "Names are to designate person, and where the identity is certain a variance in the name is immaterial." *Patterson v. Walton*, 119 N.C. 500, 501, 26 S.E. 43, 43 (1896). Errors or defects in the pleadings not affecting substantial rights are to be disregarded. *Id.* If, as here, the effect of amendment is merely

> to correct the name of a person already in court, there is no prejudice.

Id. at 297, 293 S.E.2d at 679. Thus, the trial court in its discretion could have properly allowed the plaintiff to amend its complaint to substitute the county as the named defendant instead of the Board of Commissioners, if it found that justice so required. However, as noted previously the record on appeal is silent as to any ruling by the trial court on the plaintiffs' motion to amend the summons and complaint.

Having determined that the county was the proper party defendant in the cause of action, and assuming *arguendo* that the trial court exercised its discretionary power and granted the plaintiffs' motion to amend the complaint, we must determine whether such amendment to the complaint substituting the county as the party-defendant could have related back to the original complaint, and thereby circumvented the statute of limitations. We find that it could not.

We first note that the plaintiffs' original complaint was filed on the last date on which they could file a timely complaint. Unless the plaintiffs' amendment is permitted to relate back to the date of the original complaint, the statute of limitations therefore operates as a defense for the defendant and bars the plaintiffs' claims against the county. *See* N.C. Gen. Stat. § 1-54.1 (1996) (imposing a two-month statute of limitations for commencing an action contesting the validity of a zoning ordinance or amendment adopted by a county).

In *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995), our Supreme Court specifically held that an amendment to a pleading changing the name of a party-defendant could not relate back to the filing of the original complaint. Construing the relation back rule, N.C. Gen. Stat. § 1A-1, Rule 15(c) (1990), the Court stated:

> [Rule 15(c)] speaks of *claims* and allows the relation back of claims if the original claim gives notice of the transactions or occurrences to be proved pursuant to the amended pleading. *When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur.* As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. *We hold that [Rule 15(c)] does not apply to the naming of a new party-defendant to the action.*

It is not authority for the relation back of a claim against a new party.

Id. at 187, 459 S.E.2d at 717 (emphasis added).

In subsequent cases, this Court has construed the *Crossman* decision to mean that Rule 15(c) is not authority for the relation back of claims against a new party, but *may* allow for the relation back of an amendment to correct a mere misnomer. In *White v. Crisp*, 138 N.C. App. 516, 530 S.E.2d 87 (2000), this Court held that a plaintiff's attempts to amend her personal injury suit to name a defendant in his individual, rather than official, capacity did not relate back to the filing of the original claim, and thus the suit was time-barred. 138 N.C. App. at 521, 530 S.E.2d at 90. In *Bob Killian Tire, Inc. v. Day Enters., Inc.*, 131 N.C. App. 330, 506 S.E.2d 752 (1998), we stated that "[t]he notice requirement of Rule 15(c) cannot be met where an amendment has the effect of adding a new party to the action, *as opposed to correcting a misnomer.*" *Id.* at 331, 506 S.E.2d at 753 (emphasis added). There, we rejected the plaintiff's argument that it never intended to add a new party but instead sought only to correct an inaccurate description, and that its intent to sue the proper defendant was evident from the original complaint, stating that the "plaintiff's intent . . . is not dispositive." *Id.* at 332, 506 S.E.2d at 754. Finding that the plaintiff sought to add a new party-defendant rather than correct a misnomer, we declined to allow the amendment to relate back under Rule 15(c). *Id.* at 333, 506 S.E.2d at 754.

In *Wicker v. Holland*, 128 N.C. App. 524, 495 S.E.2d 398 (1998), the plaintiff had sued several individuals for negligence resulting in property damage arising out of work performed by Boles Paving, Inc. Boles Paving, Inc. was not named as a party-defendant in the original complaint, but a third-party complaint and a cross-claim were filed against Boles Paving, Inc. by the individual defendants, thereby providing notice to Boles Paving, Inc. of the claims. *Id.* at 526, 495 S.E.2d at 399-400. Following the running of the statute of limitations, the plaintiff sought to amend her pleading to designate Boles Paving, Inc. as a defendant to the original complaint in order to allow relation back under Rule 15(c). *Id.* at 526, 495 S.E.2d at 400. The trial court denied the motion to amend and we affirmed, rejecting the plaintiff's argument that Boles Paving, Inc. already had notice of the claim and would suffer no prejudice by being designated a party-defendant. *Id.* at 527, 495 S.E.2d at 400. We stated that "[t]his argument is irrelevant under *Crossman*'s analysis of the limited reach of Rule 15(c). [The

plaintiff] sought to add a party, and such action is not authorized by the rule." *Id.*

In the present case, the plaintiffs' original complaint and summons names the Board of Commissioners as defendant. While there is no dispute that Hertford County had notice of the claim prior to the running of the statute of limitations, such notice is irrelevant pursuant to our holding in *Wicker*. Instead, under our holding in *Killian Tire*, the question becomes whether the plaintiffs' amendment had the effect of adding a new party-defendant or merely corrected a misnomer in the original complaint.

N.C. Gen. Stat. § 153A-12 provides in relevant part that "[e]xcept as otherwise directed by law, each power, right, duty, function, privilege and immunity of the [county] shall be exercised by the board of commissioners." N.C. Gen. Stat. § 153A-12 (1991). While the Board of Commissioners is statutorily vested with the power to exercise powers and rights on behalf of the county, this is much like a board of directors acting on behalf of a corporation. The corporation, being merely a legal instrumentality, is incapable of acting on its own behalf, and the board is therefore required to exercise the corporate powers. The corporate body is therefore separate and distinct from its board of directors, and a county is likewise an entity separate and distinct from its board of commissioners.

The plaintiffs contend that their amendment merely seeks to correct a misnomer reflected in the original complaint. *See McLean v. Matheny*, 240 N.C. 785, 84 S.E.2d 190 (1954) (stating that amendments to cure a misnomer in pleadings will ordinarily be allowed "where the proper party is before the court, although under a wrong name"); *Wiles v. Welparnel Construction Co.*, 295 N.C. 81, 243 S.E.2d 756 (1978) (holding that a summons is adequate even though addressed to a corporation's agent instead of the corporation, where it is clear from the caption of the summons and the complaint that it is the corporation, rather than the agent, being sued); *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984) (holding that the court's discretionary power to allow amendments extends to amendments to correct a misnomer or mistake in the name of a party in a summons or complaint, but not to substitute or change a party entirely).

We note that the cases cited by the plaintiff all pre-date our Supreme Court's decision in *Crossman*, and that *Crossman* and its progeny have redefined the standard for what constitutes a misnomer for purposes of the relation-back rule. We are unaware of any case in

our courts decided post-*Crossman* which has allowed an amendment effecting a name change of any sort to relate back to the original complaint. In *Crossman*, the plaintiff originally named Van Dolan Moore as a party-defendant in a personal injury action arising out of an automobile accident, even though it was his son, Van Dolan Moore, II, who was the driver involved in the accident. 341 N.C. at 186, 459 S.E.2d at 716. The accident report completed by the police officer incorrectly named Van Dolan Moore as the driver, although it listed Van Dolan Moore, II's driver license number. *See Crossman v. Moore*, 115 N.C. App. 372, 444 S.E.2d 630 (1994) ("*Crossman I*"). Upon learning that Van Dolan Moore, II was actually the driver involved, the plaintiff moved to amend her complaint and sought a ruling that the amendment would relate back to the original complaint, thereby avoiding a statute of limitations defense. *Crossman*, 341 N.C. at 186, 459 S.E.2d at 716. Our Supreme Court affirmed the trial court's refusal to allow the relation back of the amendment on grounds that Rule 15(c) does not apply to amendments adding or substituting a party-defendant. *Id.*

In *Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 450 S.E.2d 24 (1994), *aff'd*, 342 N.C. 404, 464 S.E.2d 46 (1995), the plaintiffs had named "Winn Dixie Stores, Inc." as the party-defendant in their original complaint, and sought to amend the complaint to name the proper defendant, "Winn Dixie Raleigh, Inc." *Id.* at 38, 450 S.E.2d at 30. The original complaint was filed on the last date on which the plaintiffs could file a timely claim. *Id.* The plaintiffs argued that the amendment, filed over seven months later, merely corrected the name of a party already in court, and should therefore relate back to the date of the original complaint. *Id.* The trial court disagreed and this Court affirmed, finding that the failure to name the proper defendant was not the result of a misnomer and therefore declining to allow the amendment to relate back to the original complaint. *Id.* at 39-40, 450 S.E.2d at 31. While our decision in *Franklin* was filed prior to our Supreme Court's *Crossman* decision and was based upon a distinctly different legal analysis, our Supreme Court later affirmed this Court's *Franklin* decision on the basis of the holding in *Crossman*. *See Franklin v. Winn Dixie Raleigh, Inc.*, 342 N.C. 404, 464 S.E.2d 46 (1995).

We conclude that the plaintiffs' attempt to amend the summons and complaint in the instant case by changing the name of the party-defendant to Hertford County in place of the Board of Commissioners effectively seeks to add a new party-defendant rather than

merely correct a misnomer, and the relation-back rule therefore cannot apply. As a result, the plaintiffs' suit against the county was time-barred under N.C. Gen. Stat. § 1-54.1, and the trial court should have granted the defendant's motion to dismiss. Since we conclude that the defendant was entitled to have this action dismissed under N.C.R. Civ. P. 12(b), we need not consider the correctness of the trial court's grant of summary judgment in favor of the defendant. Nonetheless, we note that the trial court's grant of summary judgment has the same practical effect of having granted the defendant's motion to dismiss. We therefore treat the defendant's motion for summary judgment as though it were a converted motion to dismiss. *See, e.g., North Carolina Steel, Inc. v. National Council on Compensation Ins.*, 123 N.C. App. 163, 472 S.E.2d 578 (1996), *aff'd in part and rev'd in part*, 347 N.C. 627, 496 S.E.2d 369 (1998). The trial court's 10 June 1999 order granting summary judgment to the defendant is therefore,

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. COREY McKINLEY FUNCHESS, DEFENDANT

No. COA99-1299

(Filed 29 December 2000)

1. Motor Vehicles— felonious speeding to elude arrest—jury instructions not plain error

The trial court did not commit plain error by its instruction to the jury on felonious speeding to elude arrest under N.C.G.S. § 20-141.5, because: (1) the trial court properly charged the jury with the language of the pattern jury instruction that it had to find at least two of the three aggravating factors set out in the bill of indictment were present in order to convict defendant of felonious speeding to elude arrest, N.C.P.I., Crim. 270.54A; and (2) the statutory factors are merely alternative ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony.

2. Motor Vehicles— felonious speeding to elude arrest—not required to prove all three aggravating factors listed in conjunctive in indictment

The State was not required to prove all three aggravating factors listed in the conjunctive in the indictment were present in order to obtain a conviction for felonious speeding to elude arrest under N.C.G.S. § 20-141.5(b), because the statute only required proof of two or more of the factors.

3. Motor Vehicles— felonious speeding to elude arrest—instructing on elements of driving with a revoked license

The trial court was not required to charge the jury on defendant's knowledge of revocation of his driver's license, even though it was one of the three named aggravating factors that led to defendant's conviction for felonious speeding to elude arrest under N.C.G.S. § 20-141.5(b)(5), because: (1) a trooper's testimony revealed that defendant received notice of revocation of his driving privilege at his home on 2 February 1998; (2) defendant did not contest in any way his awareness that his driver's license was revoked, nor did he object to the officer's testimony in that regard; (3) the State's evidence tended to show that it complied with the provisions for giving notice of revocation or suspension of a driver's license under N.C.G.S. § 20-48; and (4) it is not necessary for the trial court to charge on guilty knowledge where there is no evidence that defendant did not receive the notice mailed by the Department of Motor Vehicles.

Appeal by defendant from judgment entered 18 May 1999 by Judge Charles C. Lamm, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 September 2000.

In the early morning hours of 21 March 1998, Corey McKinley Funchess (defendant) was driving his 1982 Datsun on U.S. 74 in Mecklenburg County, North Carolina. N.C. State Highway Patrol Trooper T. J. Miles noticed that the Datsun did not have a license plate, and began to follow it. Trooper Miles activated his blue lights, hazard lights, and flashing blue lights in an effort to get the Datsun to stop. Defendant responded by accelerating rapidly.

When defendant's vehicle finally came to a stop, defendant jumped out of the car and attempted to flee on foot, but Trooper Miles was able to apprehend him after a brief chase. Shortly there-

after, defendant attempted to flee a second time but Trooper Miles again apprehended him. During the struggle to take defendant into custody, Trooper Miles suffered minor injuries to his elbow and knees. In addition, his uniform and shoes had to be replaced, his radio had to be repaired, and his gun was damaged.

After Trooper Miles handcuffed defendant, the trooper searched the Datsun and found marijuana. He also smelled the odor of marijuana on defendant's person and formed the opinion that defendant was physically and mentally impaired. Trooper Miles advised defendant of his *Miranda* rights and asked him to take a blood test, but defendant refused to have his blood drawn for testing. Defendant and Trooper Miles were then taken to Carolinas Medical Center because they were both bleeding from their earlier struggle.

Defendant was tried at the 17 May 1999 Session of Mecklenburg County Superior Court on charges of felonious speeding to elude arrest, driving while impaired, two counts of resisting arrest by a public officer, and damage to personal property. Defendant elected to represent himself on the charges, and the trial court appointed an Assistant Public Defender as standby counsel. The trial court dismissed the charge of damage to property, and the jury convicted defendant on the remaining charges. The trial court imposed an active sentence of 10 to 12 months' imprisonment and defendant appealed.

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

Haakon Thorsen for defendant appellant.

HORTON, Judge.

Defendant argues that the trial court committed plain error in its jury instructions. Specifically, defendant contends that the instructions allowed the jury to convict him by less than a unanimous verdict; permitted him to be convicted of felonious speeding to elude arrest without requiring proof of all the elements of that crime; and failed to define an essential element of the crime, thereby allowing "speculation" as to what satisfied that element. We disagree with each of defendant's arguments, and affirm his conviction.

Defendant did not object to the jury instructions at trial, nor did he submit proposed instructions to the trial court. Rule 10(b)(2) of our Rules of Appellate Procedure provides that

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

N.C.R. App. P. 10(b)(2) (2000).

Thus, defendant has not preserved any of the assigned errors unless he can obtain the benefit of the "plain error" doctrine. Under that doctrine, an appellate court may review errors which affect substantial rights despite a defendant's failure to bring the error to the attention of the trial court, provided defendant can show that the error asserted is "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied by Bagley v. North Carolina*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). Therefore, for each of the three errors urged by defendant, we must first determine whether the trial court's jury instructions were erroneous. If error be found, we must then determine whether it rises to the level of plain error.

I. Lack of a Unanimous Verdict

[1] This appeal requires us to construe for the first time the amendment to N.C. Gen. Stat. § 20-141.5, which created the offense of felonious speeding to elude arrest. As amended, N.C. Gen. Stat. § 20-141.5 (1999) provides that:

> (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
>
> (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.
>
> (1) Speeding in excess of 15 miles per hour over the legal speed limit.

(2) Gross impairment of the person's faculties while driving due to:

a. Consumption of an impairing substance; or

b. A blood alcohol concentration of 0.14 or more within a relevant time after the driving.

(3) Reckless driving as proscribed by G.S. 20-140.

(4) Negligent driving leading to an accident causing:

a. Property damage in excess of one thousand dollars ($1,000); or

b. Personal injury.

(5) Driving when the person's drivers license is revoked.

(6) Driving in excess of the posted speed limit, during the days and hours when the posted limit is in effect, on school property or in an area designated as a school zone pursuant to G.S. 20-141.1, or in a highway work zone as defined in G.S. 20-141(j2).

(7) Passing a stopped school bus as proscribed by G.S. 20-217.

(8) Driving with a child under 12 years of age in the vehicle.

Defendant's indictment for felonious speeding to elude arrest alleged that "[a]t the time of the violation, the defendant was speeding in excess of fifteen (15) miles per hour over the legal speed limit, the defendant was driving recklessly in violation of G.S. 20-140, and the defendant was driving while the defendant's driver's license was revoked." Thus, the indictment alleges the presence of statutory factors (1), (3), and (5), three of the aggravating factors set out in N.C. Gen. Stat. § 20-141.5(b).

The trial court charged the jury in this case that

> the State must prove beyond a reasonable doubt that two or more of the following factors are present at [the time of speeding to elude arrest]: one, speeding in excess of fifteen miles per hour over the legal speed limit; two, reckless driving, which consist[s] of driving a motor vehicle without due caution and circumspection, and in a manner so as to endanger or is likely to endanger

any person or property; or, three, driving while driver's license is revoked.

Thus, the trial court properly charged the jury, using the language of the pattern jury instruction, that it had to find that at least two of the three aggravating factors set out in the bill of indictment were present in order to convict defendant of felonious speeding to elude arrest. N.C.P.I., Crim. 270.54A (1998). Defendant argues, however, that the trial court erred in failing to instruct the jury that its members must unanimously agree on the same two factors, and that the trial court's failure to do so was plain error.

Article I, § 24 of the North Carolina Constitution states that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. See also N.C. Gen. Stat. § 15A-1237(b) (1997) (requiring unanimous jury verdicts). Defendant's argument characterizes the eight aggravating factors set out in N.C. Gen. Stat. § 20-141.5(b) as a list of separately chargeable, discrete criminal activities. Defendant further contends that the jury should have been required to agree on which of those eight particular factors were present in his case. The State, on the other hand, argues that the statutory factors are merely alternative ways of proving the crime of felonious speeding to elude arrest. For the reasons set forth below, we agree with the State's interpretation and overrule defendant's assignment of error.

In *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), our Supreme Court reviewed the trial court's instructions to the jury in a case in which defendant was charged with a violation of N.C. Gen. Stat. § 90-95(h)(1). The Court in *Diaz* found that § 90-95(h)(1) punishes anyone who "sells, manufactures, delivers, transports, or possesses more than 50 pounds of marijuana . . . ." *Diaz*, 317 N.C. at 547, 346 S.E.2d at 490; N.C. Gen. Stat. § 90-95(h)(1) (Cum. Supp. 1983). In its instruction, the trial court used the disjunctive "or" to instruct the jury to return a verdict of guilty if it found beyond a reasonable doubt that defendant "knowingly possessed *or* knowingly transported" the requisite amount of marijuana. *Diaz*, 317 N.C. at 554, 346 S.E.2d at 494 (emphasis added). The Supreme Court found that the trial court committed reversible error in its ambiguous instruction, because not one but *two* possible crimes were submitted to the jury in a single issue. The erroneous instruction prevented the jury from reaching a unanimous verdict, and defendant was granted a new trial. *Id.* at 553-54, 346 S.E.2d at 494.

In *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), the Supreme Court clarified its decision in *Diaz*. Defendant Hartness was convicted of three counts of taking indecent liberties with a minor. The trial court instructed the jury in that case that an indecent liberty was "an immoral, improper, or indecent touching or act by the defendant upon the child, *or* an inducement by the defendant of an immoral or indecent touching by the child." *Id.* at 563, 391 S.E.2d at 178 (emphasis added). Defendant assigned error to the instruction, contending that it led to his conviction by a nonunanimous verdict. *Id.* The Supreme Court distinguished *Diaz* and stated that

> [t]he risk of a nonunanimous verdict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive in the same manner as does the trafficking statute [in *Diaz*]. . . . Even if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of "any immoral, improper, or indecent liberties." Such a finding would be sufficient to establish the first element of the crime charged.

Id. at 564-65, 391 S.E.2d at 179.

The decisions in *Diaz* and *Hartness* were followed by *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991). In *Lyons*, the Supreme Court explained the crucial difference between the underlying rationales of *Diaz* and *Hartness*. Our Supreme Court stated that

> [t]here is a critical difference between the lines of cases represented by *Diaz* and *Hartness*. The former line establishes that a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. The latter line establishes that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied.

Id. at 302-03, 412 S.E.2d at 312. The *Lyons* decision was also instructive on other key differences between *Diaz* and *Hartness*. *Lyons*

explained that in order to determine the "gravamen" of the offense, a criminal statute must be examined to determine whether it punishes a single wrong or multiple discrete wrongs. *See State v. Petty*, 132 N.C. App. 453, 461, 512 S.E.2d 428, 434, *appeal dismissed, disc. review denied*, 350 N.C. 598, — S.E.2d — (1999).

The parties have continually emphasized the differences in *Diaz* and *Hartness* to support their respective positions. Succinctly stated, " '[t]he difference [between the *Diaz* line and the *Hartness* line] is whether the two underlying acts are separate offenses or whether they are merely alternative ways to establish a single offense.' " *State v. Johnston*, 123 N.C. App. 292, 297, 473 S.E.2d 25, 29, *disc. review denied*, 344 N.C. 737, 478 S.E.2d 10 (1996) (quoting *State v. Almond*, 112 N.C. App. 137, 144, 435 S.E.2d 91, 96 (1993)). Defendant relies heavily on *Diaz* for the proposition that N.C. Gen. Stat. § 20-141.5(b) punishes multiple discrete wrongs. Conversely, the State relies on *Hartness* to argue that the same statute punishes a single wrong.

Despite factual differences, we believe the case before us falls within the parameters of *Hartness*, so that we are bound by the holding of that case. N.C. Gen. Stat. § 20-141.5 seeks to punish a single wrong: attempting to flee in a motor vehicle from a law enforcement officer in the lawful performance of his duties. Violation of the statute is at least a Class 1 misdemeanor. Where at least two of the eight aggravating factors set out in the statute are present, however, the offense is a Class H felony. Although many of the enumerated aggravating factors are in fact separate crimes under various provisions of our General Statutes, they are not separate offenses as in *Diaz*, but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony. We therefore hold that the trial court's instructions, which tracked the language of the pattern jury instructions, were correct, and overrule this assignment of error.

II. The Indictment and the State's Burden of Proof

[2] The indictment against defendant read in pertinent part:

> At the time of the violation, the defendant was speeding in excess of fifteen (15) miles per hour over the legal speed limit, the defendant was driving recklessly in violation of G.S. 20-140, *and* the defendant was driving while the defendant's driver's license was revoked.

(Emphasis added.) Defendant maintains that, since the three aggravating factors were listed in the conjunctive in the indictment, the State should have had to prove all three factors were present in order to obtain a conviction for felonious speeding to elude arrest under N.C. Gen. Stat. § 20-141.5(b). We disagree.

We find guidance in our Supreme Court's decision in *State v. Moore*, 315 N.C. 738, 340 S.E.2d 401 (1986). In *Moore*, defendant was charged with the first-degree kidnapping of his estranged wife under N.C. Gen. Stat. § 14-39. *Moore*, 315 N.C. at 739, 742, 340 S.E.2d at 402, 404. The indictment in *Moore* included three of eight statutory "purposes" that make kidnapping a first-degree offense. *Id.* at 743, 340 S.E.2d at 404-05. The Supreme Court noted that "[t]he indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment." *Id.* at 743, 340 S.E.2d at 404. The Supreme Court did not, however, require the State to prove *every* ground or purpose set out in the indictment, instead stating that "[a]lthough the indictment may allege more than one purpose for the kidnapping, the State has to prove only one of the alleged purposes in order to sustain a conviction of kidnapping." *Id.* The jury in *Moore* was not required to indicate which of the three purposes it found to be present, but the case was remanded for a new trial, because one of the purposes was not supported by the evidence and should not have been submitted to the jury at all. *Id.* at 749, 340 S.E.2d at 408.

The indictment in the present case is similar in form to that in *Moore*, and includes three factors which would support a conviction for *felonious* speeding to elude arrest, a more serious conviction than the Class 1 *misdemeanor* described in N.C. Gen. Stat. § 20-141.5(a). Contrary to defendant's contention, we do not believe that the State is required by the holding in *Moore* to prove all three factors, even though they are stated conjunctively in the indictment, because the statute only requires proof of *two or more* of the factors. We find no error in the trial court's treatment of this issue, and we overrule this assignment of error.

III. Defining a Statutory Factor Which Is Itself a Crime

[3] Finally, defendant argues that, since "driving while driver's license is revoked" was one of the three named aggravating factors that led to his conviction under N.C. Gen. Stat. § 20-141.5(b)(5), the trial court should have charged the jury on the elements of the

offense of driving with a revoked license, particularly the element of knowledge. We disagree.

To convict a person of the crime of driving with a revoked license, the State must prove beyond a reasonable doubt that defendant was on notice that his driver's license was revoked. *See* N.C. Gen. Stat. § 20-28 (1999); *State v. Chester*, 30 N.C. App. 224, 226 S.E.2d 524 (1976); *State v. Woody*, 102 N.C. App. 576, 402 S.E.2d 848 (1991). Defendant contends that the trial court's failure in the case before us to charge on the elements of driving with a revoked license was plain error in violation of the requirement that "[t]he trial court must charge the essential elements of the offense." *State v. Gooch*, 307 N.C. 253, 256, 297 S.E.2d 599, 601 (1982).

On direct examination, Trooper Miles was asked to compare the information on defendant's driving record to that on a letter from the Division of Motor Vehicles notifying defendant that his driving privilege was revoked. The trooper testified that the information matched and revealed that defendant received notice of revocation of his driving privilege at his home address on 2 February 1998. During the trial, although defendant challenged many portions of the State's case, he did not contest in any way his awareness that his driver's license was revoked, nor did he object to the officer's testimony in that regard. The State's evidence tended to show that it complied with the provisions for giving notice of revocation or suspension of a driver's license found in N.C. Gen. Stat. § 20-48. "[W]here there is *no* evidence that defendant did not receive the notice mailed by the Department [of Motor Vehicles], it is not necessary for the trial court to charge on guilty knowledge[.]" *Chester*, 30 N.C. App. at 227, 226 S.E.2d at 527.

Thus, it appears that the failure of the trial court to charge on knowledge of revocation was not erroneous, and we need not reach the question of whether the trial court is required to charge the jury on the elements of the separate crimes which serve to enhance the status of speeding to elude arrest to that of a felony.

No error.

Judges WALKER and McGEE concur.

WILLIAM C. ERLER, D/B/A WEST END OFFICE BUILDING AND HUNTER TEXTBOOKS, INC., PLAINTIFFS V. AON RISKS SERVICES, INC. OF THE CAROLINAS (FORMERLY ROLLINS, HUDIG HALL OF THE CAROLINAS, INC.) AND SUSAN COTHREN, DEFENDANTS

No. COA99-1274

(Filed 29 December 2000)

1. Collateral Estoppel and Res Judicata— claim preclusion— rights and interests do not rise to level of similarity necessary

Plaintiff insured is not barred by claim preclusion from bringing suit against defendants for coverage provided under a flood insurance policy merely based on the fact that plaintiff's previous suit in federal court was voluntarily dismissed, because the rights and interests of the parties in this case do not rise to the level of similarity necessary when plaintiff's claim in the federal action was dependent on the lower floor being classified as other than a basement, whereas in the present action plaintiff concedes that the lower floor should have been classified as a "basement," but that the flood insurance agent misrepresented that it was not a "basement."

2. Evidence— insurance policy coverage—stipulations— existence of policy

Plaintiff is not barred from introducing evidence that the National Flood Insurance Program (NFIP) policy did not provide coverage for the contents located on the lower floor of the pertinent building even though plaintiff stipulated to the validity of the NFIP policy in the pretrial order, because the stipulations only establish the existence of the policy at the time of the loss.

3. Insurance— negligent misrepresentation—requested instruction—expert testimony—definition of "basement"

The trial court did not err in an action arising out of an insurance agent's alleged negligent misrepresentation by denying defendants' request for an instruction that the determination of whether the lower floor is a "basement" required the flood insurance agent to exercise specialized knowledge of the National Flood Insurance Program's complex definition and thus required expert testimony to establish the standard of care, because the

issue is one that the jury would be able to decide based on common knowledge and experience.

4. Damages and Remedies— method of calculation—"perpetual inventory"

The trial court did not err in an action to recover proceeds from a flood insurance policy by concluding that the evidence of damages presented by plaintiff's method for counting the damaged inventory was sufficient to support the jury's verdict, because the evidence was not so speculative as to be inadmissible when there was evidence of plaintiff's damages based on "perpetual inventory" and also evidence that the loss calculation should have been based on an actual count.

5. Negligence— contributory—issue properly submitted to jury

The trial court did not err in an action to recover proceeds from a flood insurance policy by concluding that the evidence does not establish plaintiff's contributory negligence as a matter of law and that the issue was properly submitted to the jury.

6. Trials— improper mention of insurance—objection sustained—curative instruction—jury presumed to act properly

The trial court did not abuse its discretion by failing to order a new trial after plaintiff's counsel told the jury that defendant was one of the largest insurance brokers in the world with offices in Chicago and that it would pay any judgment in favor of plaintiff, because: (1) the trial court sustained defendants' objection and instructed the jury to disregard the argument; and (2) the jury is presumed to have acted properly and disregarded the statements.

7. Unfair Trade Practices— insurance—motion to dismiss properly granted

The trial court did not err by dismissing plaintiff's claim of unfair and deceptive trade practices under N.C.G.S. §§ 75-1.1 and 58-63-15(1) based on defendants' actions which purported to expand plaintiff's existing insurance policy to cover inventory that was uninsurable under the policy, because: (1) defendants stood to gain very little from their misleading conduct which was limited to this plaintiff; (2) defendants' actions cannot be characterized as immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers; (3) the effect of defendants'

actions in the marketplace would be negligible; and (4) no unfair advantage was to be gained from defendants' actions since the flood insurance sought by plaintiffs was not available among competing insurers.

Appeal by plaintiffs and defendants from judgment entered 27 April 1999 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 12 September 2000.

Moore & Brown, by B. Ervin Brown, II and James S. Gibbs, Jr., for plaintiffs.

Everett, Gaskins, Hancock & Stevens LLP, by Hugh Stevens, Paul C. Ridgeway, and K. Matthew Vaughn, for defendants.

WALKER, Judge.

In 1984, plaintiffs purchased a building at 823 Reynolda Road in Winston-Salem. This building contains three floors and sits on a sloped grade such that the front entrance opens into the second floor. The first, or lowest, floor is accessible from the rear through a garage door and rear entrance door. Plaintiffs used this lower floor as an inventory storage area. In June of 1996, the building's lower floor was flooded during a storm, and much of plaintiffs' inventory of textbooks was destroyed. Plaintiffs then contacted defendant Susan Cothren (Cothren), an employee of defendant Aon Risk Services (Aon), who wrote flood insurance policies and inquired about expanding their current National Flood Insurance Program (NFIP) policy to cover the contents of the lower floor.

The Standard Flood Insurance Policy (SFIP), issued by the Federal Emergency Management Agency (FEMA), allows coverage to be expanded to "contents" but excludes contents stored in a "basement." A "basement" is defined by the NFIP as "any area of the building having its floor subgrade on all sides." Based on a description of the building given to Cothren by plaintiffs, Cothren initially informed plaintiffs on 17 July 1996 that she believed the lower floor was not a "basement." On 18 July 1996, Cothren visited the building, and after speaking with a representative of the NFIP, she confirmed to plaintiffs that the lower floor was not a "basement" and that their insurance could be expanded to cover the contents of that floor. Cothren based this advice on the fact that the lower floor had a garage door which opened out onto the driveway, thereby making it a "walkout." Cothren believed that a "walkout" was classified separately from a

"basement" and thus eligible for contents coverage. In her testimony, Cothren admitted that the SFIP does not contain such an exception for a "walkout." In August 1996, plaintiffs' application for expanded coverage was accepted by the NFIP and plaintiffs began paying an additional premium.

In May 1998, plaintiffs' building again flooded destroying the inventory located on the lower floor. Plaintiffs valued this loss of inventory at $307,958.00 and reported the loss to the NFIP who sent a claims adjuster, Eddie Adams, to examine the damage. Mr. Adams consulted an engineer, John Gardner, who examined the building and determined that the lower floor was a "basement" because it "is below the elevation of the grade on all sides." Based on this determination, the NFIP denied plaintiffs' claim on the basis that the lower floor was in fact a "basement" and that there was no coverage for contents in basement areas. Plaintiffs subsequently filed suit against Aon and Cothren alleging negligent misrepresentation, unfair and deceptive trade practices, and *respondeat superior*. At trial, the trial court granted defendants' motion for a directed verdict as to plaintiffs' claim of unfair and deceptive trade practices, and submitted issues on negligent misrepresentation and contributory negligence. The jury answered the issues in favor of the plaintiffs and returned a verdict in the amount of $280,001.

[1] We first address defendants' assignments of error. After plaintiffs filed the present lawsuit, they filed an action against FEMA in federal court seeking payment for the loss under the policy. FEMA filed a motion to dismiss on the basis that the proof of claim was not timely filed and that plaintiffs' policy did not cover contents stored in the lower floor because it was classified as a "basement." Plaintiffs then voluntarily dismissed the federal action. Defendants claim this dismissal prevented plaintiffs from obtaining a judicial determination on whether the policy provided coverage and thus "constitutes a waiver and/or estoppel that bars their claims against the defendants as a matter of law." In response, plaintiffs assert that when FEMA denied their claim, plaintiffs dismissed that action only after their own experts concluded that the lower floor was a "basement."

In support of this action, plaintiffs contend the following general rule applies:

> It is not necessary for insured, in order to recover from the broker or agent, to show that he has sued the insurance company, it being sufficient to show that the policy is defective or invalid and

> that the company has refused to pay either in whole or in part. The refusal to cover the loss may be inferred from the insurance company's failure to pay claims or to respond to insured's demand for payment.

44 C.J.S. *Insurance* § 216 (1993).

Plaintiffs are not barred from bringing suit against defendants merely because their previous suit was voluntarily dismissed. For plaintiffs' current claim to be barred, defendants must show (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits. *Hogan v. Cone Mills Corp.*, 63 N.C. App. 439, 442, 305 S.E.2d 213, 215 (1983). Claim preclusion only arises in actions between the same parties or those "so identified in interest as to represent the same legal right. 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." *Kaminsky v. Sebile*, 140 N.C. App. 71, 81, 535 S.E.2d 109, 115-16 (2000).

In the case at bar, defendants have different interests than those of FEMA. Plaintiffs' claim in the federal action was dependent on the lower floor being classified as other than a "basement." Whereas, in the present action, plaintiffs concede that the lower floor should have been classified as a "basement" but contend that Cothren misrepresented that it was not a "basement." Thus, the rights and interests of the parties in these cases do not rise to the level of similarity necessary to invoke claim preclusion.

[2] Defendants further argue that plaintiffs stipulated to the validity of the NFIP policy in the pre-trial order, thus barring them from introducing evidence that the policy did not provide coverage for the contents located on the lower floor as required to maintain this action. The stipulations in the pre-trial order state, in pertinent part:

> h. A NFIP policy, with coverage for contents located on the lower level of the Hunter Textbooks building, was in force during the month of May, 1998.
>
> i. The amount of insurance for contents covered by the flood insurance policy was $400,000.

Defendants assert that these stipulations conclusively establish that the policy at issue was valid and therefore bars these claims.

However, we conclude these stipulations only establish the existence of the policy at the time of the loss.

[3] Defendants' second assignment of error is that insufficient evidence exists to support a finding that Cothren negligently misrepresented to plaintiffs that the lower floor was not a "basement" within the meaning of the NFIP policy. Our Supreme Court has held "[t]he tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *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); *see also Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 511 S.E.2d 309 (1999). Defendants argue that plaintiffs failed to prove either that the representations were false or misleading or that Cothren failed to exercise reasonable care in forming these representations.

Plaintiffs presented the testimony of three witnesses that the lower floor was a "basement." Ed Stout, a civil engineer and land surveyor, testified that the lower floor is a basement because it is "below the surface . . . [on] all four sides." Similarly, John Garner, a civil, structural engineer who investigates claims of structural losses for the NFIP, testified that the lower level was subgrade on all four sides, thus classifying it as a "basement." Finally, Eddie Adams, an independent adjuster, testified that he is certified by FEMA to make a determination of whether an area should be classified as a "basement." Further, he testified that he had handled more than 1,100 flood claims for FEMA and that thirty to forty claims each year involve NFIP's definition of a "basement." Mr. Adams stated that he believed the lower floor was a basement and that Cothren should have known it was a basement. This evidence supports a classification of the lower floor as a "basement" within the meaning of the NFIP policy.

Nevertheless, defendants contend that plaintiffs failed to present sufficient evidence of negligent misrepresentation because they did not offer evidence of the standard of care to which Cothren should be held. Defendants argue that the determination of whether the lower floor is a "basement" required Cothren to exercise specialized knowledge of the NFIP's complex definition, thus expert testimony was necessary to establish a standard of care. The trial court denied defendants' request for such instruction and instead

instructed the jury to find that Cothren failed to exercise "reasonable care" meaning "that degree of care, knowledge, intelligence and judgment which a prudent person would use under the same or similar circumstances."

In the context of legal and medical malpractice, this Court has stated that "[e]xpert testimony is not required, however, to establish the standard of care, failure to comply with the standard of care, or proximate cause, in situations where a jury, based on its common knowledge and experience, is able to decide those issues." *Little v. Matthewson*, 114 N.C. App. 562, 567, 442 S.E.2d 567, 570-71 (1994). This Court went on to state that the "common knowledge exception" is applicable in situations where the actions at issue are "of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation." *Id.* at 568, 442 S.E.2d at 571. In applying these principles to this case, we conclude that the issue of whether Cothren negligently misrepresented to plaintiffs that the lower floor qualified for contents coverage is an issue which the jury, based on "common knowledge and experience," would be able to decide.

[4] Defendants' next assignment of error is that the evidence of damages presented by plaintiffs was insufficient to support the jury's verdict. In particular, defendants claim that the method used for counting the damaged inventory was inaccurate. At trial, plaintiffs presented the testimony of Doug Johnson, Hunter Textbooks' accountant since 1991, who testified that he had developed an inventory accounting method that involved keeping a "perpetual inventory" whereby the quantity and cost of each book was entered into a computer database as the costs were incurred. Thus, plaintiffs could determine the approximate value of their inventory at any given time. He further testified that the damages amount claimed by the plaintiffs was derived by comparing the value of the inventory after the flood to the value of the inventory before the flood as determined by the "perpetual inventory" in the computer database.

Defendants argue that this method is inaccurate and that damages should have been based on an actual count of damaged books. After the flood, plaintiffs hired Mid-South Disaster Response to assist in the clean-up. Mid-South conducted an actual count of the books as they were discarded under plaintiffs' supervision. However, Doug Johnson testified that he did not completely rely on these figures because "the staff did not feel like they were counted very well."

Defendants assert that if the damages were based on the actual count, they would be significantly lower than those based on "inventory reconciliation."

"To be entitled to compensatory damages plaintiff must show . . . the amount of loss with reasonable certainty." *Phillips v. Insurance Co.*, 43 N.C. App. 56, 58, 257 S.E.2d 671, 673 (1979). "[W]here actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed." *Id.* at 58-59, 257 S.E.2d at 673. Here, there was evidence of plaintiffs' damages based on their "perpetual inventory" and evidence that the loss calculation should have been based on an actual count. Plaintiffs' evidence was not so speculative as to be inadmissible. Thus, sufficient evidence existed to support the jury's award of damages.

[5] In the record on appeal, the defendants assigned as error the trial court's exclusion of certain exhibits which they claim adversely impacted their defense of contributory negligence. However, defendants now confine their argument to the contention that the plaintiffs were contributorily negligent as a matter of law. The issues of proximate cause and contributory negligence are usually questions for the jury. *Lamm v. Bissette Realty*, 327 N.C. 412, 395 S.E.2d 112 (1990). Only if the evidence, considered in the light most favorable to the plaintiff, affirmatively shows contributory negligence "so clearly that no other conclusion can be reasonably drawn therefrom" is the defendant entitled to judgment as a matter of law. *Wallsee v. Water Co.*, 265 N.C. 291, 297, 144 S.E.2d 21, 26 (1965). After review, we agree with the trial court that the evidence does not establish contributory negligence as a matter of law and the issue was properly submitted to the jury.

[6] Lastly, defendants argue the trial court abused its discretion by failing to order a new trial after an improper jury argument by plaintiffs' counsel. Specifically, defendants assert that plaintiffs' counsel told the jury that Aon was one of the largest insurance brokers in the world with offices in Chicago and that they would pay any judgment in favor of plaintiffs. Although the trial court sustained defendants' objection and instructed the jury to disregard the argument, defendants argue that since the jury awarded damages, the improper argument can be presumed to have prejudiced the deliberations.

In the case of *Fidelity Bank v. Garner*, 52 N.C. App. 60, 277 S.E.2d 811 (1981), plaintiff's counsel improperly referred to matters

outside the record in his closing remarks to the jury that were potentially prejudicial. Defendant made a motion to strike the statement, which was allowed, and the judge instructed the jury that the argument was improper and therefore should be disregarded. In denying plaintiff's motion for a mistrial, this Court stated that while:

> [P]laintiff's counsel should not have made such a remark . . . the record indicates that upon hearing the remark the court took the necessary steps to correct the impropriety. When a jury is instructed to disregard improperly admitted testimony, the presumption is that it will disregard the testimony.

Fidelity Bank at 65, 277 S.E.2d at 814.

In the case at bar, defendants immediately objected to the statements about Aon by plaintiffs' counsel. Their objection was sustained and curative instructions were given to the jury. Thus, the presumption is that the jury acted properly and disregarded the statements of plaintiffs' counsel. As a result, we find the trial court did not abuse its discretion in denying defendants' motion for a new trial.

[7] The plaintiffs assign as error the trial court's dismissal of their claim of unfair and deceptive trade practices on two grounds. First, plaintiffs rely on this Court's holding in *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 394 S.E.2d 643 (1990), *rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991), to establish that defendants' conduct amounted to an unfair and deceptive trade practice. In order to prove an unfair and deceptive trade practice, plaintiffs must show that defendants engaged in "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1 (1999). Plaintiffs cite *Forbes* in support of the proposition that defendants' misrepresentations are not exempt from Chapter 75 merely because they were made "negligently and in good faith, in ignorance of their falsity, and without intent to mislead." *Forbes* at 601, 394 S.E.2d at 651.

In *Forbes*, the plaintiffs were purchasers of lots and memberships in a resort community. They brought suit against the community's developers, sales agents, and brokerage firm for fraudulently transferring the plaintiffs' property deposits into the developer's private checking account in order to pay his salary. In reversing the trial court's grant of summary judgment in favor of the defendant, this Court stated:

> [w]hether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the

> marketplace. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers . . . [i]n essence, a party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.

Forbes at 600, 394 S.E.2d at 650.

We find the facts here distinguishable from *Forbes*. Defendants' actions purported to expand plaintiffs' existing insurance policy to cover inventory that was uninsurable under the policy. Defendants stood to gain very little from their misleading conduct which was limited to these plaintiffs. We cannot characterize defendants' actions as "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* Furthermore, the effect of defendants' actions in the marketplace would be negligible.

In addition, N.C. Gen. Stat. § 58-63-15(1)(1999) defines unfair methods of competition and deceptive acts or practices in the business of insurance. Since the flood insurance sought by plaintiffs was not available among competing insurers, no unfair advantage was to be gained from defendants' actions. Based on the foregoing reasons, we find no error in the trial.

No error.

Judges LEWIS and HUNTER concur.

STATE OF NORTH CAROLINA v. BARBARA TAYLOR

No. COA99-1488

(Filed 29 December 2000)

1. Appeal and Error— no motion for post-conviction hearing or appropriate relief—no further factual development

An assault defendant alleging inadequate representation waived her opportunity to develop additional factual matters, and the Court of Appeals was bound by the record on appeal, where she did not file motions for a post-conviction hearing or for appropriate relief with the court below prior to the appeal.

2. Constitutional Law— effective assistance of counsel— acceptance of plea bargain—defendant advised by judge— no prejudice

An assault defendant alleging inadequate representation failed to show how the result of the proceedings would have been any different absent the alleged deficient performance where defendant contended that her failure to accept a plea bargain was the result of inadequate information provided by counsel, but the record clearly reflects that defendant was carefully advised by the trial judge of both her possible sentence and the plea bargain. Any alleged deficiency by the defense counsel was corrected by the trial judge. Additionally, the evidence of defendant's guilt is supported by the record.

3. Judges— active role in trial—alleged deficiencies by counsel—no prejudice

There was no prejudicial error in an assault prosecution where defendant contended that the trial court prejudiced defendant in the eyes of the jury by taking an active role in assisting defense counsel. All of the court's actions were taken to protect defendant's rights and to ensure that she received a fair trial. Defendant failed to show that the ultimate resolution was not a fair trial with a reliable result.

4. Appeal and Error— unpublished opinions—not considered

A defendant's assignment of error concerning notice of counsel's inability to represent criminal defendants was dismissed where the alleged notice was contained in an unpublished opinion in a another case. Unpublished opinions are not considered by the Court. N.C. R. App. P. 30(e).

Appeal by defendant from judgments entered 2 April 1998 by Judge Gregory A. Weeks in Anson County Superior Court. Heard in the Court of Appeals 18 October 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel P. O'Brien, for the State.

Poisson, Poisson, Bower & Clodfelter, by T. Lynn Clodfelter, for defendant-appellant.

HUNTER, Judge.

Barbara Taylor ("defendant") appeals from her jury conviction of felonious assault with a deadly weapon with intent to kill inflicting serious injury and misdemeanor injury to personal property. This appeal encompasses one primary issue: whether defendant was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. After a careful review of the records and briefs, we hold that defendant was not denied effective assistance of counsel.

Premised on the effective assistance of counsel issue, defendant asserts several assignments of error: (1) whether the trial court committed prejudicial error by failing to declare a mistrial and/or a continuance after having observed defense counsel's alleged ineffective assistance of counsel, (2) whether the trial court committed plain error by allowing defendant to be represented by alleged inadequate, incompetent, ineffective counsel, (3) whether the trial court committed prejudicial error in taking an active role in the representation of defendant, and (4) whether this Court committed prejudicial error by allowing defendant to be represented by defense counsel after our decision in an unpublished opinion involving the same attorney. We hereby find no error as to defendant's first three assignments of error, and as to the fourth, we dismiss the assignment.

At trial, the State's evidence tended to show that after midnight on 17 February 1997, Elvis Lilly ("victim") drove to defendant's home to speak with his wife, Marian Sabrina Lilly ("Mrs. Lilly"), who was having an affair with defendant. An argument ensued between the victim and Mrs. Lilly, and that argument soon turned physically violent. Shortly thereafter, defendant, who had been away from home, drove up and witnessed the fight taking place in her front yard. Eventually, defendant joined in the affray. Ultimately, defendant knocked out a window of the victim's van with a baseball bat, and the fight ended when defendant struck the victim on the side of the face with the bat.

Defendant was tried during the 31 March 1998 Criminal Session of Superior Court of Anson County, the Honorable Gregory A. Weeks presiding. The jury found defendant guilty of felonious assault with a deadly weapon with intent to kill inflicting serious injury and misdemeanor injury to personal property. Judge Weeks entered judgments on the jury conviction on 2 April 1998, and defendant was subsequently sentenced to a term of imprisonment.

In the instant action, the crux of defendant's claims involve her trial and the performance of her defense counsel. At trial, defendant was represented by her court-appointed attorney, A. Milton Cornwell ("defense counsel"). Defendant did not object or make a motion as to her counsel being ineffective at trial, and furthermore, she failed to file a timely notice of appeal after trial. Consequently, defendant had to file a petition for writ of certiorari seeking belated appeal with this Court. Upon the grant of her petition, a hearing was held in superior court and attorney T. Lynn Clodfelter was appointed to represent defendant on this appeal.

At bar, defendant contends that defense counsel at trial was so lacking in the ability to represent a defendant charged with a criminal offense that the transcript reflects a total absence of knowledge of the law, preparation, understanding, strategy, or courtroom skill on defense counsel's behalf. This claim in essence encompasses an ineffective assistance of counsel challenge.

[1] Before considering defendant's allegation of ineffective assistance of counsel, we note that defendant did not file motions for a post-conviction hearing or for appropriate relief with the court below prior to taking this appeal. When an ineffective representation claim is made "before an appellate court on direct review of a criminal conviction . . . that court is necessarily bound by the record of the trial proceedings below." *State v. Milano*, 297 N.C. 485, 496, 256 S.E.2d 154, 160 (1979), *overruled on other grounds, State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983); *see also State v. Goforth*, 130 N.C. App. 603, 605, 503 S.E.2d 676, 678-79 (1998). Therefore, defendant has foregone her opportunity to develop any additional factual matters, and our review is bound by the record on appeal.

[2] In *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985), our North Carolina Supreme Court adopted the two-part test for determining whether a defendant received effective assistance of counsel as set out in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). This test entails:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so seri-

> ous as to deprive the defendant of a fair trial, *a trial whose result is reliable.* (Emphasis added.)"

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

Under this analysis

> "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

State v. Mason, 337 N.C. 165, 177-78, 446 S.E.2d 58, 65 (1994) (quoting *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694).

Importantly, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. Thus, rather than determining if defense counsel's performance was deficient in this action, we instead analyze defendant's claims to determine whether absent defense counsel's alleged errors the result would have been different.

"The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. Moreover, "[t]he question becomes whether a reasonable probability exists that, absent counsel's deficient performance, the result of the proceeding would have been different." *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987).

Defendant has failed to show this Court how the result of the proceedings would have been any different absent defense counsel's alleged deficient performance. In fact, the only two claims drawn out of defendant's arguments that allege a different result are that (1) defense counsel's failure to review the possible sentences with defendant limited defendant's ability to make an educated and

informed decision on whether to proceed with trial, and (2) defendant's failure to take a plea bargain is the result of the deficient information provided to defendant by defense counsel. However, defendant's assertions are not supported by the record.

In actuality, both alleged deficiencies of defense counsel at trial were clarified for defendant on the record by the trial judge. At trial, the following dialogue between defendant and the trial judge transpired with regards to sentencing:

> COURT: . . . You have the absolute right to try your case before a jury. . . . Do you understand what I'm saying?
>
> DEFENDANT: Yes, sir.
>
> . . .
>
> COURT: . . . If you are convicted of a Class C felony and if you in fact fall under record level two the mandatory minimum sentence that I could impose could be 80 months in prison.
>
> DEFENDANT: I know, sir.
>
> COURT: . . . There is no discretion on my part. I have to send you to prison for at least 80 months to 105, as much as 100 months to 129. Do you understand that?
>
> DEFENDANT: Yes, sir.

Then, with regards to the plea bargain, the following dialogue between defendant and the trial judge occurred:

> COURT: I'm informed that the State has offered you a Class E plea and willing to stipulate to intermediate punishment.
>
> . . .
>
> COURT: It is your absolute right to say I understand that plea; I don't want that plea; I want my case tried by a jury. But I want you to understand, ma'am, if this jury convicts I have to send you to prison.
>
> DEFENDANT: And if I plea bargain I'll still be sentenced to prison.
>
> COURT: No. That's up to me. . . .
>
> MR. CORNWELL: May I clarify one thing for her, Your Honor, because she's still confused.

COURT: That's what I wanted to make sure, that she understood the plea arrangement.

COURT: If it's an intermediate level punishment which is what I understand they're offering you, if it's record level two the range involved is 23 months and 29 months minimum which translates into 37 to 44 maximum, but I have the discretion to impose probation, special probation which would include a split sentence, or an active sentence. I could do any one of those three things. Do you understand what I'm saying?

DEFENDANT: I understand what you're saying.

COURT: . . . Now it's your right to go forward with this jury trial if that's what you want to do. I simply want to make sure you understand what the plea offer is . . . . Do you understand what I'm saying?

DEFENDANT: I understand.

COURT: Do you understand you have an absolute right to go forward?

DEFENDANT: I'm going to try it.

. . .

MR. CORNWELL: Your Honor, I would like the record to reflect she is doing so against my advice.

. . .

DEFENDANT: . . . I'd really just rather take my chances . . . .

. . .

DEFENDANT: I'd rather go to try this.

The record clearly reflects that defendant was carefully advised by the trial judge of both her possible sentence and the plea bargain. Any alleged deficiency that defense counsel may have had in explaining either was corrected by the trial judge's clear, deliberate steps to explain the sentence and plea to defendant. Based on the trial judge's explanation, defendant made an educated and informed decision to proceed (against the advice of defense counsel) with the jury trial and to reject the State's offered plea bargain. Defendant cannot now object and claim that she was prejudiced, when she made the educated, informed decision to proceed on her own accord.

Furthermore, we have reviewed each of defendant's other allegations of defense counsel's alleged deficient actions, and we find that none of them present any prejudice to defendant's case or would affect the prior resolution of this matter. Additionally, the evidence of defendant's guilt is supported by the record. While defendant does bring forward on appeal evidence at trial that raises doubt as to defendant being the perpetrator of these offenses, the credibility and weight of that evidence was properly taken into account by the jury, which found defendant guilty.

Hence, after a review of the record, we do not find anything in defense counsel's performance which overcomes the strong presumption that his conduct fell within the wide range of reasonable professional assistance. Nevertheless, even assuming defense counsel committed errors at trial, those alleged errors were not so serious as to deprive defendant of a fair trial which result was reliable. Therefore, we hold that defendant was not denied effective assistance of counsel.

Having made that determination, we proceed to an analysis of defendant's specific assignments of error *sub judice*. First, we combine two of defendant's assignments of error as they are both based on the ineffective assistance of counsel claim. In her arguments, defendant contends that the trial court committed (1) prejudicial error by failing to declare a mistrial and/or a continuance, and (2) plain error by allowing her to be represented by an alleged inadequate, incompetent, ineffective counsel after the court observed defense counsel's performance at trial. As we have held *supra*, defendant's claim of ineffective assistance of counsel has failed, and defense counsel did not prejudice the outcome of the trial. Therefore, defendant's arguments are moot and we need not address them here. Thus, we overrule these assignments of error and hold that the trial court committed no error.

[3] Defendant next assigns error and argues that the trial court committed prejudicial error by taking an active role in the representation of defendant. Again, we disagree with defendant's contentions and reject this assignment of error.

In her brief, defendant sets out approximately eleven instances in which the trial court allegedly committed error by taking an active role in assisting defense counsel, prejudicing defendant in the eyes of the jury, and failing to set aside the verdict or declare a mistrial or continuance. Chief among defendant's claims are instances where the

trial judge allegedly (1) reminded defense counsel to renew his motion to dismiss, (2) asked witnesses questions, (3) independently inquired of defendant whether she wanted to publish pictures to the jury, (4) explained the charges, sentencing, and plea bargain to both defendant and defense counsel, (5) interfered in the presentation of defendant's witnesses, in particular Mrs. Lilly, which misled defense counsel into believing the he was prevented from allowing her to testify, (6) explained "leading questions," "limiting instructions," and "cross-examination" to defense counsel in the presence of the jury, and (7) failed to set aside the verdict or declare a mistrial or continuance after having observed the alleged deficient performance of defense counsel.

A trial judge has the "inherent authority to control the court proceedings and to assist the jury in hearing and comprehending the evidence." *State v. Harrill*, 35 N.C. App. 222, 225, 241 S.E.2d 94, 97 (1978). With this authority comes, "the duty of the trial court to supervise and control the course of the trial, including the examination and cross-examination of witnesses, so as to insure justice for all parties." *State v. Agnew*, 294 N.C. 382, 395, 241 S.E.2d 684, 692 (1978). Furthermore, a trial judge has the additional duty to question a witness to clarify the witness's testimony or to elicit neglected pertinent facts. *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999).

Most important for our purposes here, "the remarks of a judge during the trial will not entitle a defendant to a new trial unless the defendant can establish prejudice arising therefrom; a bare possibility that they were prejudicial is insufficient." *Harrill*, 35 N.C. App. at 225, 241 S.E.2d at 97.

We reiterate that after reviewing each of defendant's claims, we find no prejudice nor any likelihood that the result of the trial would have been any different absent these alleged errors. Here, defendant has failed to show how any of the trial judge's comments or actions prejudiced defendant before the jury. Furthermore, the trial judge's inquiry of Mrs. Lilly prior to testifying was not prejudicial. The hearing with Mrs. Lilly was done outside the presence of the jury and was for the express purpose of advising her of her Fifth Amendment right against self-incrimination. Nevertheless, this hearing served to protect the rights and interests of the witness, and was clearly within the trial judge's authority to supervise and control the trial pursuant to *Harrill*, *Agnew* and *Fleming*. Additionally, defendant's argument is rendered moot as Mrs. Lilly did in fact testify later in the trial.

All of the trial court's actions *sub judice* were undertaken to protect defendant's rights and to ensure that she received a fair trial. In those instances in which defense counsel's performance was arguably lacking, the trial court ensured that defendant's case was not prejudiced. For example, the trial court on the record informed defendant of her possible sentencing, her plea bargain, and asked her directly whether she wished to proceed to trial with the case or to take the plea bargain. At bar, defendant has failed to show any prejudice or that the ultimate resolution was not a fair trial whose result was reliable. Thus, we find no error.

[4] Finally, we consider defendant's last assignment of error: whether this Court committed prejudicial error by allowing defendant to be represented by defense counsel after our decision in an unpublished opinion involving the same attorney, which allegedly informed this Court and the trial court of defense counsel's inability to represent a criminal defendant. We dismiss defendant's assignment of error.

Defendant's only authority for this assignment of error is an aforementioned unpublished opinion. This Court declines to consider unpublished opinions cited by a party. *Harris v. Duke Power Co.*, 83 N.C. App. 195, 199, 349 S.E.2d 394, 397 (1986). Hence, we remind counsel of our North Carolina Appellate Rules, specifically N.C.R. App. P. 30(e), which prohibit the citation of unpublished opinions and use thereof as precedent. *Long v. Harris*, 137 N.C. App. 461, 470-71, 528 S.E.2d 633, 638-39 (2000). For this reason, defendant's assignment of error is dismissed.

Thus, after reviewing the record in this case, we hold that it is not reasonably probable that the jury would have reached a different result had none of the alleged errors of counsel occurred. Therefore, defendant was not denied effective assistance of counsel, and she received a fair trial free from prejudicial error. Moreover, the trial court did not commit error in assisting defense counsel and defendant below.

No error.

Judges LEWIS and WYNN concur.

ERIE INSURANCE EXCHANGE, PLAINTIFF v. SONDRA ADAMS BLEDSOE, DEFENDANT

No. COA99-1392

(Filed 29 December 2000)

Insurance— homeowner's—coverage—instructions—proximate concurrent cause

The trial court erred by not giving a requested special jury instruction on proximate concurrent cause in a declaratory judgment action to determine coverage under a homeowner's insurance policy where a fire occurred at defendant's home; the contractor renovating the home placed about three and a half tons of sheet rock on the living room floor for an extended period; defendant alleges that the floor and foundation were damaged by the fire, water damage, and the contractor's actions; and plaintiff contends that the damage to the floor was the result of settling due to inadequate original construction, an event excluded by the policy. The policy excludes settling, but coverage will not be barred by the settling provision if the settling is so severe as to constitute a collapse. The policy here is ambiguous because it provides coverage for "collapse" under certain circumstances but does not make clear whether coverage is allowed if one of the listed factors combines with another covered peril under a different provision of the policy (fire and water damage) to cause the collapse. The dominant or efficient cause jury instruction given by the court was not improper, but was incomplete and unclear because the jury was not allowed to consider whether multiple factors combined to cause this damage. Defendant's request for a proximate concurrent cause instruction, though flawed, was correct and supported by the evidence.

Appeal by defendant from a judgment and order entered 1 October 1998 and 25 November 1998 respectively by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 20 September 2000.

Cranfill, Sumner & Hartzog, L.L.P., by Robert W. Sumner and Stephanie Hutchins Autry, for plaintiff-appellee.

G. Henry Temple, Jr. and Stephen W. Petersen, for defendant-appellant.

HUNTER, Judge.

Sondra Adams Bledsoe ("Bledsoe") appeals from the trial court's declaratory judgment after a jury verdict in favor of Erie Insurance Exchange ("Erie"), and its order denying Bledsoe's motion for judgment notwithstanding the verdict, or in the alternative a new trial. Bledsoe assigns as error the trial court's failure to give a special jury instruction regarding proximate concurrent causation in this homeowner's insurance coverage determination suit. After a careful review of the record and briefs, we agree with Bledsoe and find that the trial court erred in failing to give such an instruction, thus we remand for a new trial.

In May 1995, Bledsoe purchased a homeowner's insurance policy from Erie for her residence located in Rolesville, North Carolina. This policy provided coverage for damage to Bledsoe's home caused by certain perils including fire, water damage caused by fire suppression efforts (hereinafter "water damage"), and "collapse." On 13 November 1995, a fire occurred at Bledsoe's home, which resulted in significant damage to the residence. During post-fire repairs, the contractor renovating the home placed approximately three and a half tons of sheet rock on the residence's living room floor for an extended period. As a result of the fire, water damage, and the contractor's actions, Bledsoe alleges that the floor and foundation of the residence (hereinafter "floor") was damaged by "noticeable and substantial buckling and sagging."

While Erie paid Bledsoe for all of the damage to the residence which it believed was caused by the fire and water damage, Erie has refused to pay for the renovations to the floor claiming that the damage at issue was preexisting and the result of natural "settling"—an excluded event under the policy—that occurred over a long period of time due to the inadequate original construction of the home. Conversely, Bledsoe alleges that the buckling and sagging of the floor was a "collapse" caused by the combination of multiple factors, including fire, water damage, and the contractor's defective methods of renovation, in particular, the placement of three and a half tons of sheet rock on the residence's living room floor.

In an effort to resolve their dispute, Erie instituted this action on 22 November 1996 seeking a declaratory judgment concerning its obligations under the homeowner's insurance policy, specifically whether it was liable under the policy to provide coverage for the renovation of the floor and related costs. Subsequently, Bledsoe filed an

answer and counterclaims seeking punitive damages and alleging breach of contract, negligent infliction of emotional distress, and unfair trade practices.

On 28 July 1997, the Honorable Narley L. Cashwell of Wake County Superior Court entered an order, on Erie's motion, bifurcating Erie's declaratory judgment action from Bledsoe's counterclaims. This appeal arises out of the declaratory judgment phase of the litigation.

Erie's declaratory judgment action came on for trial before the Honorable Robert L. Farmer and a duly empaneled jury in Wake County Superior Court on 21 September 1998. Ultimately, two issues were submitted to the jury for resolution:

1. Were the deflections or displacements in the floors a result of the condition of the floor framing and/or the foundation caused by the fire or water to extinguish the fire on November 13, 1995?

2. Were the deflections or displacements in the floors after the fire on November 13, 1995 a collapse caused by the placement of sheetrock by the contractor, Bryant-Phillips Associates?

Judge Farmer instructed the jury based on a "dominant or efficient cause" standard. Specifically, he stated,

> When I use the word caused, the word caused means proximate cause to which the loss is to be attributed and is the dominant or efficient cause. In other words, something is caused by an event when the event is the real efficient or proximate cause.

The jury answered "[n]o" to both submitted issues.

Judge Farmer entered a declaratory judgment after the jury's determination on 1 October 1998, declaring that the damage to the floor was not a covered loss under Erie's policy with Bledsoe. On 12 October 1998, Bledsoe followed with a motion for judgment notwithstanding the verdict, or in the alternative a new trial. Judge Farmer denied the motion, and on 30 November 1998, Bledsoe gave notice of appeal.

Bledsoe's sole assignment of error on appeal is that the trial court committed reversible error by denying her request for a special jury instruction regarding proximate concurrent cause as to issue one—"[w]ere the deflections or displacements in the floors a result of the

condition of the floor framing and/or the foundation caused by the fire or water to extinguish the fire on November 13, 1995?" We agree with Bledsoe's contention that the trial court's failure to incorporate a proximate concurrent cause instruction was reversible error. We find that this error misled the jury, and ultimately precluded the jury from considering that multiple factors may have combined to cause the damage to the floor.

First, requests for special jury instructions are allowed in North Carolina pursuant to N.C. Gen. Stat. § 1-181 and N.C. Gen. Stat. § 1A-1, Rule 51(b). In particular, N.C. Gen. Stat. § 1-181(b) (1999) requires that "requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. . . ."

In the case at bar, Bledsoe complied with this statutory requirement by making her initial request for a special jury instruction prior to the trial court charging the jury. Bledsoe stated, "[t]he only thing I want is a proximate cause instruction and pattern that—pattern the jury instructions." Bledsoe then submitted two pattern proximate cause jury instructions—applicable to tort cases—to the court. As Erie fails to raise any statutory deficiency challenges to the form of Bledsoe's request, we treat Bledsoe's initial prayer as a proper request for a special jury instruction.

Additionally, while we agree with Erie that the pattern instructions submitted by Bledsoe were not applicable to the case *sub judice*, Bledsoe's intent was to have a special jury instruction which patterned the models that she submitted. She was not requesting the actual pattern jury instructions themselves.

In answer to Bledsoe's request for a special instruction, Judge Farmer responded, "[t]hat's not the law I don't think," and he placed the request in the file. Judge Farmer did not include a proximate concurrent cause instruction in his charge.

After the jury charge was complete, Judge Farmer asked the parties, "if you have any additional matters you wish the Court to consider charging on or any corrections you feel should be made to the charge already given . . . ." In response, Bledsoe submitted a handwritten request adapting the pattern jury instructions to the case at bar. Upon this request, Judge Farmer did not give the proximate concurrent cause instruction, but he did place the request in the file. Erie contends that this request was not timely made, however, according to N.C. Gen. Stat. § 1-181(b), "the judge may, in his discretion, con-

sider such requests [for special instructions] regardless of the time they are made." Judge Farmer had the discretion to elicit and hear additional requests for special jury instructions, thus he did so here. We acknowledge that Bledsoe's requested instruction may have been flawed, however, her intent to have an instruction that incorporated proximate concurrent cause was clear.

Furthermore, our Supreme Court has held that

> when a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error.

Calhoun v. Highway Com., 208 N.C. 424, 426, 181 S.E. 271, 272 (1935). Therefore, to determine whether the trial court committed reversible error here, we must assess whether Bledsoe's request for a proximate concurrent cause jury instruction was correct in itself and supported by the evidence.

To make this determination, we must address the present state of the law of homeowners' insurance policies in North Carolina. "First, it is well settled in North Carolina that insurance policies are construed strictly against insurance companies and in favor of the insured." *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 546, 350 S.E.2d 66, 73 (1986); *Nationwide Mutual Ins. Co. v. Davis*, 118 N.C. App. 494, 500, 455 S.E.2d 892, 896 (1995).

Secondly, two primary principles with respect to determining coverage under homeowners' policies have been espoused in North Carolina:

> (1) ambiguous terms and standards of causation in exclusion provisions of homeowners policies must be strictly construed against the insurer, and (2) homeowners policies provide coverage for injuries so long as a non-excluded cause is either the sole or concurrent cause of the injury giving rise to liability. Stating the second principle in reverse, the sources of liability which are excluded from homeowners policy coverage must be the sole cause of the injury in order to exclude coverage under the policy.

State Capitol, 318 N.C. 534, 546, 350 S.E.2d 66, 73; *Nationwide*, 118 N.C. App. 494, 500, 455 S.E.2d 892, 896.

At bar, Erie's policy with Bledsoe provides coverage for damage by fire and water damage resulting from fire suppression efforts. Further, Erie's policy with Bledsoe also provides coverage for "collapse":

> 8. Collapse. We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:
>
> . . .
>
> f. use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

Importantly, this Court has previously deemed the term "collapse" as used in homeowners' policies ambiguous and has construed the ambiguity against the insurance company and in favor of the insured. *See Markham v. Nationwide Mut. Fire Ins.* Co., 125 N.C. App. 443, 453, 481 S.E.2d 349, 356 (1997); *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 512, 428 S.E.2d 238, 241 (1993); *Thomasson v. Grain Dealers Mut. Ins. Co.*, 103 N.C. App. 475, 476, 405 S.E.2d 808, 809 (1991). At bar, Erie's policy makes clear that coverage for "collapse" is allowed if, "caused only by one or more of the following . . . use of defective . . . methods in construction, remodeling or renovation . . . ." However, the policy does not make clear whether coverage for "collapse" is allowed if one of the listed factors—in this case, defective methods of renovation—combines with another covered peril under a different provision of the policy—fire and water damage—to cause a "collapse." Thus, we deem the term "collapse" as it appears in Erie's policy with Bledsoe ambiguous.

We recognize that Erie's policy with Bledsoe excludes liability for "settling" in two places. In Section I—Perils Insured Against, the policy states, "we do not insure loss: . . . (2) caused by: . . . (f) . . . (6) settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings . . . ." Also, in the "collapse" provision itself, it is stated, "[c]ollapse does not include settling, cracking, shrinking, bulging or expansion."

However, this Court has in the past held that coverage will not be barred by the "settling" provision in a homeowners' policy when there is evidence of "settling" which is so severe that it "suddenly and materially impair[s] the structure or integrity of [a] building," and therefore constitutes a "collapse." *Guyther*, 109 N.C. App. 506, 513, 428 S.E.2d 238, 242; *Markham*, 125 N.C. App. 443, 453, 481 S.E.2d 349, 356. Moreover, provisions, such as Erie's "settling" clauses, "which exclude liability of insurance companies are not favored" by this Court. *State Capitol*, 318 N.C. 534, 547, 350 S.E.2d 66, 73; *Nationwide*, 118 N.C. App. 494, 500, 455 S.E.2d 892, 896.

Hence, evoking principle one as stated in *State Capitol* above, we strictly construe all ambiguities against Erie and in favor of Bledsoe. We next repeat the second principle regarding homeowners' policy coverage stated in *State Capitol*, "the sources of liability which are excluded from homeowners policy coverage must be the sole cause of the injury in order to exclude coverage under the policy." 318 N.C. at 546, 350 S.E.2d at 73. Under this interpretation, "settling" must be the sole cause of the damage to Bledsoe's floors to be excluded under the policy.

Through issue one—"[w]ere the deflections or displacements in the floors a result of the condition of the floor framing and/or the foundation caused by the fire or water to extinguish the fire on November 13, 1995?"—the jury was only allowed to determine whether the fire and water damage (covered perils) resulted in the damage to the floor.

Through issue two—"[w]ere the deflections or displacements in the floors after the fire on November 13, 1995 a collapse caused by the placement of sheetrock by the contractor, Bryant-Phillips Associates?"—the jury was only allowed to consider whether the damage to the floor was a "collapse" caused by defective methods of renovation (covered peril).

We disagree with Erie's conclusion that the existence of issue two gave the jury an actual opportunity to consider multiple causes of the damage to the floor. With regards to this second issue, we accept that the jury answered that the damage to the floor was not a "collapse" caused by the contractor's placement of sheet rock. However, we find that the wording of issue two limited the scope of the jury's analysis, so that they could only consider one cause of the collapse, the sheet rock, and no other.

Consequently, while the jury was allowed to consider through these two submitted issues whether (1) the fire and water damage or (2) defective methods of renovation (all covered perils) individually caused the damage to the floor, at no time was the jury allowed to determine whether (1) the fire and water damage combined with (2) the contractor's defective methods of renovation to cause a "collapse," or in the alternative, "settling" so severe that it constitutes a "collapse" (covered peril). A question of that nature should have been sent to the jury for determination.

Accordingly, we find that there was sufficient evidence presented at trial to have submitted to the jury this issue of whether the damage was a result of natural "settling," as Erie contends, or the combination of (1) fire and water damage (covered perils) and (2) the contractor's defective methods of renovation (covered peril), which caused a "collapse," or in the alternative, "settling" so severe that it constitutes a "collapse" (covered peril)—a prospective issue three.

We find little guidance in the line of North Carolina cases that interpret insurance contracts' "windstorm" provisions, and we therefore find these cases distinguishable from the case at bar. *See Harrison v. Insurance Co.*, 11 N.C. App. 367, 181 S.E.2d 253 (1971); *Wood v. Insurance Co.*, 245 N.C. 383, 96 S.E.2d 28 (1957); *Miller v. Insurance Association*, 198 N.C. 572, 152 S.E. 684 (1930).

All three cases mentioned above address insurance policies which provide "windstorm" coverage. Although these cases do rightfully uphold a "dominant or efficient cause" standard, they are distinguishable in this instance. For example, unlike the case at bar, these cases do not deal with coverage under the "collapse" provision of a homeowner's policy. Secondly, "windstorm" has not been deemed ambiguous by this Court, while "collapse" has been so deemed. These cases therefore are not applicable to the case *sub judice*.

More directly on point, this Court has on at least three occasions specifically dealt with "collapse" provisions under homeowners' insurance policies. *See Markham*, 125 N.C. App. 443, 481 S.E.2d 349; *Guyther*, 109 N.C. App. 506, 428 S.E.2d 238; *Thomasson*, 103 N.C. App. 475, 405 S.E.2d 808. In each case, we deemed "collapse" ambiguous. *Id.* In two of these cases, we specifically dealt with the "settling" exclusion provision. *Markham*, 125 N.C. App. 443, 481 S.E.2d 349; *Guyther*, 109 N.C. App. 506, 428 S.E.2d 238. Finally, in both cases, we

refused to bar coverage for "collapse" under the "settling" provision as there was sufficient evidence that the "settling" was so severe that it could constitute a "collapse." *Id.* Thus, our holding at bar is entirely consistent with our prior rendered decisions interpreting "collapse" and "settling" provisions of homeowners' insurance policies.

We reiterate that our holding here is based on the ambiguity of the term "collapse" as it appears in Erie's policy with Bledsoe. Further, we stress that our holding is not premised on the notion that the "dominant or efficient cause" jury instruction used *sub judice* was improper, but, in fact, we find that the court's instruction was simply incomplete and unclear. Without a proximate concurrent cause clarification here, we find that the jury was not fully instructed in the law as they were not allowed to consider whether multiple factors combined to cause the damage at issue.

> Nevertheless, when, as here, the facts and circumstances surrounding a claim—especially causation—remain in dispute, it is for the jury, not the trial court, to determine whether the ultimate cause of the claimed damages falls within the scope of the policy's exclusionary provisions, as defined by the trial court.

Markham, 125 N.C. App. 443, 453, 481 S.E.2d 349, 355.

Thus, Bledsoe's request for a proximate concurrent cause jury instruction, although flawed, was correct in itself and supported by the evidence. Consequently, the trial court's failure to include a charge incorporating a proximate concurrent cause instruction in substance was reversible error. We hereby remand for a new trial consistent with this opinion.

New trial.

Judges LEWIS and WYNN concur.

STEVE CANTRELL AND DEBORAH CANTRELL, PLAINTIFFS V.
TAMMY WISHON, DEFENDANT

No. COA99-1477

(Filed 29 December 2000)

Child Support, Custody, and Visitation— custody—action between natural mother and uncle and aunt—findings

In a child custody action between the natural mother and a paternal aunt and uncle in which the mother was awarded custody, the trial court erred by failing to consider the long-term relationship between the mother and her children; failing to make findings on the effect, if any, of the document that the mother signed relinquishing custody of her children to the paternal aunt and uncle; and failing to make findings on the mother's role in building the relationship between her children and the aunt and uncle. The court's findings are not detailed enough to determine whether they are supported by competent evidence, the court specifically refused to hear evidence on the mother's past conduct, and the court explicitly found that *Price v. Howard*, 346 N.C. 68, was a narrow exception to *Peterson v. Rogers*, 337 N.C. 397. The case was remanded for findings on whether the mother acted inconsistently with her constitutionally protected status and, if so, for application of the "best interests of the child" test to determine which party should have custody.

Appeal by plaintiffs from order entered 28 April 1999 by Judge Robert S. Cilley in District Court, Polk County. Heard in the Court of Appeals 17 August 2000.

Jackson & Jackson, by Phillip T. Jackson, for plaintiffs-appellants.

No brief filed for defendant-appellee.

WYNN, Judge.

This appeal challenges our Supreme Court's holding that a parent may lose the constitutionally protected right to child custody if the parent's conduct is inconsistent with the parental presumption of acting in the best interests of the child. *See Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997); *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). Because we hold that the trial court failed to make find-

ings as to whether the mother in this case acted inconsistently with her constitutionally protected status as a parent, we remand this matter to the trial court.

The parent in this case is the mother of two minor children. The children's father died in 1996 in a truck accident when one child was one year old and the other was unborn. The nonparents in this case are the paternal aunt and uncle of the children—Steve Cantrell and his wife, Deborah Cantrell.

The record shows the following facts: Before the father's death, the father, mother and their older child lived with the Cantrells. After his death, the mother gave birth to the second child and lived with the children's paternal grandparents until December 1996, at which time she moved back in with the Cantrells. While residing with the Cantrells, the mother signed a document stating that she wanted them to act as her children's parents "in all matters pertaining to there [sic] welfare." Thereafter, on 18 May 1997, she checked herself into an inpatient drug rehabilitation program where she stayed until 15 June 1997.

When the mother returned to the Cantrells' home on about 15 June, she stayed for one week. During that time, she avoided her children. Afterwards, she voluntarily moved out again, leaving her children with the Cantrells. The Cantrells cared for the children for the next five months, during which time the mother visited them infrequently. The mother returned to the Cantrells' home in November 1997 for another one week stay, then again voluntarily left.

In January 1998, the Cantrells filed a motion for custody of the children. That day, the trial court granted them temporary custody. One week later, the trial court ordered that the younger child remain with the Cantrells, but that the mother receive temporary custody of the older child. The mother filed a motion seeking visitation with the younger child, which was granted by the trial court on 22 September 1998. Between 14 January and 14 April 1999, the trial court heard evidence on the issue of permanent custody of the children. On 28 April 1999, the trial court awarded permanent custody of both children to the mother. The Cantrells appealed to this Court.

The Cantrells argue that the trial court erred in failing to make findings of fact and give consideration to the evidence presented by them that the mother had acted inconsistently with her constitutionally protected status of a parent. We agree.

The trial court made nine findings of fact, only one of which had any bearing on the mother's fitness as a parent. The trial court found:

> That the [mother] is a fit and proper person to have the permanent custody, care, and control of the aforenamed minor children and has neither abused said children nor neglected their welfare, and as the natural mother has a constitutionally protected paramount right to the custody, care, and control of the aforenamed minor children.

Thereafter, the trial court concluded:

> That the [mother] has a constitutionally protected paramount right to custody, care, and control of her natural children, which are the subject of this action.

In a child custody case, the trial court's findings of fact are binding on this Court if they are supported by competent evidence, and its conclusions of law must be supported by its findings of fact. *See Sain v. Sain*, 134 N.C. App. 460, 464, 517 S.E.2d 921, 925 (1999). However, the findings of fact and conclusions of law must be sufficient for this Court to determine whether the judgment is adequately supported by competent evidence. *See Buckingham v. Buckingham*, 134 N.C. App. 82, 88-89, 516 S.E.2d 869, 874 (1999). And the findings and conclusions of the trial court must comport with our case law regarding child custody matters.

In *Petersen v. Rogers*, *supra*, our Supreme Court recognized that parents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child. *Accord Bivens v. Cottle*, 120 N.C. App. 467, 462 S.E.2d 829 (1995), *appeal dismissed*, 346 N.C. 270, 485 S.E.2d 296 (1997). After *Petersen*, our Supreme Court in *Price v. Howard*, *supra*, held that the "protection of the parent's interest is not absolute" and " 'the rights of the parents are a counterpart of the responsibilities they have assumed.' " *Price*, 346 N.C. at 76, 484 S.E.2d at 533 (quoting *Lehr v. Robertson*, 463 U.S. 248, 257, 77 L. Ed. 2d 614, 624 (1983)). The Court reasoned that a parent's right to child custody is also based on the presumption that the parent will act in the best interests of the child. *See Price*, 346 N.C. at 79, 484 S.E.2d at 534. Thus, the Court held that a parent may lose the constitutionally protected paramount right to child custody if the parent's conduct is inconsistent with this presumption or if the parent fails to shoulder the responsibilities that are attendant to rearing a child. *See id.* If a parent does indeed act inconsistently with the protected status, a court should apply the "best

interests of the child" test in resolving a custody dispute between that parent and a nonparent. *See id.*

In *Price*, the Supreme Court pointed out the type of conduct that could result in the loss of a parent's protected status. For example, unfitness, neglect and abandonment may constitute conduct inconsistent with a parent's protected status. *See id.* Further, other types of conduct, viewed on a case-by-case basis, may also prove to be inconsistent with a parent's protected status. *See id.* at 79, 484 S.E.2d at 534-35. The Court in *Price* considered one type of conduct in particular which may show that a parent acted inconsistently with her protected status—voluntary abandonment of a child. A summary of that discussion is instructive in the case at bar.

In *Price*, the mother lived for a time with her child and the plaintiff, who erroneously thought he was the father of the child. After the parties in *Price* separated, the mother voluntarily gave custody of the child to the plaintiff, visiting her child only sporadically. In determining whether the mother acted inconsistently with her protected status, the Court considered a number of other issues: Whether her relinquishment of custody was intended to be temporary or permanent; whether her behavior had created the family unit that existed between the plaintiff and the child; and the degree of custodial, personal and financial contact between her and her child. *See id.* at 83-84, 484 S.E.2d at 537. Of particular significance to our decision in this case, our Supreme Court in *Price* did not limit consideration of the mother's relationship with the child to the recent past, but rather, it focused on her conduct over a number of years.

In the case at bar, we first note that the trial court's findings of fact are not detailed enough to determine whether they are supported by competent evidence. *See Buckingham*, *supra.* For instance, in determining that the mother was a fit and proper person to care for the children, the trial court failed to point to any evidence to support its finding.

But more compelling in this case, the trial court specifically refused to hear evidence on the mother's past conduct. Indeed, the record indicates that the trial court made the following statement:

> If you show her to have been evil, cannibalistic, demon worshipping in 1996 but it develops that she has graduated to a candidate for sainthood day, then the modern evidence is relevant and the old evidence is history.

This statement reveals that the trial court erroneously placed *no* emphasis on the mother's past behavior, however inconsistent with her rights and responsibilities as a parent.

Further, the trial court explicitly addressed the *Price* case and found that its holding was a narrow exception to the rules set forth in *Petersen*. We disagree. *Price* was not limited to the facts of that particular case, but rather, its broadened holding of *Petersen* applies to all child custody disputes. *See, e.g., Penland v. Harris*, 135 N.C. App. 359, 362, 520 S.E.2d 105, 107 (1999) (holding that *Price* requires a nonparent who seeks custody of a child to show that a parent acted inconsistently with her protected status).

In this case, the record shows that the trial court failed to consider the long-term relationship between the mother and her children; failed to make findings on the effect, if any, of the document that the mother signed relinquishing custody of her children to the Cantrells; and failed to make findings on the mother's role in building the relationship between her children and the Cantrells.

As in *Price*, we remand this case to the district court to make findings of fact on whether the mother acted inconsistently with her constitutionally protected status, and if so, to then apply the "best interests of the child" test to determine which party should have custody of the children.

Reversed and remanded.

Judges McGEE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. JACK CLAYTON SEXTON, JR.

No. COA99-1213

(Filed 29 December 2000)

Constitutional Law— right to assistance of counsel—denial based on prior waiver—violation

The trial court violated defendant's constitutional right to assistance of counsel in an action revoking defendant's probation and activating a ten-year prison sentence where defendant affirmatively requested the assistance of a public defender and the

trial court was aware of defendant's desire for assistance but denied the request based on defendant's prior waiver, because: (1) defendant carried his burden of showing a change in his desire for assigned counsel; and (2) the record reflects his request was for good cause.

Appeal by defendant from judgment entered 17 May 1999 by Judge Timothy S. Kincaid in Gaston County Superior Court. Heard in the Court of Appeals 18 September 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Diane Martin Pomper for the State.

Paul Pooley for defendant-appellant.

FULLER, Judge.

Defendant Jack Clayton Sexton, Jr. appeals the revocation of his probation and activation of a ten-year prison sentence. On 24 August 1995 defendant pled guilty to seven counts of Larceny by Employee. Defendant received a consolidated sentence of ten years imprisonment, suspended in exchange for three years supervised probation, community service, and restitution.

On 7 July 1998 a probation violation report was filed, alleging defendant failed to keep appointments with his probation officer and was in arrears in required payments. During his initial 17 August 1998 appearance in the matter, defendant signed Administrative Office of the Courts form AOC-CR-227, entitled "Waiver of Counsel," in which he affirmed that he "waiv[ed his] right to assigned counsel and that [he] . . . expressly waiv[ed] that right." Although the trial judge signed the form, he did not acknowledge whether defendant elected in open court to be tried "without assignment of counsel" or "without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel."

The hearing was called on 19 October 1998, and defendant, who was unrepresented, requested a continuance and appointment of counsel. The trial court denied both requests, finding defendant previously waived his right to an attorney. Upon finding defendant willfully violated the terms of his probation, the trial court extended defendant's term of probation by two years, and ordered defendant to perform additional community service in lieu of monetary payments.

On 22 April 1999 a second probation violation report was filed, alleging defendant's failure to inform of a change in residence, failure to keep appointments with his probation officer, and failure to perform community service. The matter was called to hearing on 17 May 1999. Defendant was advised of his right to counsel, but expressed a desire to proceed *pro se*. Defendant signed a Waiver of Counsel form, acknowledging he was fully advised of his right to counsel. At the hearing's conclusion, the trial court entered judgment revoking defendant's probation and activating defendant's ten-year sentence.

Defendant appeals, alleging: (1) the trial courts presiding over the October 1998 and May 1999 hearings violated defendant's right to assistance of counsel by requiring defendant proceed *pro se*; and (2) the trial court presiding over the October 1998 hearing erred in extending defendant's probation and the trial court presiding over the May 1999 hearing erred in revoking defendant's probation after the expiration of the period of probation.

As a preliminary matter, we note defendant's arguments pertaining to the October 1998 hearing and resulting order are not properly before this Court. Defendant failed to make objections at the hearing or file a timely notice of appeal in accordance with the Rules of Appellate Procedure. However, given the fundamental nature of a defendant's right to assistance of counsel, and the clear error in the trial court's denial of counsel upon defendant's request, we exercise our discretion to entertain defendant's arguments pursuant to a writ of certiorari. *See* N.C.R. App. P. 21(a)(1) (a " 'writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments [and orders] of trial tribunals when the right to prosecute an appeal has been lost. . . .' "); *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (quoting N.C.R. App. P. Rule 21(a)(1)). We do not pass judgment on the merits of the State's argument that defendant has no statutory right to appeal from an order modifying an ordinary term of probation.

A criminal defendant may "waive his [constitutional] right to be represented by counsel so long as he voluntarily and understandingly does so." *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999) (citing *State v. Clark*, 33 N.C. App. 628, 629, 235 S.E.2d 884, 886 (1977)). Once given, however, "a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant

makes known to the court that he desires to withdraw the waiver and have counsel assigned to him." *Id.* (citing *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540-41, *cert. denied*, 285 N.C. 595, 206 S.E.2d 866 (1974)); *see also, e.g., State v. Gamble*, 50 N.C. App. 658, 661, 274 S.E.2d 874, 876 (1981). The burden of establishing a change of desire for the assistance of counsel rests upon the defendant. *Hyatt*, 132 N.C. App. at 700, 513 S.E.2d at 93.

In the present case, we first note the trial judge's failure to complete the AOC form entitled "Waiver of Counsel." *See Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 493 n.4, 521 S.E.2d 117, 121 (1999) ("trial court ha[s] an affirmative obligation to be aware of and comply with all the provisions contained in the [AOC] forms."). Questions concerning the incomplete form's effect on the sufficiency of defendant's waiver aside, we find that defendant clearly requested withdrawal of his initial waiver and unequivocally expressed a desire to be assigned counsel.

The transcript of the 1998 hearing begins with a statement from the Assistant District Attorney that defendant "previously signed a waiver and . . . would request a Public Defender." In response to the trial court's question as to why he wished the assistance of a Public Defender, defendant responded, "I lost my job. Really, no excuse. I lost my job, and I don't have a lawyer. [The judge] told me to save the money for my lawyer the last time instead of getting a Public Defender. . . . Now, I'm sitting here fixing to face ten years over seven hundred dollars because I lost my job."

After hearing the Assistant District Attorney's recommendation that defendant's probation be revoked for various violations, the trial judge stated, "I'm not going to continue the matter. You signed this waiver before Judge Bridges and gave up your right to a lawyer. We'll proceed with the hearing."

In short, defendant affirmatively requested the assistance of a Public Defender. The trial court was aware of defendant's desire for assistance of counsel, but denied the request based on defendant's prior waiver. Defendant carried his burden of showing a change in his desire for assigned counsel, and the record reflects his request was for good cause. Thus, the trial court's denial of the request for assistance violated defendant's constitutional right to an attorney. In view of this conclusion, we need not address defendant's remaining arguments.

The 1 December 1998 order of the trial court extended defendant's term of probation in a proceeding in which defendant was denied his right to an attorney. We therefore reverse the trial court's 1 December 1998 order and remand the matter to the trial court for hearing. It necessarily follows that the trial court's 17 May 1999 order, in which the trial court revoked defendant's probation for violations occurring within the erroneously extended period, be vacated. However, we vacate the 17 May 1999 order without prejudice, authorizing the court below to take appropriate action if a probation violation should be found and properly adjudicated.

Reversed and remanded.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 29 DECEMBER 2000

ANDREWS v. ITT GRINNELL PIPING CO. No. 99-382	Ind. Comm. (254816)	Affirmed
AUSTIN v. CASWELL CTR. No. 99-1525	Ind. Comm. (TA-12771)	Reversed and remanded
BARRETT v. N.C. PSYCHOLOGY BD. No. 99-1598	Wake (96CVS10899)	Vacated and remanded
BROHMAL v. STOTT No. 00-620	Wake (88CVD11968)	Dismissed
BROWNE v. WINSTON-SALEM STATE UNIV. No. 99-1480	Forsyth (98CVS8024)	Affirmed
GREENE v. ABSORBA OSHKOSH No. 99-1414	Ind. Comm. (254230)	Affirmed
GRISWOLD v. GOMEZ No. 99-1631	Wake (99CVS822)	Affirmed
HILES v. WAL-MART STORES No. 99-1452	New Hanover (96CVS3489)	No error
IN RE BROWN No. 00-279	Iredell (98J32)	Affirmed
IN RE DAVIS No. 00-449	Hertford (94J22) (94J23)	Affirmed
IN RE HERBIN No. 00-754	Rockingham (98J37)	Affirmed
IN RE LEONARD No. 00-423	Cabarrus (98J118) (98J119)	Affirmed
IN RE WOMACK No. 00-466	Durham (97J166)	Affirmed
JAMES v. COMMUNICATION SERVS., INC. No. 99-1613	Ind. Comm. (741010)	Affirmed
JAY'S MOUNTAIN ESTATE LANDOWNER'S ASS'N v. SMITH No. 99-1352	Buncombe (96CVS5169)	Reversed and remanded

KANIPE v. FAULKNER NO. 99-1544	Wake (99CVS1860)	Vacated and remanded
KELLEY v. CITY OF DURHAM No. 99-1436	Durham (98CVS1240)	Reversed and remanded
LEXINGTON INS. CO. v. JOHN DOE 1 No. 00-36	Durham (99CVS00119)	Affirmed
McHAM v. N.C. MUT. LIFE INS. CO. No. 99-1458	Forsyth (98CVS2347)	Affirmed
McLAUGHLIN v. BLACK & DECKER No. 00-216	Ind. Comm. (453126)	Affirmed
MITCHELL v. TRANSWORLD SYS. INC. No. 99-1286	Cumberland (98CVS5839)	Dismissed
REECE v. ESTATE OF SWANN No. 99-1152	Catawba (98CVS1246)	Affirmed
ROBINSON v. BETHUNE No. 99-1607	Mecklenburg (96CVS11697)	Reversed and remanded
SCALES v. BURKE COUNTY BD. OF EDUC. No. 00-330	Burke (98CVS1002)	Appeal dismissed
SELBY v. FORNES No. 99-1514	Pamlico (99CVS234)	Affirmed
SHEEHAN v. PERRY M. ALEXANDER CONSTR. CO. No. 99-1620	Ind. Comm. (261808)	Vacated and remanded
STATE v. ARMSTRONG No. 99-1350	Duplin (98CRS9176) (98CRS9177) (98CRS9178)	No error in defendants' trial; remanded for resentencing
STATE v. ARRINGTON No. 00-624	Haywood (99CRS2119) (99CRS2120)	Affirmed
STATE v. BARRINGER No. 00-625	Mecklenburg (98CRS42794)	No error
STATE v. BOYD No. 99-1368	Durham (95CRS13585) (95CRS18886) (95CRS18887) (95CRS14674) (95CRS14675) (95CRS14676)	Vacated and remanded for resentencing

STATE v. BROWN No. 00-588	Durham (98CRS20099)	No error
STATE v. DAVIS No. 99-1487	Mecklenburg (98CRS8625) (98CRS8626) (98CRS8627)	No error in part and reversed and remanded in part
STATE v. DAVIS No. 00-300	Pitt (96CRS32704)	Affirmed
STATE v. GADDY No. 00-92	Montgomery (96CRS3506) (97CRS2384)	Remanded with instructions
STATE v. HAYES No. 00-493	Pender (99CRS1104)	No error
STATE v. HOLDEN No. 00-433	Wilson (94CRS1998)	Affirmed
STATE v. HOLLOWAY No. 00-227	Durham (99J252)	Appeal dismissed
STATE v. HOUGH No. 99-1235	Union (97CRS16623) (97CRS16624)	No error
STATE v. JENKINS No. 99-1491	Mecklenburg (98CRS16840)	No error
STATE v. JONES No. 00-206	Cumberland (97CRS48135)	No error
STATE v. LAWING No. 00-405	Cabarrus (99CRS15110) (99CRS18194)	No error
STATE v. McCOY No. 00-58	Guilford (96CRS22246) (95CRS78199)	No error
STATE v. McCOY No. 00-579	Wayne (98CRS20798) (98CRS20799) (99CRS6759)	No error
STATE v. McNEAL NO. 99-1535	Granville (98CRS4285) (98CRS4286) (98CRS4287) (98CRS4438) (98CRS4440)	Defendant received a fair trial, free from prejudicial error

STATE v. MEDLIN No. 99-1387	Moore (97CRS7105) (97CRS7107) (98CRS1431) (98CRS1432) (98CRS1433) (98CRS1434)	No error
STATE v. MONK No. 00-689	Cumberland (97CRS49864) (97CRS49865)	No error
STATE v. PERKINS No. 00-251	Rockingham (92CRS7023)	No error
STATE v. PRATT No. 99-1287	Guilford (98CRS1764) (98CRS1847) (98CRS1848) (98CRS1849) (98CRS23021)	No error
STATE v. REEVES No. 99-1340	Haywood (99CRS196) (99CRS198)	No error
STATE v. SHERROD No. 00-389	Wayne (98CRS002083) (98CRS002084) (98CRS11299)	No error
STATE v. STOKELEY No. 99-1399	New Hanover (98CRS12269) (98CRS12271)	No error
STATE v. SYKES No. 00-196	Wayne (98CRS16958)	No error
STATE v. TATE No. 00-424	Forsyth (98CRS46910)	No error
STATE v. TAYLOR No. 99-1124	Pitt (97CRS9957) (97CRS9958)	No prejudicial error
STATE v. WHITAKER No. 00-317	Pitt (98CRS16013) (98CRS16014) (98CRS16015) (99CRS5544) (99CRS5545)	Affirmed
STATE v. WHITE No. 99-1106	Avery (97CRS589)	No error

STATE v. WILDER No. 00-287	Durham (98CRS8759) (98CRS8760)	No error
STATE v. WOOTEN No. 00-454	Pitt (97CRS1739) (97CRS1741)	Affirmed
TURNER v. TURNER No. 99-1615	Union (99CVD242)	Dismissed
YOUNG v. PH GLATFELTER/ ECUSTA DIV. No. 99-1475	Ind. Comm. (004933)	Affirmed in part, remanded in part

STATE OF NORTH CAROLINA v. FREDERICK L. WASHINGTON

No. COA99-1249

(Filed 29 December 2000)

1. **Evidence— trajectory of bullet—cross-examination of lieutenant investigating scene of crime—not expert testimony—not opinion testimony**

The trial court did not abuse its discretion in a prosecution for first-degree murder, two counts of attempted first-degree murder, and felonious assault by refusing to allow defense counsel to cross-examine a lieutenant about the trajectory of a bullet fired from defendant's pistol because: (1) the lieutenant's answers were not admissible under N.C.G.S. § 8C-1, Rule 702 based on the fact that defendant did not attempt to qualify the lieutenant as an expert even though the trial court advised defendant that the opinion may be considered if defendant provided a better foundation for the witness's qualifications for giving such an opinion; (2) the lieutenant's answers were not admissible under N.C.G.S. § 8C-1, Rule 701 based on the fact that defendant did not show that the proffered opinion testimony was rationally based on the perception of the witness or that it would be helpful to a determination of the distance between defendant and the victims at the time of the shooting; and (3) the lieutenant did not observe the shooting but instead participated in the subsequent investigation, meaning the jury had precisely the same information as the witness.

2. **Witnesses— sequestration—no violation by witnesses traveling to and from court together**

The trial court did not abuse its discretion in a prosecution for first-degree murder, two counts of attempted first-degree murder, and felonious assault by allowing two of the victims to travel to and from court together while under a court order sequestering the State's witnesses, because: (1) it appears from the transcript that the order only precludes the two victims from being present while the other testifies; (2) defendant's written motion to sequester made no specific request to prevent such contact, nor did the trial court prevent such travel; (3) the trial court instructed the victim who had already testified not to discuss the case with the other victim who had yet to testify, and the testifying victim agreed; (4) defendant did not object to the trial

court's verbal instructions; and (5) defendant offered no proof that the witnesses violated the trial court's order or verbal instructions not to discuss the case.

3. Evidence— prior assaults on victim—admissible to show malice, premeditation, deliberation, intent or ill-will—lack of mistake

The trial court did not abuse its discretion in a prosecution for first-degree murder, two counts of attempted first-degree murder, and felonious assault by allowing the State to introduce evidence through a witness that defendant had choked the murdered victim on an earlier occasion, because: (1) a defendant's prior assaults on the victim, for whose murder defendant is presently being tried, are admissible for the purpose of showing malice, premeditation, deliberation, intent or ill-will; (2) the evidence was relevant to an issue other than defendant's character based on the fact that defendant contended he shot this victim by mistake; and (3) the evidence was not unfairly prejudicial under N.C.G.S. § 8C-1, Rule 403 when the trial court's procedure of conducting a voir dire examination of the witness to determine the substance of her testimony demonstrated the trial court conducted the balancing test under Rule 403.

4. Evidence— photograph of defendant taken shortly after arrest—relevant to theory of self-defense—corroboration—no improper prejudice

The trial court did not abuse its discretion in a prosecution for first-degree murder, two counts of attempted first-degree murder, and felonious assault by admitting a photograph of defendant taken shortly after his arrest even though defendant argues the photograph depicts him as being mean, because: (1) the photograph was relevant to defendant's theory of self-defense to demonstrate that defendant was neither injured or disheveled; (2) while defendant is unsmiling, he does not appear either threatening or evil; (3) the photograph was admissible to corroborate the testimony of a sergeant and a detective; and (4) defendant has failed to demonstrate any improper prejudice resulting from admission of the photograph.

5. Constitutional Law— double jeopardy—charged with attempted murder and felonious assault—no violation

Defendant's double jeopardy rights were not violated when the trial court submitted the charges of attempted murder and

felonious assault to the jury, because proof of a fact was necessary for each conviction that was not necessary for the other.

6. Constitutional Law— double jeopardy—attempted murder—felonious assault—more than one charge for same incident

Defendant's double jeopardy rights were not violated when the trial court charged both felonious assault and attempted murder as to each victim even though defendant contends these charges arose out of the same incident, because: (1) defendant has been charged with two separate and distinct offenses which happen to grow out of the particular facts of this case; and (2) a defendant may be charged with more than one offense based on a given course of conduct.

7. Homicide; Assault— attempted murder—felonious assault—motion to dismiss

The trial court did not err by denying defendant' motion to dismiss the felonious assault and attempted murder charges even though defendant contends both charges were predicated on the same evidence, because: (1) a defendant may be charged with more than one offense based on the same course of conduct; and (2) the record reveals that there was substantial evidence against defendant of every essential element of felonious assault and attempted murder.

8. Criminal Law— prosecutor's argument—defendant's failure to claim self-defense or accident prior to trial

The trial court did not err by failing to intervene ex mero motu during the State's closing argument using defendant's pretrial silence to show that defendant failed to claim self-defense or accident prior to trial, because: (1) defendant made numerous spontaneous statements to investigators acknowledging that he was in trouble prior to trial, and it would have been natural for defendant to have added that he shot two of the victims in self-defense and a third victim by accident; (2) defendant's pretrial silence was evidence of an inconsistent statement since defendant had the opportunity during his trial testimony to justify his failure to claim self-defense earlier; and (3) even though it was unclear at what point defendant was given his Miranda warnings, it was defendant's burden to establish when he was given Miranda warnings and he could have done so during his testimony or through cross-examination of various witnesses.

9. Constitutional Law— effective assistance of counsel—failure to object to portions of State's closing argument

A defendant was not deprived of his right to effective assistance of counsel in a prosecution for first-degree murder, two counts of attempted first-degree murder, and felonious assault based on defense counsel's failure to object to portions of the State's closing argument referencing defendant's failure to claim self-defense to investigators at the time of the offense, because: (1) there is no reasonable probability that defense counsel's failure to object affected the outcome of the trial; (2) the evidence of defendant's guilt was more than substantial; and (3) the State's evidence refuted defendant's testimony that he fired at two of the victims only after they charged at him.

10. Criminal Law— bailiff entered jury room during deliberations—court's failure to declare mistrial sua sponte not error

The trial court did not abuse its discretion in a prosecution for first-degree murder, two counts of attempted first-degree murder, and felonious assault by failing to declare a mistrial under N.C.G.S. § 15A-1061 sua sponte after a bailiff entered the jury room during deliberations, because: (1) when the intrusion by the bailiff became known by the trial court, the judge put the bailiff under oath and determined the bailiff had knocked on the door of the jury room without the authorization of the court to retrieve some magazines for defendant at the request of another bailiff, that the bailiff said nothing to the jurors and the jurors said nothing to him, and that the bailiff heard no deliberations and had no other contact with the jurors; and (2) neither the State nor defendant accepted the court's invitation to make further inquiry of the bailiff, and defendant did not then seek a mistrial.

Appeal by defendant from judgments entered 14 December 1998 by Judge Carl L. Tilghman in Carteret County Superior Court. Heard in the Court of Appeals 19 September 2000.

Michael F. Easley, Attorney General, by A. Danielle Marquis, Special Deputy Attorney General, for the State.

McCotter, McAfee & Ashton, PLLC, by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellant.

EDMUNDS, Judge.

Defendant appeals from his convictions for first-degree murder, two counts of attempted first-degree murder, and felonious assault. We find no error.

The State's evidence tended to show that Eugene Holiday (Holiday), a United States Marine Corps Sergeant, met Zesthima Reels (Reels) in November or December 1996. He visited Reels at her residence on eight to nine occasions prior to her death. Although Holiday testified that initially there were some romantic feelings between the two, the relationship turned platonic after he learned of Reels' age.

Holiday began receiving telephone calls at his home and office from an unidentified caller in July 1997, and on 16 July 1997, Holiday received a message that a man by the name of "Mr. Washington" called him at work. Holiday did not know anyone by this name. Reels telephoned Holiday on the same day and asked if he had been receiving calls from anyone. When Holiday responded that he had received a telephone call from a "Mr. Washington," Reels said that the man calling was "Pedro" (hereinafter defendant) and that "Pedro" had stolen her purse and taken Holiday's telephone number.

After this conversation, Holiday went to football practice, and upon returning to his barracks, he discovered that he had another message on his answering machine from an unidentified caller. Holiday called Reels and asked to speak with defendant. After some hesitation, Reels eventually put defendant on the telephone, and Holiday told him, "We need to go ahead and get together and talk. I don't understand why you are calling me . . . ." Defendant responded, "Sure, come on down." Holiday testified that defendant did not seem angry or upset; however, he thought that defendant suspected him of being involved with Reels and agreed to meet defendant because he wanted defendant to hear in person that his interest in Reels was not romantic.

Holiday approached Gregory Williams (Williams), another Marine Sergeant, and told him that "he was getting a phone call from [defendant] at work and [defendant was] leaving messages on his answering machine saying that he needed to stay away from his girlfriend." Williams agreed to accompany Holiday to see defendant. Neither Holiday nor Williams carried a weapon.

Upon entering Reels' residence, Holiday and defendant shook hands. Although defendant did not at first appear to be upset, an argument quickly ensued between the two men. Holiday testified that when Reels tried to leave the room during the argument, defendant grabbed her shirt and began choking her. Williams provided similar testimony, although he did not state that defendant choked Reels. Reels then attempted to call the police, and defendant pointed a gun at her head. Williams tried to push Holiday out of the residence, but Holiday feared that he would be shot if he turned his back to defendant. The argument between defendant and Holiday escalated. Defendant shot Holiday in the arm, and Holiday ran out of the residence. Williams testified that he then said, "What the f---?", at which point defendant shot him in the chest, shot Reels, then shot Williams again, hitting him in his arm and nose. Williams fell to the floor. He heard defendant call the police and state that he had just shot two people.

Holiday corroborated Williams by testifying that after he ran out of Reels' residence, he heard Williams say, "What the f---?" followed by three shots. He ran to a neighbor's residence and asked them to call the police. When he saw defendant open the door to Reels' residence, he ran to a local movie theater where he called the police himself.

Morehead City Police Officer Kelly Guthrie (Officer Guthrie) was the first to arrive at the scene. Holiday told her that he had been shot and that a friend who had also been shot was still in the residence. Officer Guthrie handcuffed defendant, who was cooperative. She secured the crime scene and observed that Reels had been fatally wounded. Officer Guthrie interviewed both Holiday and Williams at the hospital within hours of the shootings. Police Sergeant Donald Miller (Sergeant Miller) arrived at the scene shortly after Officer Guthrie. While transporting defendant to the Morehead City Police Department, defendant spontaneously told Sergeant Miller, "I have never been [in] this [much] trouble before but I guess I'm really in a lot of trouble now." Defendant repeated this statement three more times after he arrived at the police department. In addition, defendant inquired as to the extent of injuries suffered by the parties while in route to the police department and again inquired as to the extent of injuries two or three times at the police department. Sergeant Miller photographed defendant at the police department and testified that defendant did not have any physical injuries and that his clothing was not damaged. Detective Mike Arter (Detective Arter) also tes-

tified that defendant made the following spontaneous statements: (1) "I know I broke the law. You are not going to get any more trouble out of me;" and (2) "I have never been in trouble in my life, but I am certainly in a lot of trouble now." Both statements were made after defendant was taken to an interview room at the police department, and the second statement was repeated by defendant several times. In addition, Detective Arter testified as to the photograph Sergeant Miller took of defendant at the police department and confirmed that defendant did not have injuries and that his clothes were not torn.

Police Lieutenant Steve Sanders (Lieutenant Sanders) investigated the crime scene, where he found defendant's weapon in the front yard and four shell casings in Reels' residence. He interviewed Holiday on 17 July 1997 and Williams on 21 July 1997. Lieutenant Sanders testified that Williams' statement was substantially similar to his testimony in court. On cross-examination, the court sustained the State's objection to a hypothetical question posed by defendant regarding the trajectory of a bullet.

Dr. Paul Martinez, a medical examiner for Carteret County and an emergency room physician for Carteret General Hospital, was tendered as an expert in emergency room practice. He treated Williams shortly after the shooting and testified that he did not observe any gunshot residue on Williams' or Reels' entrance wounds. A blood alcohol test of both Williams and Reels revealed no presence of alcohol or drugs. Ronald Marrs, a special agent with the State Bureau of Investigation, was tendered as an expert in the field of firearms examination. He examined the weapon, four shell casings, and two bullets retrieved from the crime scene. He concluded that it took more than eleven and a half pounds for the pistol to fire and that the trigger had to be pulled separately for each firing. He further testified that the pistol would not leave gunshot residue at distances of four feet or greater and that no such residue was found on Williams' or Holiday's shirts. Jacqueline Washington, defendant's first cousin and a long-time friend of Reels, testified over objection that in January 1997 she witnessed defendant choking Reels. Paula Clearwater, a daycare center employee who worked with Reels, testified as to the victim's good character. Finally, the 911 audio tape was played for the jury.

Eight witnesses testified for defendant. Rosa Langdon, a friend and former guidance counselor of defendant, and Reverend Shadrach Hugh Barrow, III testified as to defendant's good character, reputa-

tion and veracity. Joseph Washington, Jr., defendant's first cousin and an officer with the Beaufort Police Department, and Martin Jones, a friend of defendant and a shift supervisor at the Carteret County Jail, testified as to defendant's appearance after the shootings. Martin Jones stated that defendant was quiet and that he cried when talking with his mother. Joseph Washington stated that defendant seemed "upset, sort of in a fog," remorseful and sincere. John Cole, an emergency medical technician with the Department of Emergency Medical Services for Morehead City, and Officer Guthrie, who was recalled by defendant, testified as to inconsistencies and contradictions in Williams' and Holiday's testimony. Specifically, John Cole stated that at the scene of the crime Williams told him that he fell to the floor after the first bullet hit him. Officer Guthrie similarly testified that when she interviewed Williams at the hospital, he told her that he fell after the first bullet hit his chest; in addition, he did not mention defendant choking the victim or pointing a gun to the victim's head. Officer Guthrie also stated that when she spoke with Holiday, he did not tell her anything about defendant choking the victim.

Finally, defendant testified in his own behalf. He stated that he began dating Reels in November 1996. On 4 July 1997, he accidently found Reels' scheduling book and saw Holiday's telephone number. He called Holiday the next morning but did not speak with him. He did not have any further contact with Holiday until 16 July 1997, when he overheard Reels having a telephone conversation with Holiday. At this time, Reels told defendant that Holiday wanted to speak with him and was going to call back in five minutes. When Holiday called, defendant told him, "I just wanted to know why you keep calling over here having someone to drop you off. You are giving [Reels] flowers when she kick you to the curb for me." Holiday responded, "I will be over there in 15 minutes."

Defendant testified that Holiday became aggressive as soon as he arrived at Reels' home, repeatedly telling defendant that he wanted to take him outside and beat him up. Defendant stated that he unholstered his gun because he feared Holiday and Williams, who were young and physically fit, while he had a bad back. Williams tried to persuade Holiday to leave, and Reels also tried to push Holiday and Williams out of her home. When Holiday and Williams charged him, he began firing. Holiday fell first, followed by Williams. Defendant looked over the counter and could not see Holiday. He felt something grab his arm, and accidentally shot Reels. Defendant then called the police.

Defendant was arrested on 16 July 1997 and indicted on 4 August 1997 for the first-degree murder of Reels and for felonious assaults on Williams and Holiday. On 2 February 1998, defendant was also indicted for attempted murder of Williams and Holiday. His trial began on 3 December 1998, and he was found guilty of all charges on 11 December 1998. Thereafter, judgments and commitments were entered, and judgment was arrested for the felonious assault charge of Holiday. Defendant appeals.

I.

[1] Defendant first assigns as error the trial court's refusal to allow defense counsel to cross-examine Lieutenant Sanders about the trajectory of a bullet fired from defendant's pistol. Rule 702 of the North Carolina Rules of Evidence controls the admissibility of expert testimony:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (1999). Testimony of a lay witness, on the other hand, "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (1999). A "trial court has wide discretion in determining whether expert testimony is admissible," and " 'may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Owen*, 133 N.C. App. 543, 549, 516 S.E.2d 159, 164 (citations omitted), *disc. review denied*, 351 N.C. 117, 540 S.E.2d 744 (1999). Similarly, whether a lay witness may testify as to an opinion is reviewed for abuse of discretion. *See State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988).

Lieutenant Sanders was neither tendered nor recognized as an expert during defendant's trial. Rather, he testified that he had been employed with the Morehead City Police Department for eighteen years, was currently serving as supervisor of the traffic division, and had assisted in the investigation of the present case. Our courts have previously found that it is not error to exclude a witnesses' testimony where the witness was not tendered as an expert. Specifically, in

State v. Shuford, 337 N.C. 641, 447 S.E.2d 742 (1994), our Supreme Court held that the trial court did not err in denying a murder defendant's request to have an ambulance driver give opinion testimony as to the distance from which the victim was shot unless he was qualified as an expert. Although the court indicated that it would allow the defendant to attempt to qualify the driver as an expert, the defendant declined. Accordingly, the court held:

> Defendant made no showing that the proffered opinion testimony was rationally based on the perception of the witness or that it would be helpful to a determination of the issue of the distance from which the victim was shot. In fact, as noted above, defense counsel candidly admitted to the court that he knew nothing about the witness' qualifications, except the witness' place of employment and that he signed the ambulance call report.
>
> At oral argument, defendant acknowledged that a layperson could provide this type of opinion testimony "if he was familiar with guns and gunshot wounds." Yet, no such information regarding the qualifications of the witness to provide this opinion testimony was presented to the trial court. Further, defendant declined an invitation by the trial court to locate the witness and obtain some information that would support his qualification to testify on this subject. . . . [D]efendant certainly had the opportunity to provide support for the witness testifying as a lay witness or as an expert. . . . Defendant has failed to demonstrate that the trial court abused its discretion by refusing to admit this testimony without some showing that the witness was qualified to testify, either as a lay witness or as an expert.

Id. at 649-50, 447 S.E.2d at 747.

Similarly, in the case at bar, defendant did not attempt to qualify Lieutenant Sanders as an expert, even though the court advised defendant in ruling on the State's objection that "[a]t this point I'm going to still sustain the objection. If you can lay a better foundation to this witness's qualifications for giving such an opinion I may reconsider it." Defendant made no further effort to qualify the witness. Accordingly, the testimony was not admissible under Rule 702.

As to defendant's argument that the investigator's answers were admissible under Rule 701, defendant did not show that the proffered opinion testimony was rationally based on the perception of the witness or that it would be helpful to a determination of the distance

between defendant and the victims at the time of the shooting. Lieutenant Sanders did not observe the shooting; instead he participated in the subsequent investigation. Defendant's questions sought an opinion about the path of a bullet premised upon: (1) a diagram that was not to scale; and (2) a resolution of conflicting testimony in defendant's favor. The jury had precisely the same information as did the witness. Any lay opinion by an investigator based upon such a problematic foundation would not have been helpful to a determination of a fact in issue. Accordingly, the trial court did not err in sustaining the State's objection.

II.

[2] Defendant next argues that the trial court erred in allowing Williams and Holiday to travel to and from court together while under a court order sequestering the State's witnesses. On 3 September 1998, defendant filed a motion "to sequester the witnesses for the State and allow them to come into the courtroom to testify as they are called to the witness stand." Although the order granting defendant's motion is not included in the record on appeal, both parties agree and the transcript reflects that the motion was granted. It appears from the transcript that the order only precludes Williams and Holiday from being present while the other testifies.

However, after Williams had testified but before Holiday was called as a witness, defendant became concerned that the two witnesses would have contact with each other before Holiday would testify. Defendant noted:

> Judge, the defense has a concern an order has been entered sequestering Gregory Williams and Jonathan Holiday. Greg Williams has testified. Have a weekend before us. I would ask that the court order Gregory Williams not to have any contact with Jonathan [Holiday].

After both witnesses stated that they traveled to court together that day, the court denied defendant's request, but instructed Williams:

> THE COURT: Is there any response to the sequestration by the defendant concerning sequestration order Mr. Williams, or excuse me, Sergeant Williams, I apologize, your testimony in that of Sergeant Holiday is subject to a sequestration order by the court which means that during the trial of this case neither of you are to discuss what your testimony would be with the other. Do you understand what that means?

A: Yes, sir.

THE COURT: So that on your way home this afternoon and throughout the weekend you are not to discuss the substance of your testimony here in court with Sergeant Holiday, and he is not to discuss what he will testify to with you. And probably the better practice is for neither of you to talk about this case at all during this weekend. You understand?

A: Yes, sir.

THE COURT: And will you comply with that order of the court?

A: Yes, sir.

The reason behind sequestration is two-fold. *See State v. Harrell*, 67 N.C. App. 57, 64, 312 S.E.2d 230, 236 (1984). Sequestration "acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses," and "it aids in detecting testimony that is less than candid." *Id.* (citing *Geders v. United States*, 425 U.S. 80, 47 L. Ed. 2d 592 (1976)). However,

> [t]he separation of witnesses . . . is not founded on the idea of keeping the witnesses from intercourse with each other. That would be a vain attempt. The expectation is not to prevent the fabrication of false stories, but by separate cross-examination to detect them.

State v. Jackson, 309 N.C. 26, 32, 305 S.E.2d 703, 709 (1983) (citation omitted).

Although defendant argues that Williams and Holiday disobeyed the court's order by traveling to and from court together, defendant's written motion to sequester made no specific request to prevent such contact. Nor did the court forbid such travel in granting defendant's motion or in its verbal instructions. Rather, the court instructed Williams, who had already testified, not to discuss the case with Holiday, who had yet to testify, and Williams agreed. The court's order and instructions were not an abuse of discretion. *See State v. Young*, 312 N.C. 669, 677, 325 S.E.2d 181, 186 (1985) (stating "[a] motion to sequester witnesses is addressed to the sound discretion of the trial judge and is not reviewable on appeal absent a showing of an abuse of discretion"). In addition, defendant did not object to the trial court's verbal instructions. *See State v. Carson*, 46 N.C. App. 99, 102, 264 S.E.2d 404, 406 (1980) (holding that defendant, by failing to object to the trial court's failure to sequester witnesses,

"waived his right to raise the propriety of the trial court's failure to order sequestration").

Moreover, defendant offered no proof that the witnesses violated the trial court's order or verbal instructions not to discuss the case. Instead, defendant alleges only general concerns, stating that the witnesses "in all likelihood were discussing the case" and that "it is foolhardy to believe that they did not discuss the case." We decline to speculate that the witnesses violated the court's order in the absence of any evidence to the contrary. Accordingly, this assignment of error is overruled.

III.

[3] Defendant also argues that the trial court erred by allowing the State to introduce evidence through Jacqueline Washington that defendant had choked the victim on an earlier occasion. In the alternative, defendant argues that even if this evidence were relevant, its probative value was substantially outweighed by the danger of unfair prejudice.

This issue is governed by Rule 404(b) of the North Carolina Rules of Evidence, which provides:

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

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). This rule 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). Moreover, this Court has consistently held "that a defendant's prior assaults on the victim, for whose murder defendant is presently being tried, are admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim." *State v. Alston*, 341 N.C. 198, 229, 461 S.E.2d 687, 703 (1995) (citations omitted); *see also State v. Gary*, 348 N.C. 510, 520, 501 S.E.2d 57, 64 (1998); *State*

v. Cox, 344 N.C. 184, 188, 472 S.E.2d 760, 762 (1996) (evidence of previous threats against victim also admissible); *State v. Kyle*, 333 N.C. 687, 697, 430 S.E.2d 412, 417 (1993).

In the case at bar, evidence of defendant's prior assault on the victim tended to establish not only malice, intent, premeditation and deliberation, all elements of first-degree murder, but more importantly, it tended to establish ill-will against the victim and lack of accident. Because defendant contended that he shot Reels by mistake, this evidence was relevant to an issue other than defendant's character.

Next, we must determine if this relevant evidence was unfairly prejudicial to defendant and inadmissible under Rule 403 of the North Carolina Rules of Evidence. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. § 8C-1, Rule 403 (1999). Our courts have previously held that "[n]ecessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree." *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). Moreover, "exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court." *Alston*, 341 N.C. at 229, 461 S.E.2d at 703 (citation omitted). Here, when defendant objected, the trial court excused the jury, conducted a *voir dire* examination of Jacqueline Washington to determine the substance of her testimony, and then considered arguments of counsel before overruling defendant and permitting the jury to hear the testimony. Although the trial court did not make a specific finding that the probative value of the evidence outweighed its prejudicial effect, the procedure that was followed demonstrated that the trial court conducted the balancing test under Rule 403. We cannot say that the trial court abused its discretion in admitting the evidence. Accordingly, this assignment of error is overruled.

IV.

[4] Defendant next contends that the court erred in admitting a photograph of him taken shortly after his arrest. The photograph was introduced during the testimony of Sergeant Miller and Detective

Arter, and the State thereafter moved to publish the photograph to the jury. Defendant objected, arguing that the photograph only illustrated his facial features and showed that he looked like a "mean kind of fellow." The court overruled defendant's objection, noting that the photograph demonstrated that defendant was neither injured or disheveled, which was relevant to his theory of self-defense discussed in his opening statement.

The admissibility of photographs is governed by Rule 403 of the North Carolina Rules of Evidence, and whether a photograph is more probative than prejudicial is a matter within the discretion of the trial court. *See State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Defendant argues that the photograph depicted him as "mean" and that as a result the jury may have been predisposed to discount his later testimony. However, we have examined the photograph in question and observe that, while defendant is unsmiling, he does not appear either threatening or evil. Moreover, the court allowed the introduction of defendant's photograph into evidence to corroborate the testimony of Sergeant Miller and Detective Arter. Defendant has failed to demonstrate any improper prejudice resulting from admission of the photograph. In light of the forecast of a self-defense argument, we hold that the trial court did not abuse its discretion in admitting the photograph taken of defendant at the police station. This assignment of error is overruled.

V.

[5] Defendant next raises several related assignments of error pertaining to the court's submission of two counts of attempted murder and two counts of felonious assault to the jury, contending that these charges as to both Williams and Holiday arose out of a single incident and are duplicative. Accordingly, defendant contends that his constitutional right to be free from double jeopardy has been violated, tainting the entire trial.

We first address defendant's contention that the offenses of attempted murder and felonious assault are duplicitous. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects against multiple punishments for the same offense. *See* U.S. Const. amend. V. The North Carolina Constitution provides similar protection. *See* N.C. Const. art. I, § 19. However, "double jeopardy does not occur unless the evidence required to support the two convictions is identical." *State v. Murray*, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984), *overruled on other grounds by State*

v. White, 322 N.C. 506, 369 S.E.2d 813 (1988). Where " 'proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.' " *State v. Fernandez*, 346 N.C. 1, 19, 484 S.E.2d 350, 361 (1997) (citation omitted).

Our Supreme Court recently analyzed the elements of both attempted murder and felonious assault and held that "[b]ecause assault with a deadly weapon with intent to kill requires proof of an element not required for attempted murder—use of a deadly weapon—it is not a lesser-included offense of attempted murder." *State v. Coble*, 351 N.C. 448, 453, 527 S.E.2d 45, 49 (2000) (citation omitted). Similarly, malice is an element of attempted murder but not of felonious assault with a deadly weapon with intent to kill. *See State v. Hall*, 59 N.C. App. 567, 297 S.E.2d 614 (1982). Because proof of a fact was necessary for each conviction that was not necessary for the other, defendant was charged with two separate and distinct offenses. Accordingly, he was not subjected to double jeopardy.

[6] Defendant next argues that charging both felonious assault and attempted murder as to each victim was error because these charges arose out of the same incident. Defendant cites *State v. Dilldine*, 22 N.C. App. 229, 206 S.E.2d 364 (1974), in which the defendant shot the victim three times in the front and twice in the back. The defendant was charged with one count of felonious assault with intent to kill for the three bullets in front and another count of felonious assault with intent to kill for the two bullets in back. This Court held that "[i]t was improper to have two bills of indictment and two offenses growing out of this one episode." *Id.* at 231, 206 S.E.2d at 366.

However, the Supreme Court later distinguished *Dilldine* in *State v. Ward*, 301 N.C. 469, 272 S.E.2d 84 (1980), noting that:

> Defendant's reliance on *Dilldine* is misplaced. There, the defendant was charged on two counts of the *same* offense, felonious assault with intent to kill, on the basis of what can only be characterized as one assault, or one continuous transaction. In the case at bar, defendant has been charged with two separate and distinct offenses which happen to grow out of the particular facts of this case. It is elementary that a defendant may be charged with more than one offense based on a given course of conduct.

Id. at 475-76, 272 S.E.2d at 88 (citation omitted). Likewise, in the case at bar, defendant was properly charged with two separate and dis-

tinct offenses as to each victim, felonious assault and attempted murder, even though the offenses both arose out of a single course of conduct.

[7] Defendant also makes the related argument that the trial court erred in denying his motion to dismiss the felonious assault and attempted murder charges, because both charges were predicated on the same evidence. However, as discussed above, a defendant may be charged with more than one offense based on the same course of conduct. Moreover,

> [i]n ruling upon defendants' motion to dismiss, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. The defendants' motion must be denied if the State has offered substantial evidence against defendant of every essential element of the crime charged. "Substantial evidence" is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The test of the sufficiency of evidence to withstand dismissal is the same whether the State's evidence is direct, circumstantial, or a combination of the two.

State v. Porter, 303 N.C. 680, 685-86, 281 S.E.2d 377, 381-82 (1981) (internal citations omitted). The record reveals that there was substantial evidence against defendant of every essential element of felonious assault and attempted murder. Therefore, these assignments of error are overruled.

VI.

[8] Defendant next argues that in the State's closing argument, the State improperly called the jury's attention to his failure to claim self-defense or accident prior to trial. Examples of the prosecutor's argument include the following:

> The defendant had the opportunity to sit in this courtroom all week, hear what all of the State's witnesses said, and then and only then, did he first reveal to you his version of what happened that night.
>
> But what did the defendant have to say that night? Did he ever say to the police: I didn't have a choice. I shot them in self-defense.
>
> When was the first time he said it? After he heard all of the State's evidence from that witness stand. So, let's compare statements

> with testimony, let's compare Mr. Washington's statement the night of the shooting and Mr. Williams and Holiday's statement the night of the shooting to the testimony in the courtroom. No self-defense that night. No they were rushing him and I know I broke the law. You won't have anymore trouble out of me. If it would have happened the way he says it happened, he would have been breaking the door down to tell somebody that he shot [Reels] accidently; that they were rushing him and it was self-defense.

Defendant did not object to these and other similar arguments made by the State. Accordingly,

> [t]he standard of review when a defendant fails to object at trial is whether the argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. " '[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' "

State v. Trull, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998) (citations omitted), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999); *see also State v. McNeil*, 350 N.C. 657, 684, 518 S.E.2d 486, 503 (1999) (noting that the argument must "stray[] so far from the bounds of propriety as to impede defendant's right to a fair trial" before a trial court will be required to intervene), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000); *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (stating that "defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair"), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). Moreover, "[a]rguments of counsel are left largely to the control and discretion of the trial judge, and counsel is allowed wide latitude in the argument of hotly contested cases." *Davis*, 349 N.C. at 22, 506 S.E.2d at 466-67 (citation omitted). "In determining whether [an argument] was grossly improper, we must examine the context in which it was given and the circumstances to which it refers." *Trull*, 349 N.C. at 451, 509 S.E.2d at 193 (citations omitted).

A defendant's exercise of his right to remain silent is guaranteed by Article I, Section 23 of the North Carolina Constitution and by the Fifth and Fourteenth Amendments to the Constitution of the United States. *See Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976).

Accordingly, we will analyze defendant's argument under both the Fifth and Fourteenth Amendments. We first address whether defendant's rights were violated by use of his pre-arrest silence for impeachment purposes.

A. Pre-Arrest Silence

In *Doyle*, the United States Supreme Court held that it is a violation of a defendant's right under the Due Process Clause to use his silence for impeachment purposes after he has been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Subsequent decisions by the Court, however, have placed limitations on *Doyle*. For instance, in *Jenkins v. Anderson*, 447 U.S. 231, 65 L. Ed. 2d 86 (1980), the Supreme Court held that the use of a defendant's pre-arrest silence to impeach his credibility on cross-examination does not violate the Fifth or Fourteenth Amendments.

In the present case, defendant acknowledges in his appellate brief that it is unclear when he was read his *Miranda* rights. There is no evidence that defendant had been read his *Miranda* rights at the time of his pre-arrest silence and inaction referred to by the State in closing arguments. Instead, it appears that defendant was arrested at the scene of the crime and then given *Miranda* warnings sometime later at the police station. Consequently, defendant's federal constitutional rights were not violated by the use of his pre-arrest silence regarding self-defense and accident.

However, the analysis does not end here. Indeed, in *Jenkins*, the Supreme Court stated:

> Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative.

Id. at 239, 65 L. Ed. 2d at 95 (citations omitted). Accordingly, we look to the North Carolina Supreme Court's opinion in *State v. Lane*, 301 N.C. 382, 271 S.E.2d 273 (1980) to analyze defendant's contention that his rights were violated by the use of any pre-arrest silence in accordance with the rules of evidence formulated by our jurisdiction. *See State v. Westbrooks*, 345 N.C. 43, 64, 478 S.E.2d 483, 496 (1996). In *Lane*, the Supreme Court stated:

"Prior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature. Even so, such prior inconsistent statements are admissible for the purpose of impeachment. . . .

'. . . [I]f the former statement fails to mention a material circumstance presently testified to, *which it would have been natural to mention in the prior statement*, the prior statement is sufficiently inconsistent.' "

Id. at 386, 271 S.E.2d at 276 (internal citation omitted).

In the present case, defendant made a number of spontaneous statements to investigators acknowledging that he was in trouble. It would have been natural for defendant to have added that he shot Williams and Holiday in self-defense and Reels by accident. Although defendant agrees with this analysis, he argues that it is not applicable to his case because the State never attempted to impeach him while he testified, but instead raised this issue for the first time in its closing argument when defendant could not explain. However, our Supreme Court has considered this particular issue and resolved it contrary to defendant's position. *See State v. Buckner*, 342 N.C. 198, 223, 464 S.E.2d 414, 428 (1995) (stating "we conclude that defendant's silence about Bivens' guilt, prior to taking the stand, was evidence of an inconsistent statement in this particular case; and it was not error for the prosecutor to make the arguments impeaching defendant's testimony at trial").

Although defendant argues that the State's argument amounted to a violation of constitutional magnitude, we do not agree. In light of *Lane*, *Buckner* and their progeny, there is no question that a defendant who takes the stand relinquishes some constitutional rights. Defendant had the opportunity during his trial testimony to justify his failure to claim self-defense earlier. We cannot hold the trial court's failure to intervene during the State's closing argument *ex mero motu* was grossly improper.

B. Post-Arrest Silence

As stated above, it is unclear at what point defendant was given *Miranda* warnings. "The burden of demonstrating error rests upon the appealing party." *State v. McGinnis*, 70 N.C. App. 421, 423-24, 320 S.E.2d 297, 300 (1984). Moreover, when a defendant does not exercise his right to remain silent after receiving *Miranda* warnings, he does

not rely on the implicit assurances embodied in the *Miranda* warnings and has not been induced to remain silent. *See State v. Mitchell*, 317 N.C. 661, 346 S.E.2d 458 (1986).

Here, defendant repeatedly made spontaneous statements which were inconsistent with statements he made at trial. Defendant had the burden of establishing when he was given *Miranda* warnings and could have done so during his testimony or through cross-examination of various State witnesses. He failed to meet his burden. Accordingly, defendant could be impeached during the State's closing arguments with inconsistent statements and silence prior to trial. This assignment of error is overruled.

VII.

[9] Defendant makes the related argument that his trial counsel's failure to object to those portions of the State's closing argument referencing defendant's failure to claim self-defense to investigators at the time of the offense deprived him of effective assistance of counsel. "A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970)). However, a defendant alleging ineffective assistance of counsel must meet a high standard. "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). Specifically, defendant must satisfy a two-part test in order to meet this burden:

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

Id. (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

Even if counsel was deficient, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's

errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citations omitted).

> This determination must be based on the totality of the evidence before the finder of fact. . . . [I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

Id. at 563, 324 S.E.2d at 248-49.

In the case at bar, our examination of the record convinces us that there is no reasonable probability that defense counsel's failure to object to comments made by the prosecuting attorney affected the outcome of the trial. The evidence of defendant's guilt was more than substantial. Although defendant argues that credibility was the central issue in the case, the State's evidence refuted defendant's testimony that he fired at Holiday and Williams only after they charged at him. An expert for the State Bureau of Investigation testified that while defendant's pistol would leave gunshot residue on an object located four feet or less away when fired, he found no residue on either Williams or Holiday. Defendant admitted on cross-examination that he never saw Holiday or Williams with a weapon. Finally, there was a back door in close proximity to where defendant was standing at the time of the shooting, through which he could have retreated if attacked. In light of this and other evidence of guilt, we are unable to hold that there was a reasonable probability that a different outcome would have followed an objection by defendant's trial counsel. This assignment of error is overruled.

VIII.

[10] Finally, defendant claims that the trial court erred by not declaring a mistrial *sua sponte* after a bailiff entered the jury room during deliberations.[1] Although defendant acknowledges in his appellate brief that the trial court examined the bailiff and determined that he had not communicated with the jury, defendant argues that despite these determinations the bailiff's actions "constituted an improper external influence on the jury" requiring the trial court to declare a mistrial.

1. Defendant also states in his appellate brief that the bailiff entered the jury room at another time during trial. However, whether the bailiff entered the jury room at this time is unclear from the transcript, and defendant did not make an objection.

This issue is controlled by section 15A-1061 of the North Carolina General Statutes, which states:

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

N.C. Gen. Stat. § 15A-1061 (1999). A motion for a mistrial lies within the discretion of the trial court. *See State v. Billups*, 301 N.C. 607, 272 S.E.2d 842 (1981). "Unless its rulings thereon are clearly erroneous or amount to a manifest abuse of discretion, they will not be disturbed." *State v. Sneeden*, 274 N.C. 498, 504, 164 S.E.2d 190, 195 (1968) (citations omitted). "This is so even when the basis of the motion for mistrial is misconduct affecting the jury." *State v. Gardner*, 322 N.C. 591, 593, 369 S.E.2d 593, 595 (1988); *see also State v. Shedd*, 274 N.C. 95, 161 S.E.2d 471 (1968). Appellate courts are deferential to the trial court's exercise of discretion in this area because a " 'trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor and make appropriate findings.' " *State v. Rutherford*, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919 (1984) (citation omitted).

"Misconduct must be determined by the facts and circumstances of each case . . . ." *Id.* " 'The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge.' " *Sneeden*, 274 N.C. at 504, 164 S.E.2d at 195 (quoting *Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E.2d 278, 279 (1915)).

> The great weight of authority sustains the rule that . . . a verdict will not be disturbed because of a conversation between a juror and a stranger when it does not appear that such conversation was prompted by a party, or that any injustice was done to the person complaining, and he is not shown to have been prejudiced thereby, and this is true of applications for new trial by the accused in a criminal case as well as of applications made in civil actions. . . . [A]nd if a trial is really fair and proper, it should not be set aside because of mere suspicion or appearance of irregularity which is shown to have done no actual injury. Generally

> speaking, neither the common law nor statutes contemplate as ground for a new trial a conversation between a juror and a third person unless it is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial. The matter is one resting largely within the discretion of the trial judge.

Id. (alteration in original) (citation omitted).

In the case at bar, there was no misconduct affecting the jury. Rather, the evidence showed that when the intrusion by the bailiff became known to the court, the trial judge put the bailiff under oath, determined that the bailiff had, without authorization of the court, knocked on the door of the jury room, that he did so because another bailiff had asked him to retrieve some magazines for defendant, that the bailiff said nothing to the jurors and the jurors said nothing to him, and that he heard no deliberations and had no other contact with the jurors. Neither the State nor defendant accepted the court's invitation to make further inquiry of the bailiff, and defendant did not then seek a mistrial. In light of this investigation and the circumstances surrounding the bailiff's entry, the trial court did not abuse its discretion in failing to declare a mistrial *sua sponte*. *See, e.g., Gardner*, 322 N.C. 591, 369 S.E.2d 593 (finding no error where trial court denied defendant's motion for a mistrial based upon a colloquy that took place between the bailiff and the jury foreman after the verdict was reached but before it was announced in open court); *Billups*, 301 N.C. 607, 272 S.E.2d 842 (finding that denial of defendant's motion for mistrial was proper where prosecuting witness entered the jury room during a recess at the conclusion of trial but prior to the charge of the court to use the bathroom and did not communicate with any of the jurors); *Sneeden*, 274 N.C. 498, 164 S.E.2d 190 (holding that trial court did not err in denying defendant's motion for mistrial where jury foreman asked bailiff how quickly a parole was possible, bailiff replied that it had nothing to do with the evidence, and bailiff reported the communication to the trial judge); *Shedd*, 274 N.C. 95, 161 S.E.2d 471 (finding no abuse of discretion in denying defendant's motion for mistrial where witness entered into a discussion with other witnesses and spectators regarding the incidents concerning the charges against defendants in the hearing of the jurors); *Rutherford*, 70 N.C. App. 674, 320 S.E.2d 916 (determining no abuse of discretion in denying defendant's motion for mistrial where juror had a conversation with plaintiff's witness during lunch recess

about whether juror correctly understood witness' testimony that he was retired from the military and whether they knew some of the same people). Accordingly, this assignment of error is overruled.

No error.

Judges GREENE and MARTIN concur.

STATE OF NORTH CAROLINA v. KENDALL JERMAINE BARNETT

No. COA99-1305

(Filed 29 December 2000)

1. Homicide— first-degree murder—sufficiency of evidence

The trial court did not err by denying a first-degree murder defendant's motions to dismiss and to set aside the verdict where defendant's statements place him at the store where the murder occurred on the morning of the murder, place defendant as having access to the victim during the moments after the victim was bludgeoned, and may be considered as tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate himself. Although defendant attacks the forensic evidence and the evidence of motive, his statements concerning his presence and the things he touched make a conclusive match on footprints or fingerprints unnecessary and the State presented evidence permitting the inference that defendant was in need of money.

2. Criminal Law— instructions—admissions

There was no plain error in a felony murder prosecution where the court charged the jury on admissions. Defendant's objection at trial was that the instruction was superfluous and he thereby waived appellate assertion that the charge violated his common law and constitutional rights. His statements were in the nature of an admission because they were incriminating in light of the other evidence presented, but, assuming the instruction was improper, it cannot be said that the jury likely would have returned a different result without the instruction because the court neither defined nor intimated what defendant's admissions

may have been and left to the jury's discretion the determination of which statements were admissions and the weight to be given those statements.

3. Evidence— defendant's drug use and prior crime—admissible as to motive

There was no plain error in a felony murder prosecution arising from the robbery of a store where the State was allowed to cross-examine defendant about a prior forgery conviction and about his drug and alcohol use. The State exceeded the permissible scope of inquiry into defendant's prior criminal conviction under N.C.G.S. § 8C-1, Rule 609(a) by eliciting details other than the name, time, and place of the crime and the punishment, but the evidence was admissible under Rule 404(b) to explain the chain of events leading to and the motive behind the crime (support of a drug habit). The fact that the forgery occurred several years before this crime goes to the weight of the evidence rather than its admissibility.

4. Criminal Law— prosecutor's closing argument—defendant as selfish

The trial court did not err by not intervening ex mero motu in a prosecutor's closing argument in a felony murder prosecution where the prosecutor argued that defendant was a selfish person who committed this crime for money to support his drug habit.

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

The short-form indictment used in a felony-murder prosecution complied with N.C.G.S. § 15-44 and did not violate defendant's constitutional rights.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant from judgment entered 2 December 1998 by Judge Jesse B. Caldwell, III in Gaston County Superior Court. Heard in the Court of Appeals 9 October 2000.

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

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

EAGLES, Chief Judge.

Defendant Kendall Jermaine Barnett was tried and found guilty of first-degree felony murder in Gaston County Superior Court on 2 December 1998. From a sentence imposing life imprisonment without parole, defendant appeals. After careful review, we conclude defendant received a fair trial free from prejudicial error.

The evidence presented at trial tended to show that shortly after 9:00 a.m. on 17 July 1996, customers of the Simply Amazing Grocery Store (store) in Gastonia, North Carolina found Max Hightower (victim), a store employee, dead behind the counter. At the time, the store cash register was emitting a beeping sound. Store owner Burgin Lindley (Lindley) testified that when someone improperly tries to open the cash register it emits a steady beep. Lindley further testified that when he arrived at the store shortly after the victim's body was discovered, approximately sixteen to twenty-four dollars in cash was missing from under the counter.

Gastonia Police Officers arrived at the store at approximately 9:30 a.m. While conducting their investigation, the police found a shoe impression in the blood on the floor around the victim's body. The police also found a bloody shoe impression on the white T-shirt the victim was wearing in his lower abdomen area. A State Bureau of Investigation (SBI) expert later compared photographs of these footprints with shoes owned by defendant. The SBI expert was unable to make a conclusive identification by comparison to defendant's shoes, but found defendant's shoes consistent with the bloody footprints. Although there was no indication that defendant's shoes had been washed, they did not test positive for blood residue. An SBI expert testified that blood may be removed from "wear surfaces of the soles . . . in a short time by walking." In addition, he testified that walking in the rain would probably be sufficient to remove blood from the soles of shoes. Moreover, the SBI examined shoes taken from another suspect the Gastonia police initially considered, and were able to eliminate the shoes as having left the prints in the blood at the store.

Police obtained several latent fingerprints from the store, including from the store counter, the register and boxes around the counter. No identifications could be made with these prints.

Outside the store police found a large wooden stick with blood, hair, and tissue on the end. Lindley testified that the stick the police

found outside the store was for his dog to play with and was normally kept on top of a drink machine in the store. Lindley further testified that the stick was actually more like a "club," big around at the top and "tapered down a little bit." SBI forensics experts later determined that a DNA sample taken from the stick was consistent with the victim's DNA. The pathologist who performed the autopsy on the victim testified that the victim died as a result of an extensive brain injury secondary to multiple blows to the skull. He further testified that death would have resulted within minutes after the wounds were inflicted.

There was testimony that a number of individuals were seen near the store on the morning of the murder. Although the Gastonia police initially considered some of these individuals in connection with the murder, they focused on defendant at the end of July. On 15 August 1996, while defendant was in police custody on another matter, he made a statement to Detective Larry Hardin regarding the murder. Prior to making his statement, defendant was orally advised of, and in writing waived, his *Miranda* rights. Defendant initially denied any involvement with the murder and denied being in the store that day. Detective Hardin then told defendant that the shoes he was wearing had the same sole pattern as the pattern found in the store in the victim's blood. At this point, defendant admitted to having been in the store that morning, but again denied any involvement in the murder. According to defendant, when he went into the store on the morning of 17 July 1996, he saw the victim lying behind the counter still breathing. Defendant walked around the counter to the victim to see if he was alright. Defendant stated that the victim moved his hand, which startled him, causing defendant to "push off" the victim with his foot. Defendant then backed out of the area behind the counter. As he backed away from the victim, defendant hit the cash register, causing some keys to drop. Defendant caught the keys, placed them on the counter and continued to back out from behind the counter. In the process, defendant bumped into a cigarette display, grabbed a pack of the cigarettes and continued toward the door of the store. Defendant then stated that he stepped on a bloody stick lying on the floor, which he picked up and threw on the grass outside the store as he ran outside.

At trial, defendant testified that he did not contact the police after leaving the store because he "didn't want to be mixed up in it." In addition, defendant testified that he initially told the police that he had not been at the store on the morning of 17 July 1996, because he

"didn't want to have anything to do with it," and because there was an outstanding arrest warrant for him.

[1] On appeal defendant first argues that the trial court erred in denying his motions to dismiss and set aside the verdict. Defendant contends that the State presented insufficient evidence to sustain his conviction for first-degree felony murder. To support his contention, defendant argues that there is a lack of direct evidence in the form of eyewitnesses and physical evidence, and no proof of motive. We are not persuaded.

To convict a defendant of murder, the State must " 'offer evidence from which it can be reasonably inferred that the deceased died by virtue of a criminal act and that the act was committed by the defendant.' " *State v. Lambert*, 341 N.C. 36, 42, 460 S.E.2d 123, 126 (1995) (quoting *State v. Furr*, 292 N.C. 711, 718, 235 S.E.2d 193, 198, *cert denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977)); *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Here it is undisputed that the victim died by virtue of a criminal act. The issue here is whether the State presented sufficient evidence tending to show that it was defendant who committed the criminal act.

It is well settled in this State that a conviction on evidence which merely gives rise to suspicion or conjecture that it was the defendant who committed the crime will not stand. *State v. Sokolowski*, 351 N.C. 137, 143, 522 S.E.2d 65, 69 (1999); *Lambert*, 341 N.C. at 42, 460 S.E.2d at 127. However, it is equally clear that if there is substantial evidence, whether it is direct, circumstantial, or both, that it was the defendant who committed the crime, a motion to dismiss must be denied. *Lambert*, 341 N.C. at 42, 460 S.E.2d at 127. Our Supreme Court has described "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980); *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981). When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from that evidence. *Lambert*, 341 N.C. at 42, 460 S.E.2d at 127; *State v. Stone*, 323 N.C. 447, 451-52, 373 S.E.2d 430, 433 (1988). "Contradictions and discrepancies must be resolved in favor of the State," *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984), and the trial court is not to consider defendant's evidence rebutting the inference of guilt "except to the extent that it explains, clarifies or is not inconsistent with the

State's evidence . . . ." *State v. Walker*, 332 N.C. 520, 530, 422 S.E.2d 716, 722 (1992). Thus, the evidence need only give rise to a reasonable inference of guilt for the case to be properly submitted to the jury. Here, we conclude that when viewed in the light most favorable to the State, substantial evidence of first-degree murder was presented to sustain defendant's conviction.

Defendant relies heavily on *State v. Bell*, 65 N.C. App. 234, 309 S.E.2d 464 (1983), *aff'd per curium*, 311 N.C. 299, 316 S.E.2d 72 (1984) to support the argument that there was insufficient evidence to show that he committed the crime charged. In *Bell*, the defendant was convicted of second-degree murder. We held that the evidence, when taken in the light most favorable to the State, at most showed that the defendant had a non-exclusive opportunity to kill the victim, and that standing alone was insufficient to survive a motion to dismiss. *Id.* at 241, 309 S.E.2d at 469. In *Bell*, "[t]he only substantial evidence linking defendant to the crime consisted of the victim's keys which were found in the defendant's pockets." *Id.* Here there is more evidence.

Defendant's statements, both to the police and at trial, place him at the store on the morning of the murder. Defendant initially denied being present at the store on the morning the murder took place. When defendant eventually admitted to being in the store that morning, he related a story that a reasonable juror could infer was designed to explain the presence of his fingerprints at the crime scene. Although defendant contends that he happened upon the victim after the fatal head wound was inflicted, this argument is premised upon the possibility that another person struck the fatal blows just prior to defendant's arrival at the store. The forensic pathologist, however, testified that the victim could only have survived a matter of minutes after the infliction of the head wounds. Thus, defendant's statements that he did not see anyone else in the store on the morning of the murder, that the victim was still alive when he saw him lying behind the counter, and that he picked up the stick containing the victim's hair, blood and tissue, all place defendant as the person who had access to the victim during the crucial moments that he could have survived after being bludgeoned. From this, a reasonable juror could find that defendant inflicted the fatal blows.

Although defendant acknowledges that his statements to the police were inconsistent, he maintains that they were "wholly excul-

patory" and that he made his initial false statement because he feared involvement with the police. In *State v. Walker*, 332 N.C. 520, 537, 422 S.E.2d 716, 726 (1992) (quoting *State v. Myers*, 309 N.C. 78, 86, 305 S.E.2d 506, 511 (1983)), our Supreme Court stated that "false, contradictory or conflicting statements made by an accused may be considered as a circumstance tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself]." Thus, here as in *Walker*, defendant's statements were used by the State to prove guilt by implication.

Defendant also attacks the State's forensic evidence. The State presented evidence that the shoe prints found on the floor of the store and on the victim's shirt were consistent with the shoes which defendant admitted wearing on the day of the murder. Defendant, however, argues that the State's evidence does not lead to a reasonable inference that it was he who left the footprints on the morning of the murder because a conclusive match was not made to his shoes. By his own assertion, defendant stepped in the blood surrounding the victim and "pushed off" the victim with his foot. Thus, defendant's statements obviate the need for a conclusive match on the footprints. In addition, although the police were unable to match fingerprints taken in the store to defendant, this was also unnecessary as defendant admitted to touching the cash register, cash register key, store counter and the murder weapon.

Defendant further contends that the State presented insufficient evidence of motive to sustain his conviction. Motive may be proved by circumstantial evidence. Here, the State presented evidence in the form of defendant's testimony that he had been unemployed for several months prior to the murder; that he was no longer living with relatives due to familial strain; that he had been drinking and using marijuana and cocaine frequently prior to the murder; that he had been drinking beer and "maybe" using marijuana the night before the murder; and that he had only "some loose change" in his possession on the morning of the murder. In the light most favorable to the State, this testimony permitted the inference that defendant was in need of money and robbed and murdered the victim to obtain that money. *State v. Powell*, 340 N.C. 674, 690, 459 S.E.2d 219, 227 (1995), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688 (1996).

The foregoing evidence, in addition to other evidence adduced at trial, is sufficiently substantial for a jury to draw a reasonable inference that defendant was the perpetrator of the crime of first-degree murder. Accordingly, this assignment of error fails.

[2] Defendant next contends that the trial court erred in charging the jury on admissions pursuant to North Carolina Pattern Jury Instruction 104.60. We disagree.

During the jury charge conference, the State requested that the trial court instruct the jury on admissions pursuant to N.C.P.I 104.60. At that time, defendant objected to the jury instruction as being "superfluous." The trial court overruled defendant's objection and explained why the instruction on admissions was appropriate:

> [The] admissions that I'm talking about are admissions about being present in the grocery store on the morning of the homicide, the admission that he went behind the counter, the admission that he had contact—that the defendant kicked the—or pushed away with his foot the victim's hand, the fact that he was standing in blood or had his shoe print in blood, the fact that he picked up a stick which had blood and tissue on it which has been identified as being consistent with that of the victim and removed it and took it outside, the fact that he admitted to taking a pack of cigarettes without paying for them, and those—and perhaps some other admissions. Of course, this charge does not explain to the jury what the admissions are. You are free to argue that one way or the other . . . .

The trial court subsequently instructed the jury, in pertinent part:

> Members of the jury, there is evidence which tends to show that the defendant has admitted a fact relating to the crime charged in this case. If you find that the defendant has made that admission, then you should consider all of the circumstances under which it was made in determining whether it was a truthful admission and the weight that you will give to it.

Defendant contends on appeal that the instruction on admissions "was not supported by the evidence, diluted the State's burden of proving defendant guilty beyond a reasonable doubt, and was highly prejudicial" thereby violating defendant's rights "under our common law, the Fourteenth Amendment to the U.S. Constitution, and Article I, § 19 of the North Carolina Constitution."

On appeal, a party may not assign as error a jury charge unless a proper objection was made at trial prior to the jury retiring to deliberate. *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 75 (1990); N.C. R. App. P. 10(b)(2). Here, before the jury charge, defendant objected to the instruction as "superfluous." Defendant now asserts

that the jury charge violated his rights under our common law as well as the United States and North Carolina Constitutions. By failing to object on these bases at trial, defendant has waived these grounds on appeal.

In exceptional criminal cases, however, the "plain error" rule may be applied to allow a party relief even though no objection, or an improper objection, was made at trial. *Cummings*, 326 N.C. at 315, 389 S.E.2d at 75; *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). The "plain error" rule provides that

> [i]n criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule of law . . . 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). Our Supreme Court has held that when deciding whether a defect in a jury instruction amounts to "plain error," the appellate court "must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79. However, our Supreme Court has also cautioned that the "plain error rule" is "always to be applied cautiously and only in the exceptional case . . . ." *Id.* at 660, 300 S.E.2d at 378 (quoting *State v. McCaskill*, 676 F.2d 995, 1002 (4th cir. 1982)).

Our Supreme Court has described an admission as a "statement of pertinent facts which, in light of other evidence, is incriminating." *State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995) (quoting *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 879-80 (1986)). Defendant's statements to the police on 15 August 1996 are in the nature of an admission. *State v. Smith*, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

In *State v. Smith*, defendant was convicted of voluntary manslaughter. The victim, defendant's wife, was found dead in their home on the morning of 17 December. *Id.* at 73, 252 S.E.2d at 536. The *Smith* defendant made a statement to the police in which he stated that he was at his home with his wife for the entire night of 16 December. Thus, the defendant's statement placed him at the "scene of the crime and in the company of the victim." *Id.* at 81, 252 S.E.2d at 541. Although defendant denied killing his wife and asserted that his statements were exculpatory as they tended "to show that some-

one else may have had the opportunity to kill" her, we described the defendant's statement as "in the nature of an admission." *Id.* at 83-84, 252 S.E.2d at 541. Likewise, here defendant's statement to the police placed him at the scene of the crime and in the company of the victim on the morning of the murder. Defendant acknowledged that he did not see anyone in the store other than the victim. When considered in light of the other evidence presented at trial, especially evidence that the victim could have survived only briefly after the infliction of the fatal wound, this statement is incriminating. Under our language in *Smith*, therefore, defendant's statement is in the nature of an admission.

Assuming *arguendo* that the instruction was improper, we conclude that defendant has failed to show "plain error." *State v. Shuford*, 337 N.C. 641, 646, 447 S.E.2d 742, 745 (1994). In the jury charge, the trial court neither defined nor intimated what defendant's admissions may have been. The language of the jury charge also left to the jury's discretion the determination of which of defendant's statements were admissions and the weight to be given those statements. Because the jury charge on admissions was based upon facts presented by a reasonable view of the evidence, we cannot say that absent the instruction the jury likely would have returned a different verdict. Defendant has failed to meet the " 'heavy burden of convincing the Court that, absent the error, the jury probably would have returned a different verdict.' " *Id.* (quoting *State v. Bronson*, 333 N.C. 67, 75, 423 S.E.2d 772, 777 (1992)). Accordingly, this assignment of error fails.

[3] Defendant next argues that the trial court committed "plain error" by allowing the State to cross-examine defendant about the details of a prior conviction and his drug and alcohol use and to engage in an improper closing argument. As previously discussed, a failure to object or except to errors at trial constitutes a waiver of the right to assert the alleged error on appeal unless the defendant can show "plain error." *State v. Oliver*, 309 N.C. 326, 340, 307 S.E.2d 304, 311-12 (1983). Here, defendant argues that under the "plain error" standard he is entitled to a new trial on these grounds. We cannot agree.

During the State's cross-examination of defendant the prosecutor inquired, without objection, about defendant's forgery conviction and his drug and alcohol use. The following are pertinent excerpts from defendant's cross-examination:

Q. You were convicted for possession of stolen property?

A. Yes.

Q. And forgery and—and forgery?

A. Yes.

. . . .

Q. What was the purpose of forging the instruments that were forged? What did you need the money for?

A. Bills, really.

. . . .

Q. Your forgery activities were not to support your drug habit?

A. No.

Q. How would you support your drug habit?

A. Probably from the money that I was making at the job, partly of it.

. . . .

Q. Now you had your job, and you were gainfully employed, and you earned a livelihood that was sufficient to support your drug habit?

A. Um-hum.

Q. But then you say you had to engage in this forgery activity so you could get additional funds to pay off your expenses for the household that you maintained.

A. Right.

Defendant argues this line of questioning was impermissible under the North Carolina Rules of Evidence.

When a defendant elects to testify, evidence of prior convictions is admissible for the purpose of impeaching defendant's credibility pursuant to Rule 609 of the Rules of Evidence. Rule 609(a) provides that

> [f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if

> elicited from the witness or established by public record during cross-examination or thereafter.

G.S. § 8C-1, Rule 609(a) (1999). This rule was recently interpreted in *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993).

In *Lynch*, our Supreme Court held that the State is prohibited "from eliciting details of prior convictions other than the name of the crime and the time, place, and punishment for impeachment purposes under Rule 609(a) in the guilt-innocence phase of a criminal trial." *Id.* at 410, 402 S.E.2d at 353. However, the *Lynch* Court went on to discuss certain exceptions to this exclusionary rule, including Rule 404(b) of the North Carolina Rules of Evidence.

Here it is clear that the State exceeded the permissible scope of inquiry into defendant's prior criminal conviction under Rule 609(a). On cross-examination the State asked defendant whether he had been convicted of possessing stolen property and forgery. When defendant answered affirmatively, the State proceeded to delve into defendant's motivation for his "forgery activity." Thus, the State elicited "details of prior convictions other than the name of the crime and the time, place, and punishment," *id.*, allowable for impeachment purposes. However, that the evidence could not be admitted pursuant to Rule 609(a) does not preclude its admission under an alternative Rule of Evidence.

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

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

G.S. § 8C-1, Rule 404(b) (1999). Our Supreme Court has held that Rule 404(b) states

> 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); *State v. King*, 343 N.C. 29, 43, 468 S.E.2d 232, 241 (1996). "The admissibility

of evidence under this rule is guided by two further constraints—similarity and temporal proximity." *Lynch*, 334 N.C. at 412, 432 S.E.2d at 354.

Here, we agree that this testimony was relevant on the issue of defendant's motive. On direct examination, defendant testified that between January 1996 and July 1996, when the murder occurred, he was using drugs and/or alcohol "frequently." Defendant further testified that on the night before the murder took place he was drinking beer and "maybe" using a "little marijuana." On cross-examination, the State further questioned defendant about his drug habit, and about his means of financing that drug habit. The evidence that defendant previously committed forgery to finance his drug habit could properly be admitted, not to show defendant had a propensity to commit forgery or other crimes, but rather to show that his need to support his drug habit and his lack of finances were the motive for the robbery and murder of the victim.

In *State v. Powell*, 340 N.C. 674, 459 S.E.2d 219 (1995), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688 (1996) the defendant was convicted of first-degree felony murder. At trial, a State's witness testified over defendant's objection that she and defendant used cocaine every day while they were living together. She also testified that during that time neither she nor defendant was employed, and their sole source of income was monthly AFDC and Social Security checks. Our Supreme Court concluded that the trial court properly ruled this evidence admissible pursuant to Rule 404(b). *Id.* at 690, 459 S.E.2d at 227. The *Powell* Court stated that the "evidence permits the inference that defendant needed money once the checks stopped . . . and decided to commit the robbery to obtain that money." *Id.* Here the evidence elicited on cross-examination about defendant's drug use and his prior conviction was admissible under Rule 404(b) because it permits the inference that defendant committed this robbery and murder to obtain money he needed to support his drug habit. As such, this evidence helps explain the chain of events leading up to, and the motive behind, the robbery and murder of Max Hightower.

Our Supreme Court has held that " '[r]emoteness in time is less significant when the prior conduct is used to show . . . motive . . . remoteness in time generally affects only the weight to be given such evidence, not its admissibility.' " *State v. White*, 349 N.C. 535, 553, 508 S.E.2d 253, 265 (1998) (quoting *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991)). The fact that defendant's conviction for

forgery occurred several years before this crime did not preclude the admissibility of the evidence; instead the passage of time affected the weight to be given that evidence.

After careful review and consideration of the record and briefs, we cannot say that in the absence of this evidence's admission, the jury would have returned a different verdict. Accordingly, we conclude that the trial court did not commit "plain error" with respect to this evidence.

[4] Defendant also argues that the trial court committed "plain error" by allowing the State to engage in an improper closing argument. Defendant asserts that the State attempted to prejudice the jury during closing arguments with the following comments:

> [W]e're here because Kendell [sic] Barnett is a selfish person, and . . . a selfish person with a drug problem is a dangerous person . . . .
>
> In order to support his cocaine habit, he began to write checks, dealt in stolen property . . . .
>
> Then I got to questioning about the necessity for forged instruments, and then that began to explain well, he needed that money to pay for the daily living expenses . . . He worked at the time, used the money that he earned to support that craving for drugs . . . .
>
> . . . .
>
> Kendell [sic] Barnett continues to be a selfish person with an addiction to controlled substances . . . .
>
> . . . .
>
> [H]e's a selfish individual, and because he is selfish, Max Hightower is dead and gone to his just reward . . . .

"Prosecutors are allowed 'wide latitude in the scope of their argument.' " *Powell*, 340 N.C. at 694, 459 S.E.2d at 229 (quoting *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987)). "A prosecutor's argument is not improper where it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *Zuniga*, 320 N.C. at 253, 357 S.E.2d at 911. If no objection is made, the trial court will only be required to intervene when the prosecutor's argument affects the right of a defendant to a fair trial. *Id.*

Here, since no objection was made during the prosecutor's closing argument, the trial court was required to intervene only if the defendant's right to a fair trial was affected by the closing arguments. After careful review and consideration of the record and briefs, we cannot conclude that the trial court erred in not intervening *ex mero motu* during the argument. Defendant's assignment of error fails.

[5] By his final assignment of error defendant contends that the trial court erred in denying his motion "to reveal the State's first-degree murder theory." Specifically, defendant argues that the short-form murder indictment used here violates his due process and equal protection rights under the United States Constitution. We are not persuaded.

The indictment against defendant for murder contained the following language:

> The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously and of malice aforethought did kill and murder Max M. Hightower.

The indictment also stated: "Offense in violation of G.S. 14-17." Defendant concedes that the indictment complies with the short form murder indictment authorized by G.S. § 15-144 which provides that

> [i]n indictments for murder and manslaughter . . . it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed) . . . .

G.S. § 15-144 (1999). Our Supreme Court has held that an indictment which complies with the requirements of G.S. § 15-144 is sufficient to charge murder in the first degree based on any theory set out in G.S. § 14-17 and referenced in the indictment. *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000). Moreover, our Supreme Court has consistently held that "indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions." *Id.*; *State v. Smith*, 352 N.C. 531, 539, 532 S.E.2d 773, 779 (2000); *State v. Wallace*, 351 N.C. 481, 504-05, 528 S.E.2d 326, 341 (2000). Here, the indictment complied with G.S. § 15-144 and was therefore sufficient. Accordingly, defendant's assignment of error is without merit.

No error.

Judge FULLER concurs.

Judge TIMMONS-GOODSON dissents.

Judge TIMMONS-GOODSON dissenting.

Respectfully, I dissent. While I believe that the evidence presented by the State was sufficient to permit the jury to find that Mr. Hightower was murdered during the commission of an armed robbery, I do not believe that the evidence was sufficient to demonstrate that defendant perpetrated these crimes. Therefore, the trial court should have allowed defendant's motion to dismiss the charge of first-degree murder.

A motion to dismiss is properly denied only "[i]f 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." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Pryor*, 59 N.C. App. 1, 5, 295 S.E.2d 610, 614 (1982). Thus, to be "substantial," the evidence of guilt "must be existing and real, not just seeming or imaginary." *State v. Sexton*, 336 N.C. 321, 361, 444 S.E.2d 879, 902 (1994), *grant of post-conviction relief aff'd*, 352 N.C. 336, 532 S.E.2d 179 (2000).

In ruling on a motion to dismiss, the trial court must examine the evidence and draw all reasonable inferences therefrom in the light most beneficial to the State. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). Exculpatory evidence offered by the defendant is not taken into account, except to the extent that it explains, clarifies, or coincides with the State's body of facts. *State v. Bates*, 309 N.C. 528, 535, 308 S.E.2d 258, 262-63 (1983). Additionally, although the propriety of dismissal turns on the peculiar facts of the case under consideration, prior decisions can be instructive as to whether the court should have granted a motion to dismiss given a particular set of circumstances. *See State v. White*, 293 N.C. 91, 235 S.E.2d 55 (1977) (relying on case with strikingly similar facts as support for decision reversing denial of motion for nonsuit).

At trial, the premise of the State's theory was the "felony murder rule," pursuant to which a murder committed during the perpetration

of a felony is "deemed to be murder in the first degree." N.C. Gen. Stat. § 14-17 (1999). According to the State, the underlying felony was armed robbery—the unlawful taking or attempted taking of " 'personal property from another or from any place of business' with the possession, use, or threatened use of a [dangerous weapon]." *State v. Cofield*, 129 N.C. App. 268, 280, 498 S.E.2d 823, 832 (1998) (quoting N.C. Gen. Stat. § 14-87(a)(1993)). Hence, to withstand defendant's motion for dismissal, it was incumbent upon the State to come forward with substantial evidence that defendant killed Mr. Hightower while perpetrating or attempting to perpetrate an armed robbery of the victim or the convenience store. In my judgment, the State failed to meet this burden.

The evidence, viewed in the light most favorable to the State, showed that at or near 9:00 a.m. on the morning of 17 July 1996, defendant entered the Simply Amazing Grocery Store in Gastonia, North Carolina, wearing a pair of black Nike tennis shoes. Minutes later, the body of Max Hightower, an employee of the store, was discovered lying in a pool of blood behind the counter. The victim had been brutally beaten about the head and face. His blood covered the immediate area within three feet of the body and spattered the adjacent wall nearly forty inches up from the floor. Nike shoe impressions consistent with the shoes worn by defendant were found in the blood surrounding the body, and a bloody Nike shoe print was visible on the front of the victim's T-shirt. The cash register emitted a beeping noise, signaling that it had been improperly used, and roughly eight to twelve two-dollar-bills had been taken from a plastic container kept under the counter. A large wooden stick, covered on one end with the victim's blood, was found in a grassy area beside the store.

Defendant, after initially denying his presence, admitted that he had been in the convenience store on the morning of the murder. His statements to the police and his testimony at trial revealed that he arrived at the store after the victim had been attacked. When he saw the victim's body, he went behind the counter to render assistance, but became frightened when the victim's hand moved toward him. Defendant kicked at the victim's chest to keep him from rising. As he backed away from the victim's body, he stumbled over a large stick, knocking a pack of cigarettes onto the floor. In his haste to leave, defendant grabbed the stick and the cigarettes and ran out the door. Once outside, he threw the stick beside the building and fled.

Defendant's evidence further showed that witnesses observed one or more individuals not matching his description waiting in front

of the store at or near the time of the crimes. Additionally, while the investigation uncovered several latent fingerprints from items on and around the counter, none of the prints collected at the scene were found to match those of defendant. Moreover, in view of the State's theory that defendant's financial needs motivated him to commit these crimes, I think it significant that investigators found a handgun under the counter, several dollars in rolled coins stacked behind the cash register, and nearly $300 in cash in the victim's wallet. Similarly, despite the evidence that the area immediately surrounding the body was covered with the victim's blood, forensic testing did not indicate the presence of blood anywhere on defendant's tennis shoes, nor did the tests reveal that the shoes had been cleaned.

The majority, in concluding that the State's evidence was sufficient to survive defendant's motion to dismiss, failed to give defendant's exculpatory evidence due consideration. In my opinion, the majority's indifference to the evidence tending to absolve defendant of guilt is contrary to our Supreme Court's ruling in *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258. In *Bates*, the defendant was convicted of first-degree murder based on the felony murder rule. The State's theory was that the defendant murdered the victim during his attempt to rob the victim of personal property found at the scene.

The evidence revealed that on the night of the incident, the defendant arrived at the home of Mary Godwin in a battered and agitated state. His "clothing was covered with blood and dirt." *Id.* at 530, 308 S.E.2d at 260. According to Mrs. Godwin, "[the] defendant appeared to be severely injured and was pleading for help." *Id.* In a field approximately 300 feet from the Godwin residence, law enforcement officers found the body of Roy Warren lying next to an automobile. Several scuff marks were visible in the soil surrounding the body, and spots of blood appeared on the side of the car. Articles of personal property belonging to both the defendant and the victim were scattered about an area approximately seventy feet away from the body. There, additional scuff marks were found, as was blood consistent with the blood types of both the defendant and the victim. The officers also located a .22 caliber revolver lying amidst the other personal items. An autopsy subsequently performed on the body revealed that the victim had endured several small cuts and abrasions, thirty-two stab wounds, and two gunshot wounds inflicted at close range.

The defendant testified that he had given the victim his mother's gun in exchange for $30.00. He stated that on the day of the incident,

he asked the victim to return the gun, because his mother had discovered it missing. The victim agreed, and the two made arrangements to meet at a field near the defendant's house. Later, the victim arrived as planned, but refused to return the gun unless the defendant returned the $30.00. An argument ensued, and when defendant turned to leave, the victim stabbed him in the back. The defendant stumbled, regained his balance, and started running toward the nearest house. The victim then fired two warning shots and threatened to kill the defendant if he did not stop running.

The defendant stopped in the area where the personal items were later found. The victim caught up with the defendant and struck him in the head with the gun. The victim then threw the defendant to the ground, and the two began to fight. When the defendant tried to wrestle the gun away from the victim, it discharged, enabling the defendant to free himself and crawl back to the car. As the defendant was entering the vehicle, the victim grabbed him from behind and pulled him to the ground. Another struggle occurred, and the defendant received a second stab wound to the chest. The defendant pulled the knife from his chest and stabbed the victim repeatedly. The victim eventually released him, and the defendant made his way to the Godwin residence.

The Supreme Court concluded that because the defendant's testimony did not contradict the prosecution's case in any way, "[the] testimony in its entirety [was to] be characterized as a clarification of the State's testimonial and physical evidence." *Id.* at 535, 308 S.E.2d at 263. The Court then reversed the defendant's conviction based on the following reasoning:

> When defendant's explanatory testimony is considered along with the physical evidence presented by the State, the logical inference is that the decedent lost the[] items of personal property during the struggle with defendant. There is simply no substantial evidence of a taking by defendant with the intent to permanently deprive [the victim] of the property. We therefore hold that defendant's motion to dismiss the charge of robbery with the dangerous weapon should have been granted. . . . Because there was insufficient evidence to support the commission of the underlying felony, there is also insufficient evidence to support defendant's conviction of felony murder.

Id.

Applying the reasoning in *Bates* to the case before us, defendant's testimony, which is entirely harmonious with the State's physical and testimonial evidence, clarifies the facts presented. Thus, the logical inference arising from the evidence is that defendant happened upon the scene of a brutal crime, that he became frightened after attempting to render assistance, that he tripped over the murder weapon in his haste to leave, and that he grabbed the weapon and ran out of the store. While the State's evidence, "taken in the strongest view adverse to defendant, . . . 'excite[s] suspicion in the just mind that he is guilty, . . . such view is far from excluding the rational conclusion that some other unknown person may be the guilty party.' " *State v. Lee*, 294 N.C. 299, 303, 240 S.E.2d 449, 451 (1978) (quoting *State v. Goodson*, 107 N.C. 798, 12 S.E. 329 (1890)).

In sum, it is my opinion that the evidence was insufficient to establish that defendant committed the crimes against Mr. Hightower and, thus, the court should have granted his motion to dismiss. Accordingly, I vote to vacate defendant's conviction and remand this matter to the Superior Court for a new trial.

WAYNE AUSTIN, EMPLOYEE, PLAINTIFF-APPELLEE v. CONTINENTAL GENERAL TIRE, SELF-INSURED, EMPLOYER, DEFENDANT-APPELLANT

No. COA99-693

(Filed 29 December 2000)

1. Workers' Compensation— asbestosis—plenary evidence

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff retired employee had asbestosis as defined in N.C.G.S. § 97-62, because a review of the deposition transcripts and medical evidence presented to the Commission shows plenary evidence to support the Commission's findings of fact.

2. Workers' Compensation— occupational disease—exposure to asbestos

The Industrial Commission did not err in a workers' compensation case by determining that plaintiff retired employee was injuriously exposed to the hazards of asbestos while employed by defendant, because: (1) a claimant does not need to provide scientific proof of his exposure to asbestos for purposes of N.C.G.S.

§ 97-57; and (2) plaintiff presented substantial other evidence of his repeated exposure to asbestos during his employment with defendant.

3. Workers' Compensation— asbestosis—application of statutes—employer not a "dusty trade"—plaintiff neither a current nor prospective employee—removal from employment not required

The Industrial Commission did not err in a workers' compensation asbestosis case by its application of N.C.G.S. §§ 97-60 to -61.7, even though defendant employer contends it was never classified as a "dusty trade" and plaintiff retired employee is neither a current nor a prospective employee, because: (1) an employer's status as a "dusty trade" does not impact the application of the examination and compensation scheme set forth in N.C.G.S. §§ 97-60 to -61.7; (2) the language of N.C.G.S. § 97-60 limited to persons "engaged or about to engage in" employment with an industry classified as a "dusty trade" does not carry over to the examination and compensation provisions of N.C.G.S. §§ 97-61.1 through -61.7; (3) N.C.G.S. §§ 97-61.5(b) and -61.7, when read together, indicate the General Assembly's intent to allow an injured plaintiff to remain in the harmful work environment and receive the 104 weeks of compensation, and removal from the industry is not required for an employee to receive the 104 weeks of compensation; and (4) an employee who retires prior to being diagnosed with asbestosis need not be "removed" from employment to be entitled to the 104 weeks compensation set forth in N.C.G.S. § 97-61.5.

4. Appeal and Error— preservation of issues—constitutional issue—failure to raise to Industrial Commission

Even though defendant employer contends that the application of N.C.G.S. §§ 97-61.1 through -61.7 to this workers' compensation asbestosis case is a violation of defendant employer's right to the equal protection of the law, this issue has not been preserved because there is no evidence that defendant made any argument before the Industrial Commission regarding the constitutionality of the challenged statutes.

5. Workers' Compensation— average weekly wage—calculation proper

The Industrial Commission did not err in a workers' compensation case by its calculation of plaintiff retired employee's aver-

age weekly wage based on N.C.G.S. §§ 97-61.5 and 97-2(5) so that plaintiff's earnings during his last year of employment were used, because: (1) whether the results are fair and just is a question of fact, and in such case a finding of fact by the Commission controls the decision; and (2) this finding is supported by competent evidence making it binding on the Court of Appeals.

Judge GREENE dissenting.

Appeal by defendant from opinion and award entered 18 December 1998 by the North Carolina Industrial Commission sitting *en banc*. Heard in the Court of Appeals 28 March 2000.

Wallace and Graham, P.A., by Mona Lisa Wallace, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by J.A. Gardner, III, and Jeff Kadis, for defendant-appellant.

Parker, Poe, Adams & Bernstein L.L.P., by Josephine H. Hicks, for North Carolina Citizens for Business and Industry, amicus curiae.

Johnston, Allison & Hord, PA, by James W. Allison, for Carolinas AGC, Inc., amicus curiae.

Trial Lawyers for Public Justice, P.C., by Anne Bloom and The Jernigan Law Firm, by Leonard T. Jernigan, Jr., for Trial Lawyers for Public Justice, amicus curiae.

The Law Offices of Robin E. Hudson, by Robin E. Hudson, for North Carolina Academy of Trial Lawyers, amicus curiae.

McGEE, Judge.

Pursuant to N.C. Gen. Stat. § 97-86 (1999), defendant-employer Continental General Tire (defendant) appeals an opinion and award of the North Carolina Industrial Commission (the Commission) entered 18 December 1998. For the reasons stated herein, we affirm.

Plaintiff Wayne Austin (plaintiff) was employed by defendant for over twenty years, during which time the record shows he was repeatedly exposed to asbestos dust and fibers. On 9 November 1986, the union to which plaintiff belonged caused an Examobile to come to the plant and have employees screened for asbestos-related dis-

eases. Plaintiff's spirometric tests showed normal results. Radiologic studies, however, indicated "[c]hest wall pleural calcification . . . consistent with pleural disease related to asbestos exposure." Plaintiff retired on 1 June 1987 for reasons unrelated to asbestos exposure.

Several years later and after several visits to Dr. R.W. Patton, Sr. (Dr. Patton) for a complete physical and follow-up examinations, plaintiff was informed he had "[p]ulmonary fibrosis, possibly asbestosis." On 8 June 1994, Dr. Patton confirmed that diagnosis in a letter to plaintiff's attorney: "Mr. Austin had both the classical diaphragmatic pleural calcifications and pulmonary fibrosis. The criteria for a diagnosis of asbestoses [sic] can be made." Thereafter, plaintiff had a complete respiratory evaluation performed by Dr. Douglas G. Kelling, Jr. (Dr. Kelling), a member of the North Carolina Medical Panel Board. Based upon Dr. Kelling's examination, he "fe[lt] [plaintiff] ha[d] asbestosis and asbestos related pleural disease." Thereafter, on 3 May 1994, Dr. Michael J. Kelley of Charlotte Radiology, P.A., examined plaintiff and concluded:

> Findings: Extensive pleural plaquing with calcifications noted bilaterally involving the posterior lateral and even anterior aspects of the pleural surface with focal pleural thickening and heavy calcification. An area of en face pleural plaquing with calcification is seen appearing as a "pseudo-tumor" at the left lung base/diaphragmatic surface. . . . Some pleural thickening with calcification extending into the right major fissure posteriorly. . . .
>
> Impression: Extensive bilateral pleural plaquing and calcification consistent with asbestos exposure. Minimal pulmonary fibrosis primarily involving the lung bases.

Plaintiff was examined twice more in 1996 with similar results.

Plaintiff filed a Form 18 notice of accident in February 1989 but did not file a Form 33 request for hearing until 24 July 1995. General Tire responded, denying liability. The matter was heard before a deputy commissioner on 9 May 1996.

During the hearing, plaintiff testified that he began working for defendant on 7 August 1976 as a painter/carpenter, a position he held for nearly fifteen years. As a painter, he regularly painted the curing presses and other machinery. To prepare for painting, plaintiff was required to blow compressed air onto the machines and pipes, which were covered with asbestos-containing insulation. While painting,

plaintiff crawled and walked on asbestos-insulated steam pipes. Blowing off the machinery caused asbestos fibers to be released into the air, and walking on the pipes caused the asbestos insulation to crumble.

The majority of plaintiff's work, however, was carpentry. Almost daily, plaintiff was required to cut asbestos-containing curing press gaskets. The sawing on the gaskets created dust, which plaintiff would blow off of the floor and sweep up.

After plaintiff's tenure as a painter/carpenter, he worked as a tire trimmer for six months; there was no testimony regarding asbestos exposure resulting from this job. Plaintiff then worked another five years for General Tire as a "let-off man" on the three-roll calendar machine. Steam pipes ran into the calendar machine. Plaintiff was required to clean his machine on a daily basis, which required him to crawl over and through the steam lines to get to the various machine parts that needed cleaning. He was responsible for watching after and cleaning approximately one hundred feet of machinery and piping.

Other employees of defendant testified as to the asbestos in the plant. Bill Evans (Evans), a retired welder/pipe fitter, testified there was substantial asbestos covering the pipes in the plant. If Evans had to repair a pipe, he would cut away the asbestos insulation, which would fall to the floor and later be thrown into a garbage can. He testified as to the condition of the asbestos insulation in the curing press area, an area in which plaintiff often worked: "[W]e had an awful lot of bad insulation . . . . It was in such bad shape, you couldn't cut it and take it off in any procedures. . . . [Y]ou take the hammer and knock it off and then just get it in a trash can the best way you could." He further testified that removal began in the late 1980s.

Charles Adams (Adams), also retired from defendant worked in receiving and testified about receiving asbestos insulation, which he took to the stockroom. For the last five years of his employment, he worked on a three-roll calendar, the same job that plaintiff had during five years of his employment with General Tire. Adams testified that there were many asbestos-insulated steam pipes in the calendar area. He stated he had seen the pipes leaking, requiring the pipe fitter to repair them. He testified as to the dust created during removal of asbestos insulation. Adams testified that merely coming in contact with the insulation on the pipes would release dust into the air.

Several other co-workers testified as to the amount of asbestos insulation in the plant and to plaintiff's repeated exposure to asbestos fibers and dust.

Defendant's expert, Thomas Wade Shepler (Shepler), gave deposition testimony that approximately 5,500 linear feet of asbestos pipe insulation were removed from the General Tire plant in October and November 1989. Shepler admitted that asbestos was found lying on the floor in the curing press area, that "asbestos containing material" had accumulated over the years in the grating on the floor, that pieces of asbestos-containing material were lying on the floor, and that a small amount of asbestos was present on overhead piping and support beams.

Depositions of the physicians who had examined plaintiff, as well as all of plaintiff's pertinent medical records, were submitted to the deputy commissioner.

After receipt of all the evidence and exhibits, on 10 July 1998, the deputy commissioner filed an opinion and award making thorough and extensive findings of fact and concluding that plaintiff had contracted asbestosis, entitling him to 104 weeks of compensation pursuant to N.C. Gen. Stat. § 97-61.5(b) (1991) at the rate of $30.00 per week. Plaintiff appealed to the Commission, which sat *en banc* and, in an opinion and award filed 18 December 1998, unanimously modified and affirmed the opinion and award of the deputy commissioner. The Commission determined that plaintiff suffered from asbestosis and was entitled to 104 weeks of compensation pursuant to N.C.G.S. § 97-61.5(b), but at the rate of $308.00 per week, an amount based upon plaintiff's last full year of employment with defendant. Defendant appeals to this Court.

I.

[1] Defendant first contends the Commission erred in finding that plaintiff had asbestosis as defined in N.C. Gen. Stat. § 97-62 (1991) (the "characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust"). Relying on a statement from the American Thoracic Society and other medical literature, General Tire contends that "asbestosis is a distinct medical condition with specific characteristics and physical manifestations" that cannot be diagnosed "in the absence of any abnormal parenchymal findings."

In reviewing decisions by the Commission, "we are limited to the consideration of two questions: (1) whether the Full Commission's

findings of fact are supported by competent evidence; and (2) whether its conclusions of law are supported by those findings." *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000) (citation omitted). If the findings are supported by *any* competent evidence, they are conclusive on appeal, even if other evidence would support contrary findings. *See id.* However, the Commission's conclusions of law are reviewable by our Court *de novo*. *See Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). Additionally, "[t]he evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

In the case before us, the Commission made extensive findings regarding the voluminous medical evidence and expert testimony presented. It weighed the evidence and deposition testimony and found:

> [G]reater weight is accorded to the opinions of Dr. Kelly, Dr. Kelling and Dr. Dula than to the opinions of Dr. Sawyer and Dr. Barnett. Dr. Kelling is on the Advisory Medical Panel for the North Carolina Industrial Commission. Dr. Michael Kelly is a radiologist who reviewed plaintiff's films due to random assignment on that day.

Based on this weighing of evidence, the Commission found: "Plaintiff suffers from asbestosis, evidenced most clearly by irregular linear opacities and blurring of the parenchymal points at the base of both lungs on X-rays and CT scans and manifested by mild to moderate pulmonary impairment."

A review of the deposition transcripts and medical evidence presented to the Commission shows plenary evidence to support the Commission's findings of fact. Accordingly, those findings are conclusive on appeal. The careful and thorough manner in which the Commission set forth those findings demonstrates its diligent consideration of the evidence. This assignment of error is overruled.

II.

[2] Defendant next contends the Commission erred in its determination that plaintiff was "injuriously exposed" to the "hazards of asbestos" while employed by General Tire. *See* N.C. Gen. Stat. § 97-57

(1991) ("[W]hen an employee has been exposed to the hazards of asbestosis . . . for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious . . . ."). Specifically, defendant contends plaintiff failed to "put forward any necessary expert testimony on any scientific information concerning the presence of any hazardous airborne/breathable or inhalable levels of asbestos present at the [] plant during his employment." This argument is without merit.

An analogous argument was made by the defendant-employer in *Gay v. J.P. Stevens & Co.*, 79 N.C. App. 324, 339 S.E.2d 490 (1986). In *Gay*, the Commission found the plaintiff's chronic obstructive lung disease to be a compensable "occupational disease," because it arose from his exposure to toxic substances in dye houses and the concentration of dust in the warehouse. The defendant argued that expert testimony regarding the plaintiff's exposure was "mere speculation" because "the levels of toxic substances in the dye houses and the concentration of dust in the warehouse were never actually measured." *Id.* at 332, 339 S.E.2d at 495. In rejecting the defendant's argument, our Court stated:

> "It is unreasonable to assume that the legislature intended an employee to bear the burden of making [toxicity] measurements during his employment in order to lay the groundwork for a worker's compensation claim. Such an interpretation of the statute would make it virtually impossible for an employee to successfully bring suit for compensation . . . due to the difficulty he would encounter in attempting to make measurements of [toxic airborne substances] on his employer's premises. A construction of the statute which defeats its purpose . . . would be irrational and will not be adopted by this Court."

Id. at 333-34, 339 S.E.2d at 496 (quoting *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 668, 303 S.E.2d 795, 797 (1983) (citations omitted)).

The rationale of the *Gay* and *McCuiston* Courts is equally applicable to the facts now presented. Accordingly, we conclude that a claimant need not provide scientific proof of his exposure to asbestos for purposes of N.C.G.S. § 97-57. Moreover, as recited above, plaintiff presented substantial other evidence of his repeated exposure to asbestos during his employment with General Tire. This assignment of error is overruled.

III.

[3] Defendant also assigns error to the Commission's application of N.C. Gen. Stat. §§ 97-60 to -61.7 (1991 & Cum. Supp. 1998) to the facts presented in this case. Relying upon basic principles of statutory construction, we disagree.

Our primary task in construing statutory provisions is to ensure that the legislative intent is accomplished. *See Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 88, 484 S.E.2d 566, 569 (1997). "Interpretations that would create a conflict between two or more statutes are to be avoided, and 'statutes should be reconciled with each other . . .' whenever possible." *Meyer v. Walls*, 122 N.C. App. 507, 512, 471 S.E.2d 422, 427 (1996) (omission in original) (quoting *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981)), *aff'd in part, rev'd in part on other grounds*, 347 N.C. 97, 489 S.E.2d 880 (1997).

Statutory interpretation properly commences with an examination of the plain words of a statute. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). Defendant contends "plaintiff is not a member of any of the categories of persons to whom the provisions . . . apply" because defendant has never been classified as a "dusty trade" and because plaintiff is "neither a current nor a prospective employee." The terminology relied on by defendant to support its contention that recovery under N.C.G.S. § 97-61.5 should not have been granted to plaintiff is found in N.C.G.S. § 97-60. While related to the compensation provisions regarding asbestosis and/or silicosis, N.C.G.S. § 97-60 stands alone in its application. It provides in pertinent part:

> The compulsory examination of employees and prospective employees as herein provided applies only to persons engaged or about to engage in an occupation which has been found by the Industrial Commission to expose them to the hazards of asbestosis and/or silicosis. . . . [I]t shall be the duty of every employer, in the conduct of whose business his employees or any of them are subjected to the hazard of asbestosis and/or silicosis, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis and/or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the Industrial Commission, provide similar examinations for all of his

> employees whose employment exposes them to the hazards of asbestosis and/or silicosis.

N.C.G.S. § 97-60. Accordingly, this section establishes a procedure by which certain employers (i.e., those found by the Commission to subject their employees to the hazards of asbestosis or silicosis) screen potential and current employees for any signs of asbestosis or asbestos-related disorders. By its terms, N.C.G.S. § 97-60 is limited to "persons engaged or about to engage in" employment with an industry classified as a "dusty trade." General Tire was never so classified and thus was never required to implement screening procedures for its prospective and current employees.

However, an employer's status (or lack thereof) as a "dusty trade" does not impact the application of the examination and compensation scheme set forth in N.C.G.S. §§ 97-61.1 through -61.7. The language in those sections refers to "an employee [who] has asbestosis or silicosis," N.C.G.S. § 97-61.1, and speaks generically to "employers." To limit the application of N.C.G.S. §§ 97-61.1 through -61.7 to employers designated as "dusty trades" would adversely affect the class of employees suffering from asbestosis or silicosis, thus thwarting the intent of the General Assembly to compensate employees who have contracted asbestosis. Accordingly, defendant's contention that the Commission erred in applying N.C.G.S. §§ 97-61.1 through -61.7 because it had not been designated a "dusty trade" is without merit.

Likewise, it follows that the language, "persons engaged or about to engage in," does not extend to N.C.G.S. §§ 97-61.1 through -61.7. The language of N.C.G.S. § 97-60 is more far-reaching than that used in N.C.G.S. §§ 97-61.1 through -61.7, in that N.C.G.S. § 97-60 requires screening of both current *and prospective* employees, whereas N.C.G.S. §§ 97-61.1 through -61.7 apply only to "employees."

Our interpretation is supported by the language of N.C. Gen. Stat. § 97-72 (Cum. Supp. 1998), which sets forth as one of the specific statutory purposes for creation of the advisory medical committee "to conduct examinations and make reports *as required by G.S. 97-61.1 through 97-61.6.*" (Emphasis added.) The General Assembly's omission of N.C.G.S. § 97-60 further suggests the exclusivity of that section.

Accordingly, we hold that an employer need not be designated a "dusty trade" for N.C.G.S. §§ 97-61.1 through -61.7 to apply. Likewise,

the "engaged or about to engage in" language of N.C.G.S. § 97-60 does not carry over to the examination and compensation provisions of N.C.G.S. §§ 97-61.1 through -61.7.

However, defendant also contends that "[r]emoval by order is a condition precedent to entitlement to 104 weeks of compensation." In *Moore v. Standard Mineral Co.*, 122 N.C. App. 375, 469 S.E.2d 594 (1996), our Court discussed the "removal" requirement.

> [T]he term "removal" as used by G.S. § 97-61.5 presumes medical diagnosis will occur *during* the hazardous employment. Thus, the language regarding "removal from the industry" has specific application only to occasions when . . . identified victims of occupational disease [] are thereafter "removed" from a hazardous industry by directive of the Commission. However, the phrase is inapposite to instances such as that *sub judice* wherein a claimant is diagnosed at some point *subsequent* to leaving hazardous employment.

Id. at 378, 469 S.E.2d at 596. We note, however, that in *Moore*, the defendant agreed that the plaintiff was entitled to benefits under N.C.G.S. § 97-61.5(b); the issue in dispute was determination of the plaintiff's "average weekly wages." For that reason, the *Moore* Court added,

> [W]e emphasize that the situation of a claimant no longer employed in any capacity at the time of diagnosis is not before us, and that legislative action to address such an instance may well be required to fulfill completely the intended purpose of compensating workers who have contracted occupational diseases.

Id. at 380, 469 S.E.2d at 598 (citation omitted). We believe, however, that the statutes, when read together, adequately speak to the situation referred to in *Moore* and now presented to our Court.

The general rule for recovery for individuals suffering from asbestosis or asbestos-related disorders is found at N.C. Gen. Stat. § 97-64 (1991), which provides:

> Except as herein otherwise provided, in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workers' Compensation Act.

The exceptions to which N.C.G.S. § 97-64 refers are found in N.C.G.S. §§ 97-61.1 through -61.7. N.C.G.S. §§ 97-61.1 through -61.4 establish a

series of examinations by the Commission's advisory medical committee of "an employee [who] has asbestosis or silicosis" and reports to be made from those examinations. N.C.G.S. § 97-61.1. After the first examination and report, *see* N.C.G.S. §§ 97-61.1, -61.2, N.C.G.S. § 97-61.5 mandates the following:

> (a) After the employer and employee have received notice of the first committee report, the Industrial Commission, unless it has already approved an agreement between the employer and employee, shall set the matter for hearing at a time and place to be decided by it, to hear any controverted questions, determine if and to whom liability attaches, and where appropriate, file a written opinion with its findings of fact and conclusions of law and cause its award to be issued thereon . . . .
>
> (b) If the Industrial Commission finds at the first hearing that the employee has either asbestosis or silicosis . . . it shall by order remove the employee from any occupation which exposes him to the hazards of asbestosis or silicosis . . . ; provided, that *if the employee is removed from the industry* the employer shall pay or cause to be paid . . . to the employee affected by such asbestosis or silicosis a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of his average weekly wages before removal from the industry . . . which compensation shall continue for a period of 104 weeks.

(Emphasis added.) N.C.G.S. § 97-61.6 then provides means for recovering additional partial or total disability and compensation for resulting death due to asbestosis or silicosis.

Looking solely at the language of N.C.G.S. § 97-61.5(b), it appears that defendant's contention is correct, that is, that recovery under this section is predicated upon an employee's removal from the industry. However, the Act is to be construed *in para materia*, and N.C.G.S. § 97-61.7 frustrates defendant's theory and sheds significant light on the situation posed by the *Moore* Court. N.C.G.S. § 97-61.7 reads in pertinent part:

> An employee who has been compensated under the terms of G.S. 97-61.5(b) *as an alternative to forced change of occupation*, may, subject to the approval of the Industrial Commission, waive in writing his right to further compensation for any aggravation of his condition that may result from his continuing in an occupation exposing him to the hazards of asbestosis or silicosis, in

> which case payment of all compensation awarded previous to the date of the waiver . . . shall bar any further claims by the employee, . . . provided, that in the event of total disablement or death as a result of asbestosis or silicosis with which the employee was so affected, compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than 100 weeks *in addition to the 104 weeks already paid.*

(Emphasis added.) Construing the Workers' Compensation Act "liberally in favor of the injured worker" as we must, *Hicks v. Leviton Mfg. Co.*, 121 N.C. App. 453, 457, 466 S.E.2d 78, 81 (1996), these sections, when read together, indicate the General Assembly's intent to allow an injured plaintiff to remain in the harmful work environment *and* receive the 104 weeks of compensation; removal from the industry is not required for an employee to receive the 104 weeks of compensation.

This automatic compensation scheme satisfies the legislative purpose of providing "compensation to those workers affected with asbestosis or silicosis, whose principal need is compensation." *Young v. Whitehall Co.*, 229 N.C. 360, 365, 49 S.E.2d 797, 801 (1948).

Our reading of these statutes is guided by earlier statements by our Courts. In *Roberts v. Southeastern Magnesia and Asbestos Co.*, 61 N.C. App. 706, 301 S.E.2d 742 (1983), our Court set forth the language of N.C.G.S. §§ 97-61.5(b) and -61.7 and stated:

> It is clear from the language of these two statutes that a diagnosis of asbestosis . . . is the equivalent of a finding of actual disability. . . .
>
> The Commission's award was predicated upon the employee avoiding further exposure to asbestosis in his employment. We recognize that the intent of the Legislature in providing for an automatic 104 installment payments was to *encourage* employees to remove themselves from hazardous exposure to asbestos and to provide for employee rehabilitation[.] We also recognize that G.S. 97-61.5(b) which authorizes this award, has as an *additional purpose* the compensation of employees for the incurable nature of the disease of asbestosis. There is no indication that the Legislature intended to prohibit any recovery whatsoever to those employees who refused to remove themselves from contact with asbestos after being diagnosed as having asbestosis.

> The statutory language merely prohibits recovery for actual partial incapacity if the employee, after receiving the initial compensation in the form of the 104 week installment payments, is shown to have remained in a job where he or she is exposed to asbestos.

Id. at 710-11, 301 S.E.2d at 744-45 (emphasis added) (internal citations omitted). Our Court, in *Hicks*, 121 N.C. App. at 456, 466 S.E.2d at 81, quoted *Roberts* with approval and stated: "Thus, this Court has previously concluded that the Legislature intended compensation under G.S. § 97-61.5(b) as compensation for permanent damage to the employee's lungs due to asbestosis *as well as* for switching trades." (Emphasis added.)

Finally, in according deference to the Commission's determination in similar situations, *see Carpenter v. N.C. Dept. of Human Resources*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992) (stating that a reviewing court should defer to an agency's reasonable interpretation of a statute it administers), we note that our exegesis of the statutes is consistent with employers' and the Commission's longstanding practices of paying and awarding benefits pursuant to N.C.G.S. § 97-61.5, *see, e.g., Davis v. Weyerhaeuser Co.*, 132 N.C. App. 771, 514 S.E.2d 91 (1999) (plaintiff retired and then sought benefits for asbestosis; Commission awarded $20,000 for permanent injury to his lungs pursuant to N.C. Gen. Stat. § 97-31(24) and held that employer was not entitled to credit for payment of 104 weeks pursuant to N.C.G.S. § 97-61.5); *Stroud v. Caswell Center*, 124 N.C. App. 653, 478 S.E.2d 234 (1996) (awarding plaintiff, who retired in 1987 and filed claim in 1989, 104 weeks compensation pursuant to N.C.G.S. § 97-61.5 and $4,000 for permanent lung damage pursuant to N.C.G.S. § 97-31(24)); *Woodell v. Starr Davis Co.*, 77 N.C. App. 352, 335 S.E.2d 48 (1985) (awarding 104 weeks compensation to plaintiff who retired in 1979 and filed claim in 1982); *Mabe v. Granite Corp.*, 15 N.C. App. 253, 189 S.E.2d 804 (1972) (defendant voluntarily paid 104 weeks compensation to plaintiff who had quit in 1968 and thereafter sought benefits).

Accordingly, we hold that an employee who retires prior to being diagnosed with asbestosis need not be "removed" from employment to be entitled to the 104 weeks compensation set forth in N.C.G.S. § 97-61.5. Defendant's assignments of error in this regard are overruled.

IV.

[4] Defendant argues in the alternative that application of N.C.G.S. §§ 97-61.1 through -61.7 "is in violation of the rights of defendant[] to the equal protection of the law as guaranteed by the constitutions of the United States and the State of North Carolina." In response, one of plaintiff's contentions is that defendant failed to raise the constitutionality of the statutes before the Commission.

"It is well established in this jurisdiction that the constitutionality of a statute will not be reviewed in the appellate court unless it was raised and passed upon in the proceedings below[.]" *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 428, 269 S.E.2d 547, 577 (1980) (citation omitted), *superseded by statute on other grounds as stated in State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 129 N.C. App. 662, 501 S.E.2d 681 (1998), *aff'd*, 350 N.C. 539, 516 S.E.2d 150 (1999); *see also Blackmon v. N.C. Dept. of Correction*, 118 N.C. App. 666, 674, 457 S.E.2d. 306, 311, *aff'd on other grounds*, 343 N.C. 259, 470 S.E.2d 8 (1996); N.C.R. App. P. 10(b)(1). There is no evidence of record that General Tire made any argument before the Commission regarding the constitutionality of the challenged statutes. This issue was not raised before the Commission, and we therefore do not consider it here.

V.

[5] Lastly, we address defendant's contention that the Commission erred in calculating plaintiff's average weekly wage. N.C.G.S. § 97-61.5(b) provides that

> the employer shall pay or cause to be paid as in this subsection provided to the employee affected by such asbestosis or silicosis a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his *average weekly wages* before removal from the industry, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 or less than thirty dollars ($30.00) a week[.]

(Emphasis added.) Relying upon this language, the deputy commissioner concluded:

> 7. In the case sub judice, plaintiff voluntarily left his hazardous employment and was diagnosed as havi[]ng asbestosis subsequent to the departure. In order to determine benefits, for a worker [who] has voluntarily left hazardous employment the

focus should be upon the determination of "average weekly wage" rather than upon "removal from the industry". [sic]

8. For the purposes of making an award under N.C. Gen. Stat. § 97-61.5(b), the wages at the time of diagnosis rather than the wages at the last time of hazardous exposure should be considered.

. . . .

10. The legislature has not provided guidance as to determining average weekly wage of an individual who has retired from ha[z]ardous work where he was exposed to asbestos, has been diagnosed with asbestosis, but has never been disabled within the meaning of the Workers' Compensation Act. Plaintiff is entitled to be compensated for 104 weeks at $30.00 per week.

(Internal citations omitted.) The Commission disagreed with these determinations and found instead:

39. In the 52 weeks prior to his retirement on June 1, 1987, plaintiff earned a salary of $31,655.99, which yields an average weekly wage of $608.76 and a weekly compensation rate of $405.83. The maximum weekly benefit in effect for 1987 limits the weekly compensation to $308.00. Plaintiff has not returned to work in any capacity for defendant or any other employer.

40. The first four preferred methodologies used to calculate the average weekly wage under N.C. Gen. Stat. § 97-2(5) would not be fair to the parties. Disability and thus earnings under N.C. Gen. Stat. § 97-60 *et seq.*, like those under N.C. Gen. Stat. § 97-31, are conclusively presumed lost, whether actually earned or not. The best evidence of those earnings conclusively presumed lost for retirees suffering from asbestosis and silicosis is the earnings in the last year of employment. The fifth methodology under N.C. Gen. Stat. § 97-2(5) is for these exceptional reasons invoked for purposes of calculating average weekly wages for retirees first diagnosed post employment as having asbestosis and silicosis. This method is also fair to the employer because premiums were paid based on that year's payroll.

Accordingly, the Commission concluded:

6. Considering all the factors at issue in this case, an appropriate basis for determining a fair and just average weekly wage for plaintiff is to calculate benefits based on the wages

last earned by plaintiff in the employment of last injurious exposure.

7. Having contracted asbestosis, plaintiff is entitled to payment of weekly compensation at the rate of $308.00 per week for 104 weeks.

(Internal citations omitted.)

The Commission relied not only on N.C.G.S. § 97-61.5 in rendering its decision, but looked also to N.C. Gen. Stat. § 97-2 (Cum. Supp. 1998), which defined terms used in the Act. Subsection (5) of that section defines "average weekly wages":

> "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . ; provided, results fair and just to both parties will be thereby obtained. . . .
>
> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C.G.S. § 97-2(5). In *Moore*, the "fair and just" result was to use the language of the first sentence and base the plaintiff's recovery on the "wages earned in his employment 'at the time of the injury,' *i.e.*, the time of his diagnosis." *Moore*, 122 N.C. App. at 379, 469 S.E.2d at 597 (citation omitted). In so doing, the plaintiff's recovery was increased from $62.01 per week (66 2/3% of his average weekly wage during his last year of employment with the defendant) to $263.42 per week (66 2/3% of his average weekly wage at the time of diagnosis, at which time he was self-employed).

In the case before us, the Commission found the method used by *Moore* to be unfair to the parties. Accordingly, it relied upon the following language of N.C.G.S. § 97-2(5): "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." "The intent of this statute is to make certain that the results reached are fair and just to both parties." *Hendricks v. Hill Realty*

Group, Inc., 131 N.C. App. 859, 862, 509 S.E.2d 801, 803 (1998) (citation omitted), *disc. review denied*, 350 N.C. 379, 536 S.E.2d 73 (1999). Furthermore, whether the results are fair and just " 'is a question of fact; and in such case a finding of fact by the Commission controls [the] decision.' " *Id.* (citation omitted). The method prescribed by the Commission was to rely upon plaintiff's earnings during his last year of employment. Using this figure was, according to the Commission, fair to both plaintiff and General Tire. As this finding is supported by competent evidence, it is binding on our Court. Accordingly, this assignment of error is overruled.

The opinion and award of the Commission is affirmed.

Affirmed.

Judge EDMUNDS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority that an employee "need not be 'removed' from employment to be entitled to the 104 weeks compensation set forth in N.C.G.S. § 97-61.5." I, therefore, dissent.

N.C. Gen. Stat. § 97-64 sets forth the general rule that "in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workers' Compensation Act." N.C.G.S. § 97-64 (1999). In N.C. Gen. Stat. §§ 97-61.1 through -61.7, however, our Legislature has set forth an exception to this general rule. The exception, which applies to employees who have received a diagnosis of silicosis and/or asbestosis, provides, in pertinent part:

> (b) If the Industrial Commission finds . . . the employee has either asbestosis or silicosis or if the parties enter into an agreement to the effect that the employee has silicosis or asbestosis, *it shall by order remove the employee from any occupation which exposes him to the hazards of asbestosis or silicosis*, and if the employee thereafter engages in any occupation which exposes him to the hazards of asbestosis or silicosis without having obtained the written approval of the Industrial Commission as provided in G.S. 97-61.7, neither he, his dependents, personal representative nor any other person shall be entitled to any compen-

> sation for disablement or death resulting from asbestosis or silicosis; provided, that *if the employee is removed from the industry the employer shall pay or cause to be paid* as in this subsection provided to the employee affected by such asbestosis or silicosis a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages before removal from the industry, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 or less than thirty dollars ($30.00) a week, which compensation shall continue for a period of 104 weeks. Payments made under this subsection shall be credited on the amounts payable under any final award in the cause entered under G.S. 97-61.6.

N.C.G.S. § 97-61.5(b) (1999) (emphasis added). The unambiguous language of section 97-61.5(b) requires an employee to be "removed" from his employment as a prerequisite to receiving the 104 weeks of compensation provided for in the statute. *See State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998) (when provisions of a statute are unambiguous, "there is no room for judicial construction and the courts must give the statute its plain and definite meaning"), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999). An employee who is no longer employed at the time he is diagnosed with asbestosis, therefore, may not, under the plain language of section 97-61.5(b), proceed with a workers' compensation claim under this statute. Further, even assuming the language of section 97-61.5(b) is ambiguous, a reading of the statute that requires the Commission to order an employee removed from the industry prior to receiving 104 weeks of compensation comports with the Legislature's intent when enacting the statute. *See State v. Tew*, 326 N.C. 732, 738, 392 S.E.2d 603, 607 (1990) (courts must give effect to legislative intent when construing a statute). Sections 97-61.1 through -61.7 were enacted "to encourage employees to remove themselves from hazardous exposure to asbestos and to provide for employee rehabilitation." *Roberts v. Southeastern Magnesia and Asbestos Co.*, 61 N.C. App. 706, 710, 301 S.E.2d 742, 744 (1983). An employee who is no longer employed in a position that causes harmful exposure need not be "removed" from his employment. Additionally, sections 97-61.1 through -61.7 set forth monitoring and examination procedures that an employee must undergo in order to receive compensation. These "monitoring and examination procedure[s] . . . presume[] medical diagnosis will occur *during* the hazardous employment." *Moore v. Standard Mineral Co.*, 122 N.C. App. 375, 378, 469 S.E.2d 594, 596 (1996).

The majority states that, although the plain language of section 97-61.5(b) provides "recovery under this section is predicated upon an employee's removal from the industry," the Legislature intended section 97-61.5(b) to apply even when no removal order has been issued. The majority cites N.C. Gen. Stat. § 97-61.7 in support of its holding. Section 97-61.7 permits an employee who has been compensated pursuant to section 97-61.5(b), with the approval of the Commission, to retain his employment with his employer and to waive any further compensation based on aggravation of his condition. N.C.G.S. § 97-61.7 (1999). Section 97-61.7, however, applies only after an employee has been allowed compensation under section 97-61.5(b), and section 97-61.7 does not alter the requirement of section 97-61.5(b) that the Commission order the employee "removed" from employment with employer.

Additionally, the majority cites *Roberts* in support of its holding. In *Roberts*, this Court held that an employee who remained in a job where he was exposed to asbestos was not precluded from receiving 104 weeks of compensation under section 97-61.5(b). *Roberts*, 61 N.C. App. at 710-11, 301 S.E.2d at 744-45. In *Roberts*, however, the Commission ordered the employee removed from employment that required contact with asbestos. *Id.* at 711, 301 S.E.2d at 745. Accordingly, *Roberts* does not stand for the proposition that an order of removal is not a prerequisite to recovery under section 97-61.5(b).

I acknowledge the "removal" requirement of section 97-61.5(b) raises concerns regarding whether an employee who chooses to remove himself from employment prior to a diagnosis of asbestosis should be precluded from receiving 104 weeks of compensation under section 97-61.5(b). For example, this statute may encourage employees who are exposed to asbestos to remain in their employment until they receive a diagnosis of asbestosis. These concerns, however, should not be resolved by this Court; rather, the proper forum for addressing these concerns is in the Legislature. *See Moore*, 122 N.C. App. at 380, 469 S.E.2d at 598 (noting legislative action may be required to address asbestosis claims of employees who are no longer employed by their employers at the time of diagnosis). Accordingly, I would reverse the opinion and award of the Commission and hold that because plaintiff was not employed by defendant at the time of his diagnosis and, therefore, was not "removed" from his employment pursuant to section 97-61.5(b), section 97-64 provides plaintiff's sole remedy for his alleged asbestos-related disorder.

JIMMIE CLARK, EMPLOYEE-PLAINTIFF-APPELLEE v. ITT GRINNELL INDUSTRIAL PIPING, INCORPORATED, EMPLOYER-DEFENDANT-APPELLANT, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER-DEFENDANT-APPELLANT, CIGNA INSURANCE COMPANY, CARRIER-DEFENDANT-APPELLANT

No. COA99-246

(Filed 29 December 2000)

1. Workers' Compensation— asbestosis—sufficiency of evidence

The Industrial Commission did not err in a workers' compensation action by finding that plaintiff had asbestosis as defined by N.C.G.S. § 97-62 where the record contained the opinions of three doctors that plaintiff had lung conditions consistent with or characteristic of asbestos exposure.

2. Workers' Compensation— asbestosis—last injurious exposure—sufficiency of evidence

There was sufficient evidence in a workers' compensation action to support the Industrial Commission's findings that plaintiff was injuriously exposed to the hazards of asbestos while employed by defendant-ITT. Plaintiff specifically testified that he wore asbestos gloves, that he would lay asbestos wrap over pipes, and that the railroad bottom of a furnace which carried asbestos would be rolled near his work position when he worked for defendant; another employee testified that he also wore asbestos gloves and that he would prepare a pipe for the furnace by putting an asbestos wrap on it; and the senior engineer for the plant, a witness for defendant, acknowledged that ITT "probably used some form of asbestos wrap" before he arrived there. The Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony.

3. Workers' Compensation— issue raised in Industrial Commission review

The fact that a workers' compensation issue was not raised until it was reviewed by the Industrial Commission is of no consequence to the appellate review of the case. It is the Commission's duty to consider every aspect of the claim whether before the hearing officer or on appeal to the Commission.

4. Workers' Compensation— asbestosis—dusty trades—compensation scheme

The Industrial Commission did not err in a workers' compensation asbestos case by applying N.C.G.S. § 97-60 through 61.7

even though there was no evidence that plaintiff was engaged or about to engage in an occupation that the Commission had found to expose employees to the hazards of asbestosis. N.C.G.S. § 97-60, which requires that potential and current employees be screened for asbestos-related disorders, is limited to persons engaged in or about to engage in an industry classified as a dusty trade, but the employer's status as a dusty trade does not impact the application of the examination and compensation scheme set forth in N.C.G.S. § 97-61.1 through 61.7.

5. Workers' Compensation— asbestosis—removal from industry—not required

An employee suffering from an asbestos-related disease need not be removed from employment to be entitled to the 104 weeks of compensation set forth in N.C.G.S. § 97-61.5. The language of N.C.G.S. § 97-61.5(b), read alone, appears to require that an employee be removed from the industry, but construing that statute in pari materia with N.C.G.S. § 97-61.7 evidences the General Assembly's intent to allow an injured worker to remain in the harmful work environment and receive the 104 weeks of compensation.

6. Constitutional Law— equal protection—workers' compensation—asbestosis

N.C.G.S. § 97-60 and 61.1 through 61.7 do not violate defendants' rights to equal protection in that occupational diseases other than asbestosis or silicosis do not provide an automatic 104 weeks of compensation.

7. Workers' Compensation— asbestosis—average weekly wage—calculation

The Industrial Commission's findings in a workers' compensation case were insufficient to support its conclusion regarding an asbestosis plaintiff's average weekly wage and the matter was remanded to the Industrial Commission. The Commission made no findings regarding the fair and just method of calculating the wage, so that it must be assumed that the Commission was relying upon the first method set out in N.C.G.S. § 97-2(5); that method requires looking at the plaintiff's employment immediately preceding diagnosis; and the Commission made the calculation by looking at the last full year of employment. There is no requirement of actual disablement in the asbestosis statutes.

Appeal by defendants ITT Grinnell Industrial Piping, Inc. and Liberty Mutual Insurance Company from opinion and award entered 23 September 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 November 1999.

The Law Offices of Robin E. Hudson, by Robin E. Hudson and Samuel A. Scudder, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Thomas M. Clare, for defendant-appellant ITT Grinnell Industrial Piping Inc.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe, Patrick D. Sarsfield, II, J.A. Gardner, III, and Andrew R. Ussery, for defendant-appellant Liberty Mutual Insurance Company.

Cranfill, Sumner & Hartzog, L.L.P., by Gregory M. Kash, for defendant-appellee Cigna Insurance Company.

Wallace and Graham, P.A., by Mona Lisa Wallace, for the North Carolina Academy of Trial Lawyers, amicus curiae.

Johnston, Allison & Hord, P.A., by James W. Allison, for Carolinas AGC, Inc., amicus curiae.

Parker, Poe, Adams & Bernstein, L.L.P, by Josephine H. Hicks, for North Carolina Citizens for Business and Industry, amicus curiae.

McGEE, Judge.

Pursuant to N.C. Gen. Stat. § 97-86 (Cum. Supp. 1998), defendant-employer ITT Grinnell Industrial Piping, Inc. (ITT Grinnell) and defendant-carrier Liberty Mutual Insurance Company (Liberty Mutual) appeal an opinion and award of the North Carolina Industrial Commission (the Commission) entered 23 September 1998. The Commission, in reversing the deputy commissioner's opinion and award entered 15 July 1997, awarded plaintiff-employee Jimmie Clark workers' compensation benefits for "Asbestos-related lung disease."

Plaintiff testified he worked as a pipe fitter for multiple employers for most of his life. He began working as a pipe fitter in 1952 at the age of eighteen in the shipyards of Newport News, Virginia, where he was exposed to asbestos products or dust during his employment.

Plaintiff changed jobs in June 1969, and for almost the next twenty-six years he was employed at an ITT Grinnell plant, formerly Carolina Industries Piping Company. ITT Grinnell fabricated pipes for use in nuclear power plants. Plaintiff began work in Bay One at ITT Grinnell as a pipe fitter for one week. He then worked in Bay Two for six months. Afterward, plaintiff trained in Bay Four for four months and then was transferred to Bay Three, where "heavy wall piping" was fabricated. Almost all of plaintiff's work, until the end of his employment in February 1985, occurred in Bay Three.

Plaintiff testified that as a pipe fitter in Bay Three his primary duties were to cut holes and preheat piping joints with a torch before they were fitted by welders. Plaintiff occasionally performed welding operations after he pre-heated a pipe.

As a pipe fitter, plaintiff testified that he wore "burning gloves" or mittens made of asbestos to protect his hands from the heat. He continued to wear the asbestos gloves until they were replaced with non-asbestos gloves in late 1974.

Plaintiff testified that he worked in proximity to where stress relief operations were performed on the floor in Bay Three. To perform stress relief, an electric coil was wrapped around the necessary part of the pipe and fitting. The heating coil and the pipe were then wrapped with asbestos cloth and secured. The pipe and cloth remained in that position until a certain temperature was reached. Plaintiff also testified that he would lay the asbestos wrap over a pipe that had been pre-heated.

During plaintiff's first year in Bay Three, the ITT Grinnell plant completed a special, free-standing stress relief furnace that sat outside the bay area. It had a railroad car bottom, approximately ten-feet wide by forty-feet long with "fire bricks" on it. This railroad car bottom was rolled from the outside furnace to the inside of Bay Three, very close to plaintiff's work position. Plaintiff testified in his deposition that the railroad car carried soft, fibrous mortar and dust. After the stress relief furnace was constructed, the plant rarely used the stress relief on the floor in Bay Three.

The Commission heard testimony of Samuel Andrews (Andrews), who was employed by ITT Grinnell from 1969 to 1977. Andrews said that he wore asbestos gloves every day to handle hot pipes. He confirmed plaintiff's testimony that asbestos wrap was used on hot pipes in Bay Three. Furthermore, Andrews testified that he saw white

residue of asbestos on the pipe after the pipe came out of the stress relieving furnace.

Adolphus Young (Young) testified he worked for ITT Grinnell from 1969 to 1984. After Bay Three was completed, Young worked there most of the time. Young testified that he wore asbestos-containing gloves. In addition, he said that asbestos wrap was used during performance of stress relief on the floor. Later, Young operated the stress relief furnace. He stated that on a regular basis he would prepare a pipe for the furnace by putting an asbestos wrap on it.

Michael Valentine (Valentine), a senior welding engineer at ITT Grinnell from 1974 to 1985, testified that asbestos wrap was not used when the pipes went into the stress relief furnace. He also speculated that the ashes that accompanied the pipe after it was removed from the furnace were "related to [] the protective coating" of the pipe. However, Valentine also acknowledged that ITT Grinnell "probably used some form of asbestos wrap" before he began working there in 1974.

The Commission found as fact:

> 5. The Plaintiff's employment with Defendant/employer provided exposure to asbestos materials on a regular basis. These materials included asbestos welding gloves, asbestos pipe wrap, asbestos brick, asbestos mortar, asbestos dust from the railroad car from the outside furnace, and other asbestos containing materials. The plaintiff's last injurious exposure to asbestos was with Defendant/employer between the years 1974 through 1975, when the plant stopped using asbestos-containing products.
>
> 6. Plaintiff was diagnosed with asbestosis and was advised of this condition June 15, 1989.
>
> . . . .
>
> 8. Plaintiff underwent his first and only Advisory Medical Committee examination by Dr. C.D. Young on November 4, 1991. It was Dr. Young's opinion that Plaintiff, more likely than not, had asbestosis.

Based on these findings of fact, the Commission concluded:

> 1. Plaintiff has asbestosis as defined by N.C. Gen. Stat. § 97-62. Plaintiff's last injurious exposure to asbestos occurred

while working for Defendant/employer before the plant stopped using asbestos materials. Therefore, Plaintiff is eligible for compensation pursuant to N.C. Gen. Stat. § 97-61.5.

2. In order for the uninsured Defendant/employer to incur liability in this case, Plaintiff's last injurious exposure to asbestos must have occurred during the time Defendant/employer was uninsured, which was before January 1, 1972. Plaintiff's last injurious exposure occurred after January 1, 1972. Therefore, the uninsured Defendant/employer has no liability.

. . . .

5. As a result of his contraction of asbestosis, Plaintiff is entitled to receive weekly compensation at the rate of $319.38 per week for a period of 104 weeks commencing as of November 4, 1991. N.C. Gen. Stat. § 97-61.5.

(Citation omitted.)

The Commission awarded plaintiff workers' compensation benefits from Liberty Mutual only, and all other claims of plaintiff against defendants were denied. Defendants appeal from the opinion and award of the Commission.

I.

[1] Defendants argue that the Commission erred in finding that plaintiff had asbestosis, as defined in N.C. Gen. Stat. § 97-62 (1991). Under the North Carolina Workers' Compensation Act, asbestosis is defined as the "characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust." *Id.* Relying on certain medical literature and learned treatises, defendants contend that asbestosis is "a distinct medical condition with specific characteristics and risks" and is distinguishable from "pleural plaques" in the lungs.

Our Court's standard of review in an appeal from the Commission is limited to two questions: (1) whether there is any competent evidence to support the Commission's findings of fact and (2) whether the findings support the Commission's conclusions of law. *See Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996). Our Supreme Court recently stated:

Under our Workers' Compensation Act, "the Commission is the fact finding body." "The Commission is the sole judge of

the credibility of the witnesses and the weight to be given their testimony."

. . . .

"The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." Thus, on appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding."

N.C.G.S. § 97-86 provides that "an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact." As we stated in *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 141 S.E.2d 632 (1965), "[t]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.

Adams v. AVX Corp. 349 N.C. 676, 680-81, 509 S.E.2d 411, 413-14 (1998) (alteration in original) (internal citations omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

Viewing the evidence in the light most favorable to plaintiff, the record before us contains competent evidence to support the Commission's findings that plaintiff suffered from asbestosis. On 17 September 1990, plaintiff was examined by Dr. David E. Shanks (Dr. Shanks), an expert in pulmonary medicine who is affiliated with the North Carolina Industrial Commission's Advisory Medical Committee. According to Dr. Shanks' initial examination, plaintiff's x-rays indicated evidence of "pleural plaques and thickening." Dr. Shanks later opined that plaintiff had "fibrotic conditions of the lung [] characteristic of asbestos exposure." Dr. Clinton D. Young (Dr. Young), a pulmonary specialist, examined plaintiff on 4 November 1991 and found that "[c]hest x-ray reveals definite pleural plaques quite consistent with asbestos exposure." In his deposition testimony, Dr. Young stated:

Q . . . Do you have an opinion as to whether Mr. Clark more likely than not has asbestosis?

A Yes.

Q What is your opinion?

A My opinion was that more likely than not, he did.

Dr. Andrew J. Ghio (Dr. Ghio), an expert in pulmonary medicine, reviewed plaintiff's x-rays on 8 August 1994 and observed "[e]vidence on chest radiograph consistent with a significant asbestos exposure." Dr. Ghio confirmed his opinion in later testimony. There was sufficient evidence in the record before the Commission to support its finding of fact that plaintiff has asbestosis.

II.

[2] Defendants next challenge the sufficiency of the evidence supporting the Commission's findings that plaintiff was injuriously exposed to the "hazards" of asbestos while employed with defendant ITT Grinnell. The statute upon which defendants rely provides in part:

> In any case where compensation is payable for an occupational disease, the employer in whose employment the employee *was last injuriously exposed to the hazards of such disease*, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.
>
> For the purpose of this section when an employee has been exposed to the *hazards of asbestosis* or silicosis for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious . . . .

N.C. Gen. Stat. § 97-57 (1991) (emphasis added). More specifically, defendants contend the Commission lacked any scientific evidence concerning the presence of airborne, asbestos fibers at the ITT Grinnell plant. We disagree.

In *Gay v. J.P. Stevens & Co.*, 79 N.C. App. 324, 339 S.E.2d 490 (1986), the defendants argued that expert testimony about the plaintiff's exposure to toxic fumes while in the defendant-employer's employment was "mere speculation" because the levels of toxic substances in plaintiff's workplace were never actually measured. In quoting *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 668, 303 S.E.2d 795, 797 (1983), a case in which our Supreme

Court rejected the employer's argument that the employee must introduce evidence of the noise level to recover benefits for loss of hearing, our Supreme Court reiterated the unreasonableness of such a high standard of proof:

> "It is unreasonable to assume that the legislature intended an employee to bear the burden of making noise-level measurements during his employment in order to lay the groundwork for a worker's compensation claim. Such an interpretation of the statute would make it virtually impossible for an employee to successfully bring suit for compensation for a hearing loss, due to the difficulty he would encounter in attempting to make measurements of sound on his employer's premises. A construction of the statute which defeats its purpose—to provide a means by which employees can recover for injury due to harmful workplace noise—would be irrational and will not be adopted by this Court."

Gay, 79 N.C. App. at 333-34, 339 S.E.2d at 496 (citation omitted). In applying *Gay* and *McCuiston*, we conclude that a claimant need not introduce scientific evidence to prove his exposure to asbestos for the purposes of N.C.G.S. § 97-57.

We also note that less evidence than was presented in this case was specifically found to be sufficient in *Woodell v. Starr Davis Co.*, 77 N.C. App. 352, 335 S.E.2d 48 (1985). In *Woodell*, the plaintiff filed a workers' compensation asbestos claim against an insulation contractor and its insurance carrier. Like defendants' argument in our case, the defendants in *Woodell* contended that the evidence produced did not support the Commission's findings or conclusion that the plaintiff was injuriously exposed to asbestos. However, unlike plaintiff in our case, the plaintiff in *Woodell* was the *only* witness to testify that he worked with asbestos-containing pipes. The *Woodell* Court held this evidence to be sufficient. *Id.* at 357, 335 S.E.2d at 51.

In the case before us, plaintiff specifically testified that he wore asbestos gloves and that he would lay asbestos wrap over a pipe during stress relief operations on the floor. Plaintiff testified that the railroad bottom of the stress relief furnace, which carried asbestos, would be rolled near his work position. Andrews testified that he also wore asbestos gloves and saw white residue of asbestos on the pipe after the pipe came out of the furnace. Young also said he wore asbestos gloves. Moreover, he stated that he would prepare a pipe for the furnace by putting an asbestos wrap on it. Even Valentine, a wit-

ness for defendants and senior engineer at the plant, acknowledged that ITT Grinnell "probably used some form of asbestos wrap" before he arrived there in 1974. In addition, as discussed above, all three medical experts found that plaintiff's chest x-rays revealed conditions consistent with asbestos exposure. Because the Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony, *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965), we hold that there was competent evidence to support the Commission's finding that plaintiff was exposed to asbestos.

III.

[3] Defendants next contend the Commission erred by applying the provisions of N.C. Gen. Stat. §§ 97-60 through -61.7 (1991 & Cum. Supp. 1998) in this case because there was no evidence that plaintiff was "engaged or about to engage in" an occupation that the Commission had found to expose employees to the hazards of asbestosis. In response, plaintiff contends we should not reach this issue because "it was not raised until after all the evidence had been submitted, the case had been decided by the Deputy Commissioner, and was on appeal before the Full Commission." However, it is the Commission's duty to consider every aspect of the claim whether before the hearing officer or on appeal to the Commission. *See Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988) ("[T]he 'full Commission' is not an appellate court in the sense that it reviews decisions of a trial court. It is the duty and responsibility of the full Commission to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it."). Accordingly, the fact that this issue was not raised until it was reviewed by the Commission is of no consequence to our appellate review of the case. We thus turn to the merits of defendants' argument.

[4] Although the Workers' Compensation Act should be liberally construed, *see Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968), " '[j]udges must interpret and apply statutes as they are written,' " *Andrews v. Nu-Woods, Inc.*, 299 N.C. 723, 726, 264 S.E.2d 99, 101 (1980) (alteration in original) (citation omitted), "ensur[ing] that the legislative intent is accomplished," *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 88, 484 S.E.2d 566, 569 (1997) (citation omitted). Statutes should be reconciled with each other whenever possible, avoiding interpretations that would create conflicts between two or more statutes. *See Meyer v. Walls*, 122 N.C.

App. 507, 512, 471 S.E.2d 422, 427 (1996), *aff'd in part, rev'd in part on other grounds*, 347 N.C. 97, 489 S.E.2d 880 (1997).

We begin this interpretation of the statutes by examining the plain words of the statutes. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). The language on which defendants rely is derived from N.C. Gen. Stat. § 97-60 (Cum. Supp. 1998), which reads in pertinent part:

> The compulsory examination of employees and prospective employees as herein provided applies only to persons engaged or about to engage in an occupation which has been found by the Industrial Commission to expose them to the hazards of asbestosis and/or silicosis. . . . [I]t shall be the duty of every employer, in the conduct of whose business his employees or any of them are subjected to the hazard of asbestosis and/or silicosis, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis and/or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the Industrial Commission, provide similar examinations for all of his employees whose employment exposes them to the hazards of asbestosis and/or silicosis.

By its very terms, N.C.G.S. § 97-60 establishes a requirement that certain employers (i.e., those found by the Commission to subject its employees to the hazards of asbestosis or silicosis) screen potential and current employees for any signs of asbestosis or asbestos-related disorders. N.C.G.S. § 97-60 is limited to "persons engaged or about to engage in" employment with an industry classified as a "dusty trade."

However, N.C.G.S. § 97-60 stands alone in its application; the employer's status (or lack thereof) as a "dusty trade" does not impact the application of the examination and compensation scheme set forth in N.C.G.S. §§ 97-61.1 through -61.7. The language in those sections refers to "an employee [who] has asbestosis or silicosis," N.C. Gen. Stat. § 97-61.1 (Cum. Supp. 1998), and speaks generally to "employers." Limiting the application of N.C.G.S. §§ 97-61.1 through -61.7 to employers designated as "dusty trades" would adversely affect the class of employees suffering from asbestosis or silicosis, thus thwarting the intent of the General Assembly to compensate employees who have contracted asbestosis.

Similarly, the language in N.C.G.S. § 97-60, "persons engaged or about to engage in," does not extend to N.C.G.S. §§ 97-61.1 through -61.7. The language of N.C.G.S. § 97-60 is more far-reaching than that used in N.C.G.S. §§ 97-61.1 through -61.7, in that N.C.G.S. § 97-60 requires screening of both current *and prospective* employees, whereas N.C.G.S. §§ 97-61.1 through -61.7 apply only to "employees."

We find support for our interpretation in N.C. Gen. Stat. § 97-72 (Cum. Supp. 1998), which sets forth as one of the specific statutory purposes for creation of the advisory medical committee "to conduct examinations and make reports as required by G.S. 97-61.1 through 97-61.6." (Emphasis added.) The General Assembly's omission of N.C.G.S. § 97-60 further suggests the exclusivity of that section.

Accordingly, we disagree with defendants' arguments in this regard and hold that an employer need not be designated a "dusty trade" for N.C.G.S. §§ 97-61.1 through -61.7 to apply. Likewise, the "engaged or about to engage in" language of N.C.G.S. § 97-60 does not carry over to the screening and reporting provisions of N.C.G.S. §§ 97-61.1 through -61.7.

[5] However, defendants also contend that "most importantly, the payment of one hundred four weeks of compensation is reserved to those employees who are *actually removed* from their employment." (Emphasis added.) This Court addressed the removal requirement in *Moore v. Standard Mineral Co.*, 122 N.C. App. 375, 469 S.E.2d 594 (1996).

> [T]he term "removal" as used by G.S. § 97-61.5 presumes medical diagnosis will occur *during* the hazardous employment. Thus, the language regarding "removal from the industry" has specific application only to occasions when . . . identified victims of occupational disease [] are thereafter "removed" from a hazardous industry by directive of the Commission. However, the phrase is inapposite to instances such as that *sub judice* wherein a claimant is diagnosed at some point *subsequent* to leaving hazardous employment.

Id. at 378, 469 S.E.2d at 596. An important distinction, however, is that in *Moore*, the defendant agreed that the plaintiff was entitled to benefits under N.C.G.S. § 97-61.5(b). For that reason,

> we emphasize[d] that the situation of a claimant no longer employed in any capacity at the time of diagnosis is not before us, and that legislative action to address such an instance may well

> be required to fulfill completely the intended purpose of compensating workers who have contracted occupational diseases.

Id. at 380, 469 S.E.2d at 598 (citation omitted). We believe, however, that a close reading of the statutes resolves the situation referred to in *Moore* and now presented to our Court.

The general rule for recovery for individuals suffering from asbestosis or asbestos-related disorders is found at N.C. Gen. Stat. § 97-64 (1991), which provides:

> Except as herein otherwise provided, in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workers' Compensation Act.

The exceptions to which N.C.G.S. § 97-64 refers are found in N.C.G.S. §§ 97-61.1 through -61.7. N.C.G.S. §§ 97-61.1 through -61.4 establish a series of examinations by the Commission's advisory medical committee of "an employee [who] has asbestosis or silicosis" and reports to be made from those examinations. *Id.* § 97-61.1. After the first examination and report, *see id.* §§ 97-61.1, -61.2 (1991), N.C. Gen. Stat. § 97-61.5(b) (1991) mandates the following:

> If the Industrial Commission finds at the first hearing that the employee has either asbestosis or silicosis . . . it shall by order remove the employee from any occupation which exposes him to the hazards of asbestosis or silicosis . . . ; provided, that *if the employee is removed from the industry* the employer shall pay or cause to be paid . . . to the employee affected by such asbestosis or silicosis a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages before removal from the industry . . . which compensation shall continue for a period of 104 weeks.

(Emphasis added.) N.C. Gen. Stat. § 97-61.6 (1991) then provides means for recovering additional partial or total disability and compensation for resulting death due to asbestosis or silicosis.

Looking solely at the language of N.C.G.S. § 97-61.5(b), it appears that recovery under this section requires that an employee be removed from the industry. However, the Act is to be construed *in para materia*, and N.C. Gen. Stat. § 97-61.7 (1991) aids in resolving the situation posed by the *Moore* Court. N.C.G.S. § 97-61.7 reads in pertinent part:

> An employee who has been compensated under the terms of G.S. 97-61.5(b) *as an alternative to forced change of occupation*, may, subject to the approval of the Industrial Commission, waive in writing his right to further compensation for any aggravation of his condition that may result from his continuing in an occupation exposing him to the hazards of asbestosis or silicosis, in which case payment of all compensation awarded previous to the date of the waiver . . . shall bar any further claims by the employee, . . . provided, that in the event of total disablement or death as a result of asbestosis or silicosis with which the employee was so affected, compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than 100 weeks *in addition to the 104 weeks already paid.*

(Emphasis added.) Construing the Workers' Compensation Act "liberally in favor of the injured worker," *Hicks v. Leviton Mfg. Co.*, 121 N.C. App. 453, 457, 466 S.E.2d 78, 81 (1996), which we are required to do, we read these sections together as evidencing the General Assembly's intent to allow an injured plaintiff to remain in the harmful work environment *and* receive the 104 weeks of compensation. Accordingly, contrary to defendants' argument, removal from the industry is not required for an employee to receive the 104 weeks of compensation.

This automatic compensation scheme satisfies the legislative purpose of providing "compensation to those workers affected with asbestosis or silicosis, whose principal need is compensation." *Young v. Whitehall Co.*, 229 N.C. 360, 365, 49 S.E.2d 797, 801 (1948).

Our reading of these statutes is further guided by earlier statements by our appellate courts. In *Roberts v. Southeastern Magnesia and Asbestos Co.*, our Court set forth the language of N.C.G.S. §§ 97-61.5(b) and -61.7 and stated:

> It is clear from the language of these two statutes that a diagnosis of asbestosis . . . is the equivalent of a finding of actual disability. . . .
>
> The Commission's award was predicated upon the employee avoiding further exposure to asbestos[] in his employment. We recognize that the intent of the Legislature in providing for an automatic 104 installment payments was to *encourage* employees to remove themselves from hazardous exposure to

> asbestos and to provide for employee rehabilitation[.] We also recognize that G.S. 97-61.5(b) which authorizes this award, has as an *additional purpose* the compensation of employees for the incurable nature of the disease of asbestosis. There is no indication that the Legislature intended to prohibit any recovery whatsoever to those employees who refused to remove themselves from contact with asbestos after being diagnosed as having asbestosis. The statutory language merely prohibits recovery for actual partial incapacity if the employee, after receiving the initial compensation in the form of the 104 week installment payments, is shown to have remained in a job where he or she is exposed to asbestos.

61 N.C. App. 706, 710-11, 301 S.E.2d 742, 744-45 (1983) (emphasis added) (internal citations omitted). Our Court, in *Hicks*, 121 N.C. App. at 456, 466 S.E.2d at 81, quoted *Roberts* with approval and stated: "Thus, this Court has previously concluded that the Legislature intended compensation under G.S. § 97-61.5(b) as compensation for permanent damage to the employee's lungs due to asbestosis *as well as* for switching trades." (Emphasis added.)

Finally, we give deference to the Commission's determination in similar situations. *See Carpenter v. N.C. Dept. of Human Resources*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992) (stating that a reviewing court should defer to an agency's reasonable interpretation of a statute it administers). Our reading of the statutes is consistent with employers' and the Commission's long-standing practices of paying and awarding benefits, pursuant to N.C.G.S. § 97-61.5, to employees such as plaintiff. *See, e.g., Davis v. Weyerhaeuser Co.*, 132 N.C. App. 771, 514 S.E.2d 91 (1999) (plaintiff retired and then sought benefits for asbestosis; Commission awarded $20,000 for permanent injury to his lungs pursuant to N.C. Gen. Stat. § 97-31(24) and held that employer was not entitled to credit for payment of 104 weeks pursuant to N.C.G.S. § 97-61.5); *Stroud v. Caswell Center*, 124 N.C. App. 653, 478 S.E.2d 234 (1996) (awarding plaintiff, who retired in 1987 and filed claim in 1989, 104 weeks compensation pursuant to N.C.G.S. § 97-61.5 and $4,000 for permanent lung damage pursuant to N.C.G.S. § 97-31(24)); *Woodell v. Starr Davis*, 77 N.C. App. 352, 335 S.E.2d 48 (1985) (awarding 104 weeks compensation to plaintiff who retired in 1979 and filed claim in 1982); *Mabe v. Granite Corp.*, 15 N.C. App. 253, 189 S.E.2d 804 (1972) (defendant voluntarily paid 104 weeks compensation to plaintiff who had quit in 1968 and thereafter sought benefits).

Accordingly, we hold that an employee need not be "removed" from employment to be entitled to the 104 weeks compensation set forth in N.C.G.S. § 97-61.5. Defendants' assignments of error on this issue are overruled.

IV.

[6] Defendants next argue that if N.C.G.S. § 97-60 and §§ 97-61.1 through -61.7 do apply to the parties in this case where they contend "plaintiff was not engaged or about to engage in an employment that exposed him to the hazards of asbestosis and was not otherwise forcibly removed from his occupation as a result of the asbestosis diagnosis, then the application of" those provisions violates defendants' right to equal protection of the law as guaranteed by the Constitutions of the United States and the state of North Carolina. Defendants contend that there are many other occupational diseases as serious as asbestosis and silicosis and by providing for an automatic 104 weeks of compensation for employees who suffer from asbestosis or silicosis but *not* so providing for employees with other occupational diseases makes these provisions "grossly under-inclusive."

Defendants' argument is, in essence, that the under-inclusive nature of the asbestosis statutes somehow "places a disproportionate and unconstitutional burden on Defendants." In response, plaintiff contends that defendants have no standing to raise this issue.

We note that a similar constitutional challenge was made by the defendant-employer in *Jones v. Weyerhaeuser Co.*, No. COA99-742 (N.C. App. Dec. 29, 2000), where the defendant argued that N.C.G.S. § 97-61.5 denied its company equal protection because the statute treats employers with employees who are exposed to asbestos and silica differently than employers with employees who are not exposed to asbestos and silica. However, the defendant in *Jones* argued it sustained some monetary injury by application of N.C.G.S. § 97-61.5. *Id.*, slip op. at 4. ("[B]ecause [defendant's] business exposed its workers to asbestos, defendant is 'burdened with additional liability for workers compensation benefits, with which similarly situated employers' (whose businesses did not expose their workers to asbestos or silica) are not so burdened."). Conversely, neither defendant in the case before us alleges any disparate economic impact resulting from application of the asbestosis statutes. Thus, while in *Jones* the defendant's argument was "at best tenuous," *id.*, defendants' argument in this case is untenable. Nonetheless, we

upheld the constitutionality of N.C.G.S. § 97-61.5 in *Jones* and we rely upon the language set forth therein to now overrule defendants' constitutional challenge to N.C.G.S. §§ 97-60 and -61.1 through -61.7. This assignment of error is overruled.

V.

[7] Finally, defendants contend the Commission erred in calculating plaintiff's "average weekly wage" in awarding compensation. As to plaintiff's average weekly wage, the Commission found:

> 3. As of the last date of employment with Defendant/employer, Plaintiff earned $24,899.10 in his last full year of employment, his applicable average weekly wage being $478.83, which yields a workers' compensation rate of $319.38.

Based upon this finding and citing N.C.G.S. §§ 97-57 and 97-61.5, the Commission concluded:

> 4. The defendant/carrier Liberty Mutual was on the risk at the time of Plaintiff's last injurious exposure and is, therefore, liable for payment of compensation due Plaintiff pursuant to the Act.
>
> 5. As a result of his contraction of asbestosis, Plaintiff is entitled to receive weekly compensation at the rate of $319.38 per week for a period of 104 weeks . . . .

Defendants contend plaintiff's compensation rate should have been calculated based upon the year of his "last injurious exposure," citing N.C. Gen. Stat. § 97-54 (1991), which defines "disablement." However, compensation under N.C.G.S. §§ 97-61.1 through -61.7 is unrelated to actual disablement. N.C.G.S. § 97-61.5(b) provides that

> the employer shall pay or cause to be paid as in this subsection provided to the employee *affected by* such asbestosis or silicosis a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his *average weekly wages* before removal from the industry, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 or less than thirty dollars ($30.00) a week . . . .

(Emphasis added.) "Average weekly wage" is defined as:

> [1.] [T]he earnings of the injured employee in the employment in which he was working at the time of the injury during the period

> of 52 weeks immediately preceding the date of the injury . . . ; provided, results fair and just to both parties will be thereby obtained. . . .
>
> [5.] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (Cum. Supp. 1998). There is no requirement of actual disablement in the asbestosis statutes, and defendants' contention must fail. Nonetheless, we find the Commission's findings deficient on the issue of plaintiff's average weekly wage.

N.C.G.S. § 97-2(5) " 'provides a hierarchy' of five methods of computing the average weekly wages." *McAninch v. Buncombe County Schools*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997). Accordingly, if the first method prescribed would be "fair and just," it is the method to be employed. "The final method, as set forth in the last sentence, clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods." *Id.* (citation omitted).

Our Court addressed the applicability of the first method to facts similar to those now presented in *Moore*, 122 N.C. App. 375, 469 S.E.2d 594. The parties in *Moore* entered into an agreement whereby the employer and insurance company agreed to compensate the employee, pursuant to N.C.G.S. § 97-61.5(b), for 104 weeks of compensation at the rate of $62.01 per week (sixty-six and two-thirds percent of the plaintiff's average weekly wage earned during his last year of employment with the defendant-employer). The agreement was contingent on "a determination by the Commission as to whether the appropriate rate had been paid." *Id.* at 376, 469 S.E.2d at 595. The Commission adopted the deputy commissioner's opinion and award, which had set the plaintiff's weekly compensation rate at $263.42 (or sixty-six and two-thirds percent of his average weekly wage earned during the fifty-two weeks prior to diagnosis of silicosis).

On appeal to this Court, the defendants in *Moore* argued "that the average weekly wage governing compensation is that which the employee was receiving 'before removal from the industry' within which silicosis was contracted." *Id.* at 377, 469 S.E.2d at 596. Conversely, the plaintiff contended that the "date of the injury,"

N.C.G.S. § 97-2(5), was the time of diagnosis, thus mandating that "compensation [] be calculated based upon his wages 'during the period of 52 weeks immediately preceding the date' of diagnosis," *Moore*, 122 N.C. App. at 377, 469 S.E.2d at 596. We agreed with the plaintiff's argument and held that, for purposes of calculating the average weekly wages (pursuant to the first method set out in N.C.G.S. § 97-2(5)) of a claimant who is diagnosed with asbestosis or silicosis *subsequent to* leaving his employment, the "date of the injury" is the time of diagnosis. *Id.* at 379, 469 S.E.2d at 597 (citation omitted).

In the case before us, the Commission, without explanation, found as fact that plaintiff's average weekly wage should be calculated by looking to his last full year of employment with defendant-employer. It then concluded that such payment should "commenc[e] as of November 4, 1991," the date on which plaintiff was examined by the Commission's Advisory Medical Committee.

Without any findings regarding the "fair and just" method for calculating plaintiff's average weekly wage, we must assume that the Commission was attempting to rely upon the first method set forth in N.C.G.S. § 97-2(5). However, as previously discussed, that method requires looking at the plaintiff's employment immediately preceding diagnosis for calculating his average weekly wage. *See Moore*, 122 N.C. App. 375, 469 S.E.2d 594. Accordingly, we find that the Commission's findings are insufficient to support its conclusion that "Plaintiff is entitled to receive weekly compensation at the rate of $319.38 per week for a period of 104 weeks." We therefore remand to the Commission the issue of calculation of plaintiff's average weekly wage and his resulting benefits.

Affirmed in part, remanded in part.

Judges HORTON and EDMUNDS concur.

CHARLES SCHLOSSBERG, PLAINTIFF-APPELLEE v. T.J. (P.J.) GOINS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A CORPORAL OF THE CITY OF GREENSBORO POLICE DEPARTMENT, T.D. DELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE GREENSBORO POLICE DEPARTMENT, AND THE CITY OF GREENSBORO, DEFENDANTS-APPELLANTS

No. COA99-1391

(Filed 29 December 2000)

1. Appeal and Error— appealability—denial of summary judgment—governmental immunity

Denials of summary judgment were immediately appealable because the motions were based upon governmental immunity as well as public officer immunity.

2. Immunity— governmental—waiver—local government risk pool

In a tort action arising from an investigation and arrest, the city and the officers were entitled to partial summary judgment on grounds of governmental immunity for damages greater than $7,000,000 and for damages $600,000 or less, the city waived immunity for damages greater than $2,000,000 up to $7,000,000 by the purchase of excess liability insurance, and the trial court properly denied summary judgment based on immunity for damages over $600,000 up to $2,000,000. Governmental immunity may be waived by purchasing liability insurance or by participating in a local government risk pool and the city here participated in the Local Government Excess Liability Fund. Although the city contended that this was not a local government risk pool, it could not be concluded as a matter of law that the fund does not constitute a local government risk pool for damages in the $600,000 to $2,000,000 range.

3. Immunity— public officer—malice

The trial court correctly denied summary judgment for two officers in their individual capacities in a tort action arising from an investigation and arrest where they claimed public officers' immunity. Plaintiff presented evidence that he was beaten repeatedly and severely and merely resisted, not trying to strike or attack the officers. There was a genuine issue of material fact as to whether the officers in their individual capacities acted with malice, corruption, or beyond the scope of their authority.

Appeal by defendants from order entered 19 July 1999 by Judge Russell G. Walker, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 20 September 2000.

Carruthers & Roth, P.A., by Kenneth R. Keller and Norman F. Klick, Jr., for the plaintiff-appellee.

Hill, Evans, Duncan, Jordan & Davis, P.L.L.C., by Joseph R. Beatty and Polly D. Sizemore, for the defendants-appellants.

WYNN, Judge.

Unless waived or consented to, a city and its employees acting in their official capacities are protected from tort actions under the doctrine of governmental immunity. Likewise, public officers' immunity protects public officials from actions for mere negligence in the performance of their duties. The trial court in this case denied the City of Greensboro and its police officers the benefit of both doctrines. We reverse that judgment insofar as its holding is based on governmental immunity, but affirm the trial court's decision to deny summary judgment on the basis of the public officer immunity doctrine.

In April 1998, Charles Schlossberg brought this action against the City of Greensboro, and against Corporal T.J. Goins and Officer T.D. Dell of the Greensboro Police Department in their official as well as individual capacities. The complaint alleged assault, battery, false imprisonment/false arrest and malicious prosecution, and sought punitive damages from Officer Dell and Corporal Goins in their individual capacities for injuries sustained during an incident which occurred in June 1997.

The record on appeal shows that around 10:50 p.m. on 29 June 1997, Officer Dell responded to a call regarding a hit and run accident. When he arrived at the scene of the accident, a witness described the suspect vehicle as a tannish or metallic-colored Jeep Cherokee, occupied by a male, with Kentucky license plate number "ZLP 595." A record check with the Kentucky Department of Motor Vehicles records revealed a vehicle matching the description given by the witness. After speaking with the owner of the damaged vehicle, Officer Dell attempted to locate the suspect vehicle in the vicinity of the accident, but was unsuccessful.

Shortly after midnight, Officer Dell overheard a call on his radio to Officer Julius A. Fulmore concerning a residence at which a man

was reportedly banging on the door and shouting about a wreck. Suspecting that the call related to the earlier hit and run, Officer Dell met Officer Fulmore at the residence to investigate the incident. A tan metallic Jeep Cherokee with Kentucky license plate number "ZLP 595" parked in the driveway of the residence confirmed his suspicions. Officer Dell inspected the vehicle and noticed what appeared to be fresh scratch marks on the bumper and a warm engine.

The events which next occurred are sharply in dispute. According to the officers, they knocked on the door of the house and Mr. Schlossberg answered the door. Officer Dell noted that Mr. Schlossberg fit the description of the driver of the suspect hit and run vehicle. The two officers stated that Mr. Schlossberg became agitated and angry when questioned about the accident, and denied having driven the vehicle recently. He claimed that any scratches on the vehicle were old damage. The officers stated that Mr. Schlossberg cursed repeatedly and stated that if the officers were not going to arrest him, that he was going to go back to bed, and then slammed the door.

Afterwards, Officer Fulmore left the scene and returned to the site of the earlier hit and run to obtain further information. Meanwhile, Officer Dell returned to his patrol car and radioed Corporal Goins who joined him at the residence. Corporal Goins then telephoned Mr. Schlossberg and informed him that the Jeep Cherokee was going to be impounded. Shortly thereafter, Mr. Schlossberg came out of the house and walked towards the Jeep. As he did so, Corporal Goins went to move his patrol car to block the driveway so as to prevent him from driving the Jeep away. According to both Officer Dell and Corporal Goins, Officer Dell yelled at Mr. Schlossberg before he reached the vehicle, instructing him to stop. But Mr. Schlossberg ignored that instruction, retrieved his wallet from the vehicle and started returning to the house. Officer Dell again instructed him to stop, and told him that he was under arrest. Since Mr. Schlossberg continued to ignore the instruction to stop and continued to walk towards his residence, the officers physically apprehended him before he was able to enter the house.

Mr. Schlossberg recalled this sequence of events differently. He stated that when he left the house to get his wallet from the vehicle, the officers were not in sight, and he did not hear any instructions from either Officer Dell or Corporal Goins before he was attacked as he returned to the house and attempted to enter the side door. During the ensuing struggle, the officers repeatedly struck him with their

hands, knees and flashlights, and also sprayed him with mace. He stated that as a result of this struggle, he suffered various injuries, including a broken rib and broken finger.

The record shows that after the officers took Mr. Schlossberg into custody, his wife confessed to the hit and run, and she was therefore charged appropriately. Mr. Schlossberg was charged with obstruction of justice, which charge was ultimately dismissed, following which this action was filed. The City and the police officers answered his complaint and affirmatively pled the defenses of governmental and public officers' immunity. From the trial court's denial of their motions for summary judgment based on those immunities, they appeal to us.

The issues on appeal are: (I) Did the trial court err in failing to find as a matter of law that both the City and the police officers were entitled to governmental immunity? and (II) Did the trial court err in failing to find as a matter of law that the police officers were entitled to public officers' immunity? We hold that under the facts of this case, all of the defendants are entitled to governmental immunity; however, since there is a question of fact on the issue of public officers' immunity, the trial court properly denied summary judgment on that issue.

[1] At the outset, we note that the trial court's interlocutory order denying summary judgment is immediately appealable as affecting a substantial right because it is based upon governmental immunity, as well as public officers' immunity. *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999); *see also Jones v. Kearns*, 120 N.C. App. 301, 303, 462 S.E.2d 245, 246, *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995); *Young v. Woodall*, 119 N.C. App. 132, 135, 458 S.E.2d 225, 227 (1995), *rev'd on other grounds*, 343 N.C. 459, 471 S.E.2d 357 (1996).

On appeal, the City and the police officers jointly assert that the trial court erred in denying their motion for summary judgment because their evidence establishes the insurmountable affirmative defense of governmental immunity.

I. Governmental Immunity

[2] In North Carolina, governmental immunity serves to protect a municipality, as well as its officers or employees who are sued in their official capacity, from suits arising from torts committed while the officers or employees are performing a governmental function.

See Jones, 120 N.C. App. at 304, 462 S.E.2d at 247; *Young*, 119 N.C. App. at 135, 458 S.E.2d at 228; *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276 (1993), *disc. review denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). Furthermore, our courts recognize law enforcement as a governmental function. *See Young*, 119 N.C. App. at 135, 458 S.E.2d at 228 (citing *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990)).

In this case, the record shows that Officer Dell and Corporal Goins acted in their official law enforcement capacities as police officers employed by the Greensboro Police Department when they attempted to apprehend Mr. Schlossberg. As their actions therefore constituted a governmental function, the City of Greensboro, and Officer Dell and Corporal Goins in their official capacities, are generally immune from suit under the doctrine of governmental immunity. That immunity is absolute unless the City has consented to being sued or otherwise waived its right to immunity. N.C. Gen. Stat. § 160A-485(a) (1987); *see Williams v. Holsclaw*, 128 N.C. App. 205, 208, 495 S.E.2d 166, 168, *aff'd*, 349 N.C. 225, 504 S.E.2d 784 (1998). Since the record does not show that the City has expressly consented to being sued by Mr. Schlossberg, his actions against the City and its police officers acting in their official capacities, may only be maintained to the extent the City has waived its governmental immunity.

A city may waive its governmental immunity by purchasing liability insurance or by participating in a local government risk pool under Article 23 of Chapter 58 of the General Statutes. N.C. Gen. Stat. § 160A-485(a); *see Jones*, 120 N.C. App. at 303, 462 S.E.2d at 246; *Young*, 119 N.C. App. at 136, 458 S.E.2d at 228; *Combs v. Town of Belhaven, N.C.*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992). Such immunity is waived only to the extent that the city is indemnified by its purchase of insurance or by its participation in the risk pool; that is, to the extent the city does not purchase liability insurance or participate in a local government risk pool, it retains its governmental immunity. N.C. Gen. Stat. § 160A-485(a).

The City of Greensboro admits the existence of a $5,000,000.00 excess liability insurance policy, and it acknowledges that, pursuant thereto, it has waived its governmental immunity for liability for claims greater than $2,000,000.00 up to and including $7,000,000.00. The City further contends that it does not participate in a local government risk pool. On that point, Mr. Schlossberg disagrees with the City. He argues that the City participates in a local government risk

pool which covers claims over $100,000.00 up to and including $2,000,000.00.

Indeed, at the time of the alleged incident, the City participated as a member of the Local Government Excess Liability Fund, Inc. The City describes that Fund as a non-profit corporation that was incorporated in 1986 under Chapter 55A of the General Statutes. In his affidavit, Everett Arnold, the Executive Director of the Guilford City/County Insurance Advisory Committee (which advises the City of Greensboro on insurance matters), described the Fund as a self-insurance plan which "was created to allow participating non-profit government agencies to fund liability claims for which the defense of governmental liability is inapplicable, through a central agency administered by a professional administrator."

The Fund administered three separate funds for the payment of liability claims against its members: Fund A, Fund B and Fund C. Mr. Arnold described the three different funds as follows:

> 4. . . . Fund B is available to pay claims exceeding $100,000.00, up to $600,000.00, subject to the City of Greensboro paying the first $100,000.00. In the event Fund B makes any claims payments, the City of Greensboro is obligated to repay Fund B the entire amount so paid. Fund A was established to pay claims in excess of $600,000.00 up to a maximum of $1,600,000.00, after exhausting the City's direct responsibility for payment of the first $100,000.00, and after Fund B payment of $500,000.00. Fund C was established to provide payment for any amount in excess of $1,600,000.00 up to $2,000,000.00. . . .
>
> 5. . . . The governmental agencies participating in the Fund share costs only for the administration of the Fund. There is no sharing of risks among the members of the Fund for any claim under $600,000.00. All such claims under $600,000.00 which are paid from Fund B are the direct responsibility of the participating member against which the claim is asserted, and any payments made by Fund B must be repaid by the participating governmental agency.

Mr. Arnold concluded the Fund is not a local government risk pool under Article 23 of Chapter 58 of the General Statutes.

Our Supreme Court construed what constitutes a local government risk pool under N.C. Gen. Stat. §§ 58-23-1 *et seq.* (1994) in *Lyles v. City of Charlotte*, 344 N.C. 676, 477 S.E.2d 150 (1996), *reh'g denied*,

345 N.C. 355, 483 S.E.2d 170 (1997). In *Lyles*, our Supreme Court considered whether the City of Charlotte had waived its sovereign immunity by participating in a local government risk pool when it entered into an agreement with Mecklenburg County and the Charlotte-Mecklenburg Board of Education. Those three entities had created a Division of Insurance and Risk Management (DIRM) to handle liability claims against them. *Id.* Under the agreement, each of the three member entities paid funds into separate trust accounts from which the DIRM would pay claims against each entity. The Supreme Court specifically noted that the funds in each entity's trust account were not commingled with the funds in the other entities' trust accounts. Each entity was responsible for paying the first $500,000.00 for any claim against it out of its own trust account. For claims exceeding $500,000.00 against an entity for which the entity had insufficient DIRM funds to pay in its own trust account, the entity was entitled to borrow funds deposited in the DIRM by the other entities to the extent those funds exceeded $500,000.00. Any funds so borrowed were required to be repaid with interest.

The plaintiff in *Lyles* contended that this arrangement constituted a local government risk pool, as each of the DIRM members had

> the right, in certain circumstances, to use funds contributed by the other entities for the payment of claims, [and] the entities had [thereby] pooled retention of their risks for liability claims and provided for the payment of such claims made against any member of the pool on a cooperative or contract basis.

Id. at 679, 477 S.E.2d at 152-53. In holding that this arrangement did not constitute a local government risk pool, the Supreme Court analyzed the DIRM in light of the statutory requirements for such risk pools found in N.C. Gen. Stat. § 58-23-1 *et seq.* First, the Court noted that the statute defines a "local government," for purposes of joining a local government risk pool, as including only counties, cities, and housing authorities—not school boards. *Id.* at 680, 477 S.E.2d at 153; *see* N.C. Gen. Stat. § 58-23-1 (1994). The Court noted that the statute requires that a contract or agreement creating a local government risk pool must contain a provision requiring the pool to pay all claims for which each member incurs liability. *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153; *see* N.C. Gen. Stat. § 58-23-15(3) (1994). Because the DIRM members were required to repay any borrowed amounts, the Court felt that this arrangement did not equate to a payment of claims

by the pool, and did not rise to the level of risk-sharing required by the statute. *Lyles*, 344 N.C. at 680, 477 S.E.2d at 153. The Court also emphasized that the entities did not pool their risks in one common pool, but instead created separate trust accounts for each DIRM member. Moreover, the three entities failed to meet many of the statutory requirements for creating and operating a local government risk pool; and while the Court acknowledged that this fact should not be determinative, it felt that it should be afforded some weight. In concluding that the DIRM arrangement did not constitute a local government risk pool, the Court stated:

> We believe it would be a mistake to hold that a local government may ignore these statutory requirements and create a risk pool to its own liking. The City did not intend to join a local government risk pool, and we do not believe we should hold it has done so by accident.

Id. at 681, 477 S.E.2d at 153.

Since *Lyles*, this Court has had few opportunities to further consider the question of what constitutes a local government risk pool, and those decisions have relied on the *Lyles* decision and generally have concerned the same DIRM considered by the Supreme Court in *Lyles*. *See Kephart by Tutwiler v. Pendergraph*, 131 N.C. App. 559, 507 S.E.2d 915 (1998); *Cross v. Residential Support Services, Inc.*, 129 N.C. App. 374, 499 S.E.2d 771 (1998); *Mullis v. Sechrest*, 126 N.C. App. 91, 484 S.E.2d 423 (1997), *rev'd on other grounds*, 347 N.C. 548, 495 S.E.2d 721 (1998); *Pharr v. Worley*, 125 N.C. App. 136, 479 S.E.2d 32 (1997); cf. *Dobrowolska ex rel. Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590, *disc. review allowed*, 352 N.C. 588, —— S.E.2d —— (2000).

The issue of whether the Fund in the instant case constitutes a local government risk pool is not as clear as the same question decided in *Lyles* regarding the DIRM. However, in *Dobrowolska*, this Court considered the same Fund at issue in the present case and concluded that summary judgment for the defendants in that case was proper where the plaintiffs sought only $350,000.00 in damages. 138 N.C. App. at 8-9, 530 S.E.2d at 596. Nonetheless, in *Dobrowolska*, we limited that holding to the precise facts of that case by stating that "the Fund cannot be classified as a local government risk pool *as to the present case* because it will not actually pay for any part of the claim." *Id.* (emphasis added).

In this case, Mr. Schlossberg filed a statement of monetary relief under N.C.R. Civ. P. 8(a)(2) seeking $5,000,000.00 for compensatory damages and $5,000,000.00 for punitive damages against Officer Dell and Corporal Goins in their individual capacities. *See* N.C. Gen. Stat. § 1A-1, Rule 8(a)(2) (1999). Thus, our holding in *Dobrowolska* has limited application to this case. Nonetheless, several of the findings regarding the Fund in *Dobrowolska* are relevant to our analysis here.

As discussed at length in *Dobrowolska*, the Fund fails in many respects to comply with the statutory requirements for a local government risk pool. *See Dobrowolska*, 138 N.C. App. at 8, 530 S.E.2d at 595-96. For instance, the members of the Fund include the Guilford County Board of Education and Guilford Technical Community College, neither of which falls within the definition of a "local government" for purposes of joining a local government risk pool as provided in N.C. Gen. Stat. § 58-23-1. According to Mr. Arnold's unrebutted affidavit, the members of the Fund did not give thirty days advance written notice of their intention to organize and operate a risk pool as required pursuant to N.C. Gen. Stat. § 58-23-5 (1994). The members of the Fund did not enter a contract or agreement containing a provision for "a system or program of loss control" as mandated by N.C. Gen. Stat. § 58-23-15(1) (1994). Moreover, the Fund was never intended to be considered a local government risk pool and was not organized to comply with the statutory requirements found in N.C. Gen. Stat. § 58-23-1 *et seq.* Indeed, Mr. Schlossberg presented no evidence to refute Mr. Arnold's statements in his affidavit that the City is required to reimburse the Fund for claims payments made from Fund B. As we noted in *Dobrowolska*, "immunity is not waived when a claim is paid for which the pool is reimbursed, because the pool has not paid the claim and the requirements of N.C. Gen. Stat. § 160A-485 have not been met." 138 N.C. App. at 8, 530 S.E.2d at 596.

On the other hand, the City presented no evidence showing that it is required to reimburse the Fund for claims payments made from either Fund A or Fund C. Also, there is no evidence that the Fund maintains separate accounts for the contributions made by each of its various members. In short, the evidence presented in the instant case does not point us unerringly toward a finding that the Fund *in its entirety* is not a local government risk pool. When viewing all of the evidence in the light most favorable to Mr. Schlossberg, we cannot conclude as a matter of law that the Fund does not constitute a local government risk pool insofar as the City is sued for damages that fall

in the ranges established under Fund A and Fund C—exceeding $600,000.00 and up to and including $2,000,000.00.

Therefore, consistent with our holding in *Dobrowolska*, we conclude that the Fund is not a local government risk pool to the extent the City must reimburse the Fund B claims—over $100,000.00 and up to and including $600,000.00. Furthermore, we conclude that the City, irrespective of its participation in the Fund, is uninsured for claims up to and including $100,000.00, as well as for claims exceeding $7,000,000.00. Accordingly, the City along with Officer Dell and Corporal Goins in their official capacities are entitled to partial summary judgment on grounds of governmental immunity for damages of $600,000.00 or less, and for damages greater than $7,000,000.00. *See Schmidt*, 134 N.C. App. at 256, 517 S.E.2d at 176; *see also Dobrowolska*, 138 N.C. App. at 8-9, 530 S.E.2d at 596.

However, we uphold the trial court's denial of summary judgment on grounds of governmental immunity for the part of Mr. Schlossberg's claim that asserts damages that fall in the ranges of Fund A and Fund C—over $600,000.00 and up to and including $2,000,000.00. Moreover, as previously stated, the City has waived its governmental immunity for damages greater than $2,000,000.00 and up to $7,000,000.00 by its purchase of excess liability insurance.

II. Public Officers' Immunity

[3] We next consider whether the trial court committed reversible error in denying the motion for summary judgment on grounds that Officer Dell and Corporal Goins do not have public officers' immunity. We uphold the trial court's denial of summary judgment on this ground.

Under the public officers' immunity doctrine, "a public official is [generally] immune from personal liability for mere negligence in the performance of his duties, but he is not shielded from liability if his alleged actions were corrupt or malicious or if he acted outside and beyond the scope of his duties." *Slade v. Vernon*, 110 N.C. App. 422, 428, 429 S.E.2d 744, 747 (1993). Our courts recognize police officers as public officials. *See Jones*, 120 N.C. App. at 305, 462 S.E.2d at 247 (citing *Shuping v. Barber*, 89 N.C. App. 242, 248, 365 S.E.2d 712, 716 (1988)). Thus, police officers enjoy absolute immunity from personal liability for their discretionary acts done without corruption or malice. *Id.* (citation omitted); *see Collins v. North Carolina Parole Comm'n*, 344 N.C. 179, 183, 473 S.E.2d 1, 3 (1996) (holding that a pub-

lic officer is immune from personal liability if he "exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption") (citation omitted).

This Court has defined discretionary acts as "those requiring personal deliberation, decision, and judgment." *Jones*, 120 N.C. App. at 306, 462 S.E.2d at 248 (citing *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236). Also, where a defendant performs discretionary acts as part of his or her official or governmental duties, to sustain a suit for personal or individual liability, a plaintiff must allege and prove that the defendant's acts were malicious or corrupt. *Id.* (citing *Wilkins v. Burton*, 220 N.C. 13, 15, 16 S.E.2d 406, 407 (1941)); *see Epps v. Duke University, Inc.*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 851-52, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). A plaintiff may not satisfy this burden through allegations of mere reckless indifference. *See Robinette v. Barriger*, 116 N.C. App. 197, 203, 447 S.E.2d 498, 502 (1994), *aff'd*, 342 N.C. 181, 463 S.E.2d 78 (1995), *reh'g denied*, 342 N.C. 666, 465 S.E.2d 548 (1996), *overruled on other grounds by Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997).

Undisputedly, Officer Dell and Corporal Goins were on duty as police officers on the night of 29 June 1997. Officer Dell received and responded to the initial call regarding the hit and run accident, and later responded to a radio call that brought him to the residence of Mr. Schlossberg. Officer Dell attempted to obtain information from Mr. Schlossberg, and then called Corporal Goins who arrived at Mr. Schlossberg's residence shortly thereafter. It is further undisputed that Officer Dell and Corporal Goins were acting as public officials executing a governmental function at the time of the incident giving rise to Mr. Schlossberg's suit. Moreover, the decisions made by Officer Dell and Corporal Goins in attempting to restrain and arrest Mr. Schlossberg were discretionary decisions made during the course of performing their official duties as public officers. *See Jones*, 120 N.C. App. at 306, 462 S.E.2d at 248. Therefore, to survive the police officers' motion for summary judgment on the issue of their individual liability, Mr. Schlossberg must have alleged and forecasted evidence demonstrating the officers acted corruptly or with malice.

In his complaint, Mr. Schlossberg asserted separate claims against Officer Dell and Corporal Goins in their individual capacities. In his battery claim, Mr. Schlossberg alleged that the conduct of

Officer Dell and Corporal Goins was "illegal, malicious, intentional, excessive, not reasonably necessary, willful and wanton, corrupt, . . . and beyond the scope of their employment." Mr. Schlossberg's assault claim alleged that the conduct of Officer Dell and Corporal Goins was "beyond the scope of their employment." Likewise, his false imprisonment/false arrest and malicious prosecution claims state that the officers' conduct was malicious and beyond the scope of their employment. In support of these claims, Mr. Schlossberg presented deposition testimony of his wife and Dr. Robert V. Sypher, Jr., a hand specialist who treated his broken finger. He also presented evidence showing that he was beaten repeatedly and severely by Officer Dell and Corporal Goins. Furthermore, Corporal Goins stated in his deposition that Mr. Schlossberg did not try to strike the officers and that he did not feel that they were being attacked by him, but merely resisted.

We conclude that the evidence, when viewed in the light most favorable to Mr. Schlossberg, creates a genuine issue of material fact as to whether Officer Dell and Corporal Goins, in their individual capacities, acted with malice, corruption or beyond the scope of their authority in their arrest of Mr. Schlossberg. Therefore, the trial court properly denied the police oficers' motion for summary judgment regarding Mr. Schlossberg's claims against Officer Dell and Corporal Goins in their individual capacities.

We remand to the trial court for further proceedings consistent with this opinion. The trial court's denial of the motion for summary judgment is,

Affirmed in part, reversed in part, and remanded.

Judges LEWIS and HUNTER concur.

STATE OF NORTH CAROLINA v. FELIX FISHER

No. COA99-1222

(Filed 29 December 2000)

1. **Arrest— warrantless search—inconsistent testimony—failure to procure magistrate's signature on citation**

The trial court's finding at a suppression hearing that defendant was placed under arrest for driving while license revoked prior to the search of defendant's vehicle was not supported by competent evidence, because: (1) the testimony of two officers contained material inconsistencies in the State's own evidence; and (2) the officers' complete failure to procure a magistrate's signature on the citation indicates that defendant was never arrested.

2. **Search and Seizure— canine sniff of exterior of car—illegal seizure**

The trial court did not err by suppressing evidence of marijuana found as a result of the warrantless search of defendant's vehicle by a canine sniff of the exterior of the car in a public place, because: (1) defendant was never arrested; (2) the officers were not justified in searching defendant's car based upon the issuance of a citation even if the officers may have had probable cause to arrest defendant; (3) the officers did not possess reasonable suspicion based upon objective facts to detain defendant for investigative measures outside the scope of the initial traffic stop; (4) the officers did not obtain any evidence which would justify extending defendant's detention beyond the time it took to investigate the initial traffic stop; and (5) the two factors that one officer knew that the area of the traffic stop was notorious for its drug trade and that defendant was previously involved in drug-related activity standing alone are insufficient to justify detaining an individual for the purpose of conducting a canine sniff or other limited investigative measure outside the scope of the initial stop.

Appeal by State from order granting defendant's motion to suppress entered 13 September 1999 by Judge Clifton W. Everett, Jr. in Superior Court, Craven County. Heard in the Court of Appeals 18 September 2000.

Attorney General Michael F. Easley, by Assistant Attorney General T. Brooks Skinner, Jr., for the State.

Joshua W. Willey, Jr. for defendant-appellee.

TIMMONS-GOODSON, Judge.

The State, pursuant to section 15A-979(c) of the North Carolina General Statutes, appeals from the trial court's pre-trial order granting Felix Fisher's ("defendant") motion to suppress evidence. Having reviewed the arguments and materials submitted on appeal, we affirm.

The facts, as found by the trial court, are as follows: On 29 November 1998, Investigator John Smith ("Investigator Smith") of the New Bern Police Department's narcotics unit observed a White Chevrolet Blazer, belonging to defendant, parked in an area of New Bern, North Carolina, known for its drug trade. The investigator knew defendant had a reputation for dealing drugs. Investigator Smith did not see defendant at the time, but suspecting that defendant was in the area, he ran a "record check" on defendant, which revealed that his driver's license had been revoked.

On the night of 1 December 1998, while patrolling an area known for its drug trade, Investigator Smith observed defendant driving his Blazer, accompanied by a passenger. Investigator Smith immediately radioed uniformed patrol Officer Ernest Tripp ("Officer Tripp"), also of the New Bern Police Department, requesting that Officer Tripp stop defendant for operating his vehicle while his driver's license was revoked.

Following Investigator Smith's directive, Officer Tripp effectuated the stop. Investigator Smith approached defendant and requested that defendant produce his driver's license. Defendant provided the investigator with a "limited driving privilege," which allowed defendant to operate a motor vehicle until 8:00 p.m. When asked where he was going, defendant responded that he was transporting his passenger to obtain kerosene.

The court specifically found that the time of the stop was approximately 8:20 p.m. The court further found the following facts in relation to the stop:

> [Investigator Smith] instructed the defendant to exit the vehicle and turned him over to [Officer Tripp] and directed [Officer

> Tripp] to cite the defendant for operating a motor vehicle while his driver[']s license was revoked and placed the defendant under arrest for such charge.
>
> . . . [T]he defendant was taken by [Officer Tripp] back to his patrol car. [Officer Tripp] proceeded to write out the citation charging the defendant with operating his motor vehicle while his driver[']s license was revoked. That there was no indication that the defendant was anything but cooperative with the officers during this encounter. He displayed no act of violence or force of violence and did not attempt to retrieve any firearm or other deadly weapon from his person. There is no evidence before the Court that the defendant was personally searched at this time. . . . [N]or were there any observations by any other law enforcement officers at the scene that anything was observed openly exposed in the automobile to indicate the presence of any contraband, stolen goods, deadly weapons, firearms, or any other matters which would have alerted the officers that any violation of the law other than the one for which the defendant was stopped had occurred.

While Officer Tripp issued defendant a citation for driving while license revoked, Investigator Smith radioed a dispatcher and requested the assistance of "a K-9 unit." "[S]hortly thereafter," Officer John Carlstead ("Officer Carlstead") and his canine, Kiko, arrived. The court found that Kiko was "properly trained and utilized by the New Bern Police Department in the detection of controlled or illegal drugs[.]" Under the direction of Officer Carlstead, Kiko " 'sniff[ed]' the automobile" and "alerted on" the vehicle's front end.

The officers noticed a spring devise attached to the front bumper, and upon the officer's inquiry, defendant stated that the devise was used to secure the hood. Without obtaining defendant's consent or informing him of their intent to search the Blazer, the officers searched under the hood, where they located 135 grams of marijuana inside the vehicle's firewall.

The court found the following additional facts in connection with the encounter:

> That other than such suspicion as [Investigator Smith] might have held based upon his personal knowledge of the defendant's past, there is nothing before the Court to indicate that upon the stop of the defendant for driving while his license was revoked,

there was any indication in the officer's mind, nor is there anything in which the Court can discern, that he saw any evidence of any illegal drugs or controlled substances located in or about the defendant's vehicle, and that other than the fact that the defendant was operating his vehicle at a time after the expiration of the limited license, there is nothing to indicate any illegal conduct on behalf of the defendant.

. . . There was no indication that there was any need to disarm the defendant in order to take him into custody nor any need to preserve evidence for later use at trial. Since after stopping the defendant and determining that he was outside the scope of his limited driving privilege, no further evidence would have been necessary.

Defendantwas charged with possession of marijuana with intent to sell and deliver, maintaining a vehicle for the purpose of keeping controlled substances, and possession of drug paraphernalia. Bond was set, and defendant was released from custody on the drug-related charge. However, defendant's citation for driving while license revoked was never "sworn to before a magistrate." Nor, was a release order issued or a bond set on that charge.

Based on the aforementioned factual findings, the trial court granted defendant's motion to suppress.

The State appeals the order of the trial court granting defendant's motion to suppress. Our review of an order suppressing evidence is strictly limited. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982). In evaluating such an order, this Court must determine whether competent evidence supports the trial court's findings of fact. *Id.* Findings of fact supported by competent evidence are binding on appeal. *Id.* "Inconsistencies or conflicts in the testimony *do not necessarily* undermine the trial court's findings, since such contradictions in the evidence are for the finder of fact to resolve." *State v. Bromfield*, 332 N.C. 24, 36, 418 S.E.2d 491, 497 (1992) (emphasis added)(citation omitted). "If there is a conflict between the [S]tate's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict[,] and such resolution will not be disturbed on appeal." *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982) (citation omitted). Although the trial court's findings of fact may be binding on appeal, we review its conclusions of law *de novo*. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992). We must not dis-

turb the court's conclusions if they are supported by the court's factual findings. *Cooke*, 306 N.C. 132, 291 S.E.2d 618.

The State does not challenge the court's findings of fact on appeal, but assigns as error the court's conclusions of law concerning the propriety of the search of defendant's vehicle. Based on the State's assignments of error and defendant's responses on appeal, we discern two dispositive issues: (I) whether defendant was actually arrested; and (II) whether the canine sniff of the perimeter of defendant's vehicle in a public place during a traffic stop was proper in light of the circumstances surrounding that traffic stop.

(I)

[1] We first address whether defendant was actually arrested. In its factual findings, the trial court found the following:

> [Investigator] *Smith* instructed the defendant to exit the vehicle and turned him over to [Officer Tripp] and directed [Officer Tripp] to cite the defendant for operating a motor vehicle while his driver[']s license was revoked and *placed the defendant under arrest for such charge.* (Emphasis added.)

Although not specifically asserting that the aforementioned finding was erroneous, defendant contends on appeal that he was not arrested. Given the court's specific finding that Investigator Smith "placed" defendant under arrest, we find that defendant is in essence arguing that the above cited factual finding was not supported by competent evidence. We must agree.

The testimony of Investigator Smith and Officer Tripp at the suppression hearing was replete with internal contradictions concerning whether defendant was actually arrested. Investigator Smith testified that he informed defendant that he was under arrest for driving while license revoked at 8:54 p.m., the time written on the uniform citation. Investigator Smith further testified, "We placed him under arrest. We wrote him a citation. The arrest was written on the citation, a Magistrate's Order we'll call it. . . . It's written on a uniform ticket, but the magistrate signs off on it." Investigator Smith also stated that "Officer Tripp wrote the ticket, wrote the charge on an uniform ticket, that's true, but we took [defendant] to the magistrate's office where she signed off on the ticket, making it a Magistrate's Order, not the uniform ticket."

Investigator Smith later acknowledged, contrary to his own testimony, that although the officers procured a magistrate's order for

the drug-related charges, the citation for driving while license revoked was never signed by a magistrate. *See* N.C. Gen. Stat. § 15A-511(c) (1999) ("If the person has been arrested, for a crime, without a warrant [the] magistrate must determine whether there is probable cause . . . ."). Nor, was there a release order signed or bond set pursuant to defendant's alleged warrantless arrest for driving while license revoked. *See* N.C.G.S. § 15A-511(e) (If magistrate finds that arrest is supported by probable cause, "the magistrate must release him in accordance with Article 26 of this Chapter, Bail, or commit him to an appropriate detention facility . . . pending further proceedings . . . .")

Concerning the subsequent search of defendant's vehicle, Investigator Smith first testified that the search took place after the citation was written. However, upon being confronted with a State Bureau of Investigations report noting that the marijuana was seized at 8:30 p.m., and the citation for driving while license revoked indicating that it was completed at 8:54 p.m., Investigator Smith contradicted his own testimony by responding, "I don't recall if [the citation] was written at the scene of the incident or if it was written at the police station or whether it was written at the magistrate's office. That's something you have to inquire through Officer Tripp."

Officer Tripp likewise testified that Investigator Smith informed defendant that he was going to place him into custody, meaning he "was going to be transported." When asked whether he placed defendant in custody for driving while license revoked, Officer Tripp answered, "No." Officer Tripp then stated that defendant "was being taken into custody for purposes of doing [sic] the citation for driving while license revoked" and that he issued the citation while at the police station. However, Officer Tripp subsequently testified that the time appearing on the citation indicated when it was written.

The following exchange also took place during Officer Tripp's testimony:

> Q [the State]. So, [Officer Tripp], was it your intent to take the defendant to jail for driving while license revoked?
>
> MR. WILLEY [defendant's attorney]: Objection.
>
> THE COURT: Well, I thought he said that's when [Investigator] Smith arrested him.

Ins't that what he said, "I arrested him[?"] Who arrested him here, both of them, one, or Officer Tripp?

MRS. HOBBS [the State]: Well, Judge, not always the same officer does everything. I mean, Investigator Smith is the one with the prior knowledge, radios that to [Officer] Tripp. He pulls him over.

It's basically a team effort here, Judge. He knows the license was revoked. [Officer] Tripp—

THE COURT: I think the evidence is Officer Tripp did what [Investigator] Smith told him to do, is the way I get the picture. Go ahead.

A. Yes . . . . I just took him into custody and transported him to the police department . . . for the purpose to complete the processing of the charge that he was being charged with.

We recognize that contradictions and inconsistences rarely render a court's factual findings erroneous. However, the testimony presented at the suppression hearing concerning defendant's arrest contained material inconsistencies in the State's own evidence, not simply contradictions between the State's evidence and defendant's evidence. For example, Investigator Smith testified that he and Officer Tripp place defendant under arrest. However, Investigator Smith stated that the arrest was by virtue of a magistrate's order, which he later admitted was never signed. Nor, was a bond set or release order issued pursuant to defendant's alleged arrest for driving while license revoked. That kind of evidence would have clearly indicated that a warrantless arrest had been effectuated. Officer Tripp likewise testified that defendant was placed in custody for the purpose of issuing a citation, but never clearly testified that he or Investigator Smith actually arrested defendant.

Other than the officers' self-contradicting testimony, there was no other evidence signifying that defendant was arrested. In fact, the officers' complete failure to procure a magistrate's signature on the citation indicates that defendant was never arrested. Given the material, internal contradictions in the State's evidence and the complete lack of other evidence supporting the court's finding, we conclude that competent evidence did not support the court's finding that defendant was arrested.

(II)

[2] Next, we examine whether the perimeter canine sniff and subsequent search of defendant's vehicle was reasonable under the Fourth Amendment in light of our conclusion that defendant was never arrested.

It is well established that "[i]f officers have probable cause to arrest the occupants [of a vehicle], they may search—incident to that arrest—the entire interior of the vehicle, including the glove compartment, the console, or any other compartment, whether locked or unlocked, and all containers found within the interior." *State v. Brooks*, 337 N.C. 132, 144, 446 S.E.2d 579, 587 (1994) (citing *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768, *reh'g denied*, 453 U.S. 950, 69 L. Ed. 2d 1036 (1981) and *State v. Andrews*, 306 N.C. 144, 147, 291 S.E.2d 581, 583 (1982)); *see also United States v. Robinson*, 414 U.S. 218, 38 L. Ed. 2d 427 (1973). In *Knowles v. Iowa*, 525 U.S. 113, 142 L. Ed. 2d 492 (1998), the United States Supreme Court recently announced that warrantless searches incident to the issuance of a citation violated the Fourth Amendment. In so holding, the Court reasoned that where a citation is issued, unlike when an arrest is effectuated, the two historic rationales for a search incident to an arrest, i.e., the need to disarm defendant and the need to collect evidence, do not per se exist. *Id.* at 116-18, 142 L. Ed. 2d at 498-99. The Court held that this was true even if the officers issuing the citation had probable cause to arrest the defendant. *Id.*

The trial court concluded the following concerning the search of defendant's vehicle:

> [T]he search of the defendant's vehicle on the night of December 1, 1998, although conceivably being a search incident to arrest, does not fall within the exception set out by the United States Supreme Court in United States v. Robinson, 414 U.S. 218 (1973), since there was no need to disarm the defendant in order to take him into custody and there was no need to preserve any evidence for later use at a trial, and further, that there was no indication on the part of the arresting officers at the time of the stop that the defendant had violated any of the criminal laws of this state other than driving while his license was revoked, and there was no other indication that the defendant was committing any other illegal act which would require a full "field search" of his vehicle, and the search later carried out was done without consent of the defendant and without probable cause.

The court's reasoning was not entirely correct, given its reliance on the erroneous factual finding that defendant was arrested. However, its ultimate conclusion, that the search of defendant's vehicle was not justified by the historic rationales supporting a search incident to an arrest, i.e., a need to disarm defendant or preserve evidence, was accurate. Because defendant was never arrested, the search of his vehicle was not justified as a search incident to a lawful arrest. Furthermore, in accordance with *Knowles*, the officers were not justified in searching defendant's car based upon the issuance of the citation. This is true even though the officers may have had probable cause to arrest defendant.

The State contends that even if we find defendant was not arrested, no justification was necessary to conduct the canine sniff of the exterior of his car in a public place, because such a limited investigatory measure is not a search under the Fourth Amendment. With this argument, we must disagree.

In *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110 (1983), the United States Supreme Court found that a canine sniff of a airport passenger's luggage was not a search. In so finding, the Court reasoned that it was "aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id.* at 707, 77 L. Ed. 2d at 121. This Court has adopted the *Place* analysis in at least three cases, finding that canine sniffs are not searches. *State v. Odum*, 119 N.C. App. 676, 459 S.E.2d 826 (1995) (canine sniff of a train passenger's luggage), *rev'd on other grounds*, 343 N.C. 116, 468 S.E.2d 245 (1996); *State v. McDaniels*, 103 N.C. App. 175, 405 S.E.2d 358 (1991) (briefcase), *aff'd*, 331 N.C. 112, 413 S.E.2d 799 (1992); *State v. Darack*, 66 N.C. App. 608, 312 S.E.2d 202 (1984) (lawfully detained airplane); *see cf. State v. Rogers*, 43 N.C. App. 475, 259 S.E.2d 572 (1979) (finding, pre-*Place*, that canine sniff of safety deposit box was not a search).

In *City of Indianapolis v. Edmond*, 531 U.S. 32, 148 L. Ed. 2d 333 (U.S. Nov. 28, 2000) (No. 99-1030), the United States Supreme Court, relying on *Place*, declared that a canine sniff of an exterior of a car is not a search. The *Edmond* court noted that "an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics." *Edmond*, 531 U.S. at 40, 148 L. Ed. 2d at 343 (citing *Place*, 462 U.S. at 707, 77 L. Ed. 2d at 121). The court therefore concluded

that "[l]ike the dog sniff in *Place*, a sniff by a dog that simply walks around a car is 'much less intrusive than a typical search.' " *Id.* (quoting *Place*, 462 U.S. at 707, 77 L. Ed. 2d at 121).

Given our previous application of the principles articulated in *Place* to a variety of analogous situations, we adopt the United States Supreme Court's recent declaration that a canine sniff of a vehicle's perimeter is not a search. Despite this deduction, we are unpersuaded by the State's argument that no justification is needed to conduct a canine sniff of a vehicle's perimeter.

In *State v. McClendon*, 130 N.C. App. 368, 502 S.E.2d 902 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999), and *State v. Falana*, 129 N.C. App. 813, 501 S.E.2d 358 (1998), this Court indicated that although a canine sniff of the exterior of an automobile may not constitute a search, a defendant's detention during a traffic stop for the purpose of conducting a canine sniff must be justified by a reasonable suspicion, based on objective, specific, and articulable facts that criminal activity is afoot. The circumstances presented by both *Falana* and *McClendon* are similar to those *sub judice*.

In *Falana*, 129 N.C. App. 813, 501 S.E.2d 358, a state trooper stopped a vehicle based on suspicion of a traffic violation. After a brief investigation, the trooper confirmed his suspicion and issued a warning ticket. Based upon the defendant's nervousness, the trooper retrieved a canine from his vehicle and conducted a dog sniff of the exterior of the defendant's car. The canine alerted to the vehicle's passenger door, at which time the trooper searched the car finding a gun in the glove compartment and a bag of cocaine. This Court did not specifically discuss the canine sniff, but noted that the trooper's reasons for extending the traffic stop beyond the issuance of a warning ticket "were insufficient to support a further detention of the defendant once the warning ticket was issued and the defendant's papers were returned." *Id.* at 817, 501 S.E.2d at 360.

In McClendon, 130 N.C. App. 368, 502 S.E.2d 902, an officer observed the defendant speeding while following too closely behind a mini-van. Deducing that the defendant's vehicle and the mini-van were traveling together, the officer and one of his colleagues stopped both vehicles. One officer first spoke with the driver of the mini-van and issued him a warning ticket for speeding. The other officer spoke with the defendant, whose hand was trembling and who was unable to find the vehicle's registration or identify the vehicle's owner.

The officer further questioned the defendant and ran a license check of defendant's driver's license and the vehicle registration. The address on the defendant's license matched that of the registration. Still, the name specified by the defendant as the vehicle's owner did not appear on the title. The officer issued a warning ticket for speeding and following too closely. After the defendant refused to consent to a search, the officers performed a canine sniff of the vehicle's exterior, and the canine alerted to the rear of the defendant's vehicle. A subsequent search of the car floorboard revealed a quantity of marijuana.

This Court noted that although the scope of the defendant's detention must be " 'carefully tailored to its underlying justification[,]' " the investigating officers " 'may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.' " *Id.* at 375, 502 S.E.2d at 906-07 (citations omitted). These questions and other similarly limited investigatory measures must be " 'legitimately aimed at confirming the defendant's identity' " and must be " 'reasonably related to the purpose of issuing a warning ticket,' " i.e., the purpose of the underlying stop. *Id.* at 375, 502 S.E.2d at 907 (citation omitted).

The Court found that the questions asked by the officers following the initial traffic stop were "legitimately aimed at confirming" the officer's suspicions that criminal activity was afoot. *Id.* at 376, 502 S.E.2d at 907. The Court found that the detention of the defendant subsequent to the issuance of the warning ticket (during which time the canine sniff was performed) was also justified by a reasonable suspicion. The Court noted that the officers' suspicion was based on facts gleamed from the questioning of the defendant during the traffic stop, including defendant's nervousness, inconsistent and vague answers, and other factors. *Id.* at 378, 502 S.E.2d at 908.

We find *Falana* and *McClendon* controlling. In the present case, the officers clearly possessed reasonable suspicion or even probable cause to believe defendant was driving while his license was revoked. The officers stopped defendant, performed limited measures to further investigate and confirm their suspicions concerning defendant's non-drug related criminal activity, and began issuing him a citation.

However, while the officers investigated their suspicions related to the subject of the initial traffic stop and detained the defendant for

the purpose of issuing the citation, "there [was] nothing to indicate any illegal conduct on behalf of the defendant." The trial court duly noted that defendant was cooperative and nonviolent and that the officers did not observe any contraband, firearms, or other evidence related to criminal activity in defendant's vehicle. Accordingly, the officers did not possess reasonable suspicion based upon objective facts to detain defendant for investigative measures outside the scope of the initial traffic stop. Likewise, the officers did not obtain any evidence which would justify extending defendant's detention beyond the time it took to investigate the initial traffic stop. Thus, defendant's detention during the canine sniff was an illegal seizure, and the trial court properly suppressed evidence subsequently found as a result of that canine sniff.

The State contends on appeal that the officers possessed a reasonable suspicion to detain defendant based on Investigator Smith's knowledge that the area of the traffic stop was notorious for its drug trade and that defendant was previously involved in drug-related activity. We recognize that under the totality of the circumstances, a trial court may consider the above cited factors in determining whether officers possess reasonable suspicion to detain a defendant beyond the scope of the initial traffic stop. *See State v. Watson*, 119 N.C. App. 395, 458 S.E.2d 519 (1995). However, those two factors standing alone are insufficient to justify detaining an individual for the purpose of conducting a canine sniff or other limited, investigative measures outside the scope of the initial stop.

Based on the foregoing reasons, we affirm the trial court's order suppressing evidence recovered in the search of defendant's vehicle.

Affirmed.

Chief Judge EAGLES and Judge FULLER concur.

CARL D. BUCKLAND, SR., AND NORTHFIELD DEVELOPMENT COMPANY, INCORPORATED, PLAINTIFFS v. THE TOWN OF HAW RIVER, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA99-1347

(Filed 29 December 2000)

1. **Cities and Towns— approval of subdivision plat—improperly required to pave, curb, and gutter streets abutting subdivision**

The trial court erred by granting defendant's motion for summary judgment thereby effectively requiring plaintiffs to improve or construct roads that abut or extend beyond their development as a condition of approving plaintiffs' subdivision plat, because: (1) defendant had no authority under N.C.G.S. § 160A-372 to require plaintiffs to pave, curb, and gutter streets abutting their subdivision when these streets were not within plaintiffs' subdivision; and (2) although defendant had the option of requiring plaintiffs to provide funds for road construction under N.C.G.S. § 160A-372, there is no evidence that defendant sought such funds, nor does it appear that defendant's subdivision ordinance contains a provision allowing this action.

2. **Cities and Towns— annexed territory—adequate maintenance of streets—summary judgment improper**

The trial court erred by granting summary judgment in favor of defendant on plaintiffs' claim that the pertinent street in an annexed territory has not been adequately maintained because a question of fact exists since the record is undeveloped as to the current state of repair of the street and the customary maintenance provided by defendant on similar streets.

Appeal by plaintiffs from judgment entered 2 August 1999 by Judge James C. Spencer, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 11 October 2000.

Smith, James, Rowlett & Cohen, L.L.P., by J. David James, for plaintiff-appellants.

Averett Law Offices, by D. Melissa Averett, for defendant-appellee.

EDMUNDS, Judge.

Plaintiffs, Carl Buckland, Sr. and Northfield Development Co., Inc., appeal the trial court's order granting defendant Town of Haw River's, motion for summary judgment and denying plaintiffs' motion for summary judgment. We reverse.

On 21 July 1956, A.C. Simpson and his wife Hazel P. Simpson (the Simpsons) filed a plat for registration with the Alamance County Register of Deeds. The plat shows a road in the shape of a squared-off horseshoe, which begins and ends at U.S. Highway 70 (now U.S. Highway 70A). The eastern prong of the horseshoe is labeled Hollar Street and the western prong is labeled Fairview Street. There is no defined place along the horseshoe where Fairview Street becomes Hollar Street, although the transition appears to occur along a straight portion of the road furthest from Highway 70A. A copy of the plat is attached to this opinion and made part thereof. On 8 August 1972, the Simpsons deeded a right-of-way for the horseshoe-shaped road to the State Highway Commission, and on 6 October 1983, Ms. Simpson deeded 7.6 acres of her land to plaintiff Carl Buckland and his wife Anita Buckland (the Bucklands).

Defendant annexed certain property that included the 7.6 acres owned by plaintiffs on 1 June 1986, and all property owners in the annexed area began paying municipal taxes. In 1987, after assessing the appropriate property owners, defendant extended sewer service into the newly annexed area; after another assessment, defendant extended water to the area in 1997.

In 1997 and thereafter, plaintiffs requested that defendant approve a subdivision plat dividing plaintiffs' property into eleven lots. The land plaintiffs sought to subdivide primarily rested south of and adjacent to the section of the horseshoe farthest from U.S. Highway 70A where Hollar and Fairview Streets merge, although a section of plaintiffs' property rested adjacent to the west side of Fairview Street. On 4 August 1998, defendant notified plaintiffs that the Town Council of Haw River had approved plaintiffs' subdivision plat with the condition that plaintiffs "adhere to the subdivision regulations regarding the improvement of the public right-of-way and unopened portion of Fairview and Hollar Streets," specifically instructing plaintiffs that its "subdivision ordinance requires paving and curb and gutter."

Plaintiffs filed a complaint seeking an "Order in the nature of Mandamus requiring [defendant] to (1) approve their subdivision

request" without restrictions; and (2) "provide adequate street maintenance to the Fairview Street area."

> Mandamus is the proper remedy to compel public officials to perform a purely ministerial duty imposed by law; it generally may not be invoked to review or control the acts of public officers respecting discretionary matters. However, mandamus will lie to review discretionary acts when the discretion appears to have been abused or the action taken arbitrarily, capriciously, or in disregard of law.

In re Alamance County Court Facilities, 329 N.C. 84, 104, 405 S.E.2d 125, 135 (1991) (citations omitted). Our Supreme Court has held that mandamus is the proper procedure to compel officials to issue a building permit when the plaintiff shows he has met all the requirements for a permit. *See Lee v. Walker*, 234 N.C. 687, 68 S.E.2d 664 (1952). Both plaintiffs and defendant moved for summary judgment, and the trial court granted defendant's motion and denied plaintiffs' motion. Plaintiffs appeal.

A trial court may grant a motion for summary judgment where there is no genuine issue of material fact and where the movant is entitled to judgment as a matter of law. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). "A trial court's grant of summary judgment is fully reviewable by this Court because the trial court rules only on questions of law." *Metropolitan Prop. and Casualty Ins. Co. v. Lindquist*, 120 N.C. App. 847, 849, 463 S.E.2d 574, 575 (1995) (citation omitted).

I.

[1] Plaintiffs contend that the trial court erred by granting defendant's motion for summary judgment, thereby effectively requiring that plaintiffs improve or construct roads that abut or extend beyond their development. By granting defendant's motion, the trial court found as a matter of law that defendant can require plaintiffs to pave, curb and gutter all of Fairview and Hollar Streets as a condition of approving plaintiffs' subdivision plat.

Our Supreme Court has held that if the reason articulated by a town for denial of a subdivision permit is supported by valid enabling legislation and competent evidence on the record, the decision must be affirmed. *See Batch v. Town of Chapel Hill*, 326 N.C. 1, 12, 387 S.E.2d 655, 662 (1990). Conversely, "[a] subdivision plat

may not be disapproved where the . . . developer fails or refuses to comply with unauthorized or irrelevant conditions." 8 Eugene McQuillin, *The Law of Municipal Corporations* § 25.118.30, at 373 (3d ed. 2000 rev. ed.).

We open our analysis by reviewing the statutes pertaining to subdivision regulation. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citation omitted). Chapter 160A of the General Statutes of North Carolina contains enabling legislation for city and town ordinances. Section 160A-372 grants municipalities certain powers they may include in a subdivision control ordinance. N.C. Gen. Stat. § 160A-372 (1999). As to street construction, this statute reads in pertinent part, "[a] subdivision control ordinance may provide for the orderly growth and development of the city; for the coordination of streets and highways *within* proposed subdivisions with existing or planned streets and highways and with other public facilities." *Id.* (emphasis added). Accordingly, a municipality's subdivision ordinance may require a developer to consider existing or planned streets when it plats streets or highways within its subdivision, *see Batch*, 326 N.C. 1, 387 S.E.2d 655, but the statute does not empower municipalities to require a developer to build streets or highways *outside* its subdivision.

However, municipalities are not powerless to require developers to bear the cost of road construction outside the subdivision that is made necessary, in part or in full, because of the proposed subdivision. Doing so involves a tradeoff for the municipality. The last paragraph of N.C. Gen. Stat. § 160A-372 provides:

> The ordinance may provide that in *lieu of required street construction*, a developer may be required to provide funds that the city may use for the construction of roads to serve the occupants, residents, or invitees of the subdivision or development and these funds may be used for roads which serve more than one subdivision or development within the area. All funds received by the city pursuant to this paragraph shall be used only for development of roads, including design, land acquisition, and construction. However, a city may undertake these activities in conjunction with the Department of Transportation under an agreement between the city and the Department of Transportation. Any formula adopted to determine the amount of funds the developer is to pay *in lieu of required street construc-*

> *tion* shall be based on the trips generated from the subdivision or development. The ordinance may require a combination of partial payment of funds and partial dedication of constructed streets when the governing body of the city determines that a combination is in the best interests of the citizens of the area to be served.

(Emphases added.) The only related earlier reference to street construction in the statute is the language previously quoted requiring developers to consider existing or planned streets and highways when platting streets and highways *within* the subdivision. However, also pursuant to the language quoted above, a municipality "in lieu of required street construction" may require a developer to provide funds to be used to construct roads both within and outside of a development. N.C. Gen. Stat. § 160A-372. If the municipality selects this alternative, it undertakes to build these roads itself and foregoes the option of compelling the developer to build its own roads within the development. The provision allowing for "partial payment of funds and partial dedication of constructed streets" supports this interpretation because a developer can only dedicate "constructed streets" that lie within the subdivision.

In the case at bar, defendant contends that plaintiffs can be required to pave, curb and gutter all of Fairview and Hollar Streets, arguing that because sections of plaintiffs' land abut one side of portions of these streets, the streets are within plaintiffs' subdivision. We disagree. *See Property Group, Inc. v. Planning and Zoning Com'n*, 628 A.2d 1277 (Conn. 1993) (affirming lower court's decision that road abutting developers land was off-site). The plat provided in the record indicates that at least twelve lots not owned by plaintiffs are also adjacent to Fairview or Hollar Streets. Six of plaintiffs' proposed eleven lots are adjacent to these roads, bordering the roads on one side. Because the Simpsons deeded a right-of-way for the horseshoe shaped road to the State Highway Commission on 8 August 1972, there is no contention that plaintiffs are the fee simple owners of the roads. Therefore, defendant had no authority under N.C. Gen. Stat. § 160A-372 to require plaintiffs to pave, curb and gutter streets abutting their subdivision because these streets were not within plaintiffs' subdivision. *See Nat'l Medical Enterprises, Inc. v. Sandrock*, 72 N.C. App. 245, 324 S.E.2d 268 (1985). In addition, although defendant had the option of requiring plaintiffs to provide funds for road construction pursuant to section 160A-372, there is no evidence that defendant sought such funds, nor does it appear that

defendant's subdivision ordinance contains a provision allowing this action. Accordingly, the trial court's grant of summary judgment for defendant, implicitly finding as a matter of law that defendant could compel plaintiffs to construct access roads, was error.

II.

[2] Plaintiffs' complaint also alleged that defendant has not taken proper care of Fairview Street, stating that "[s]ince annexation, Defendant has failed to adequately maintain any portion of Fairview Street and all portions of said street are in need of maintenance and paving." Plaintiffs sought an "Order finding the Defendant in violation of N.C.G.S. [§] 160A-33 Declaration of Policy and N.C.G.S. [§] 160A-35 in failing to provide street maintenance services and directing Defendant to provide such services."

Section 160A-33 reads in pertinent part, "It is hereby declared as a matter of State policy: . . . (5) That areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality in accordance with G.S. 160A-35(3)." N.C. Gen. Stat. § 160A-33 (1999). Section 160A-35 sets forth prerequisites for annexation of an area by a municipality, providing:

> A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be annexed and shall, prior to the public hearing provided for in G.S. 160A-37, prepare a report setting forth such plans to provide services to such area. The report shall include:
>
> . . . .
>
> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:
>
> a. Provide for extending . . . street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

N.C. Gen. Stat. § 160A-35(3)a (1999). Defendant's annexation ordinance provides,

> Upon and after the 1st day of June, 1986, the above described territory and its citizens and property shall be subject to all debts, laws, ordinances and regulations in force in the (Town) of Haw River and shall be entitled to the same privileges and benefits as other parts of the (Town) of Haw River.

"The statutory remedy for owners of property in the annexed territory where 'the municipality has not followed through on its service plans . . .' is by writ of *mandamus*." *Safrit v. Costlow*, 270 N.C. 680, 684, 155 S.E.2d 252, 255 (1967) (citation omitted). Plaintiffs sought this remedy, alleging defendant's inaction in maintaining Fairview Street is "unreasonable, arbitrary and capricious." *See In re Alamance County Court Facilities*, 329 N.C. 84, 405 S.E.2d 125. Fairview Street was in existence and appears on the plat accompanying defendant's ordinance annexing the area in dispute in 1986. Plaintiffs allege the street has been used by the public since at least 1983; in addition, plaintiff Buckland stated in an affidavit that defendant provided stone to smooth eroded portions of Fairview Street. Defendant has admitted installing a stop sign at Fairview and West Main Street. Accordingly, defendant is responsible for maintaining Fairview Street on "substantially the same basis and in the same manner as such service[] [was] provided within the rest of the municipality prior to annexation." N.C. Gen. Stat. § 160A-35(3)a; *see In re Annexation Ordinance*, 255 N.C. 633, 645, 122 S.E.2d 690, 699 (1961) (construing statutory equivalent of Section 160A-35(3)a, held "primary duty of street maintenance in the area in question, after annexation, is upon the city, and it must in good faith make plans to maintain the streets, whether paved or unpaved"); *Hooper v. City of Wilmington*, 42 N.C. App. 548, 550, 257 S.E.2d 142, 143 (1979) (holding that where various ditches and drainage systems in a watershed were in existence prior to annexation of area, the city accepted them by use or maintenance).

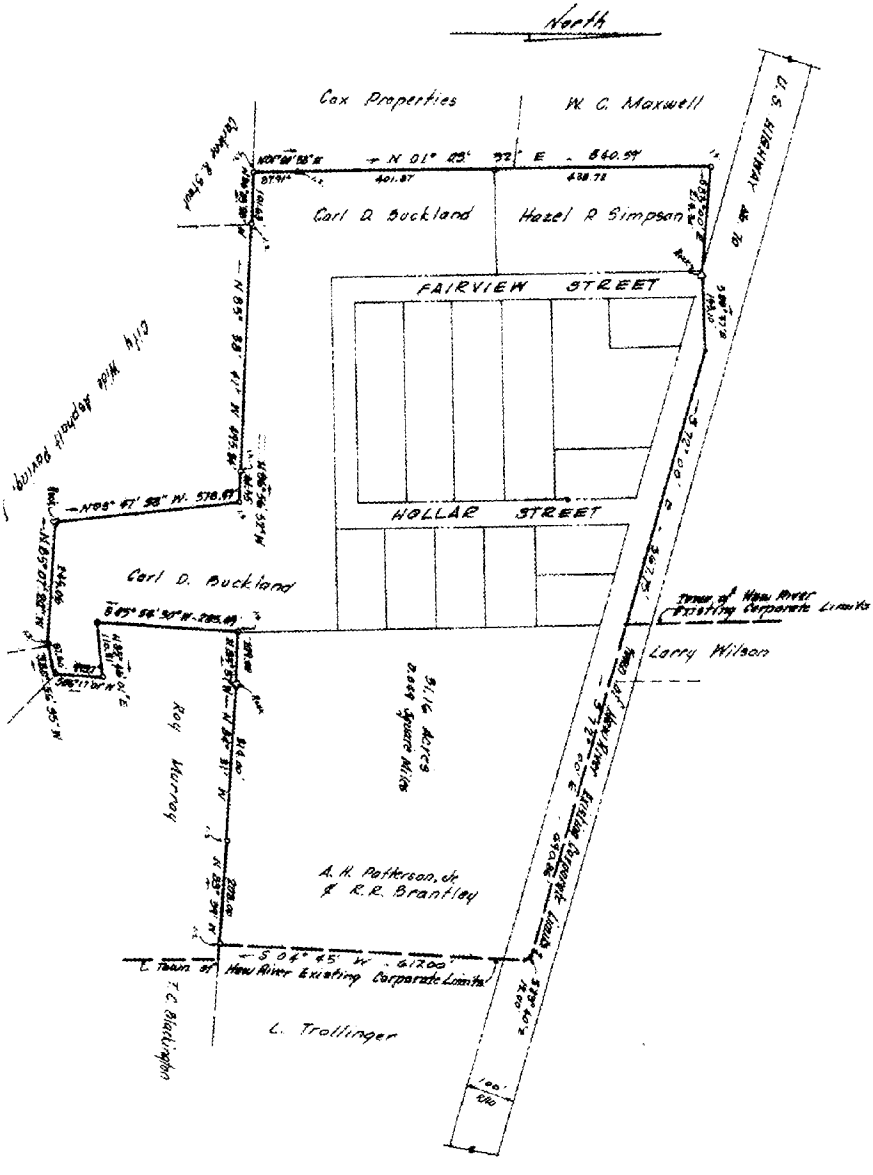
The key issue is whether defendant has fulfilled its duty to maintain Fairview Street. As stated previously, summary judgment is only appropriate where there is no genuine issue of material fact and where the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c); *Kessing*, 278 N.C. 523, 180 S.E.2d 823. The record is undeveloped as to the current state of repair of Fairview Street and the customary maintenance provided by defendant on similar streets. Because we have only the parties' conflicting allegations, a question of fact exists. Accordingly, the trial court erred in granting summary judgment as to this claim.

This case is remanded to the trial court for entry of an order granting plaintiffs' motion for summary judgment as to the issue relating to approval of plaintiffs' subdivision plat and denying defendant's summary judgment motion as to this issue. We further hold that the trial court erred in granting summary judgment to defendant as to plaintiffs' claim that Fairview Street has not been adequately maintained.

Reversed and remanded.

Judges GREENE and MARTIN concur.

[See copy of plat on following page.]


North
Cox Properties
W. C. Maxwell
N 01° 28' 32" E - 860.59'
401.87'
438.72'
Carl D. Buckland
Hazel R. Simpson
FAIRVIEW STREET
HOLLAR STREET
U.S. HIGHWAY 70
City Wide Asphalt Paving
N 85° 47' 58" W. 578.67'
Carl D. Buckland
S 85° 56' 30" W. 285.49'
Town of Haw River Existing Corporate Limits
Larry Wilson
Roy Herron
8.16 Acres
A. H. Patterson, Jr. & R. R. Brantley
S 04° 45' W - 612.00'
Town of Haw River Existing Corporate Limits
L. Trollinger
T. C. Blackington
100' R/W

KAY SMITH, PLAINTIFF v. YOUNG MOVING AND STORAGE, INC., DEFENDANT

No. COA99-1378

(Filed 29 December 2000)

1. **Arbitration and Mediation— motion to stay trial pending arbitration—not a dispositive motion**

The trial court erred by denying defendant's motion to compel arbitration and to stay trial pending arbitration, even though plaintiff contends defendant missed the deadline for filing dispositive motions set in the court's scheduling order, because defendant's motion was not a dispositive motion.

2. **Arbitration and Mediation— failure to plead arbitration as affirmative defense—not waiver**

A defendant did not waive arbitration by failing to plead it as an affirmative defense under N.C.G.S. § 1A-1, Rule 8(c), because the mere filing of pleadings does not manifest waiver of a contractual right to arbitrate.

3. **Arbitration and Mediation— delay in seeking arbitration— no prejudice shown**

A plaintiff was not prejudiced by a defendant's delay in seeking arbitration because: (1) the prejudice described by plaintiff consists, for the most part, of inconveniences and expenses consistent with normal trial preparation; and (2) the record is devoid of evidence of the extent of expenses incurred by plaintiff, and plaintiff might well have incurred the same expense during arbitration.

Judge GREENE dissenting.

Appeal by defendant from order entered 11 August 1999 by Judge Henry W. Hight in Johnston County Superior Court. Heard in the Court of Appeals 19 September 2000.

Hinton, Hewett & Wood, P.A., by Alan B. Hewett, for plaintiff-appellee.

McGuire, Woods, Battle & Boothe, L.L.P., by Fred M. Wood, Jr., and Melissa M. Kemmer, for defendant-appellant.

EDMUNDS, Judge.

Defendant Young Moving and Storage, Inc., appeals the trial court's order denying its Motion to Compel Arbitration and Stay Litigation Proceeding Pending Arbitration. We reverse.

On 22 May 1998, plaintiff Kay Smith filed a claim alleging that defendant had lost personal property that she had stored under contract at defendant's facility. Defendant's answer denied liability but did not assert any affirmative defenses. On 4 March 1999, the trial court entered a Scheduling Order requiring that mediation be conducted on or before 22 May 1999 and that "[a]ll dispositive motions with specific grounds for . . . relief" be filed by 30 June 1999. In the same Order, the court calendared the case for trial on 16 August 1999.

Although a mediator was appointed by the trial court, the mediated settlement conference ended in an impasse. Thereafter, plaintiff served defendant with her First Set of Interrogatories and a Request for Production of Documents on 27 January 1999; defendant responded on 12 April 1999 and supplemented its answers on 8 June 1999. Defendant served upon plaintiff its First Set of Interrogatories and Requests for Production of Documents on 14 April 1999.

On 11 June 1999, plaintiff noticed the deposition of defendant's chief executive officer for 8 July 1999. However, defendant's original counsel withdrew on 12 June 1999, and new counsel filed notice of appearance on 24 June 1999. On 2 July 1999, through its new counsel, defendant filed a Motion for Leave to Amend Answer, a Motion to Compel Arbitration and Stay Litigation Proceeding Pending Arbitration, and a Motion for Continuance of Trial and Extension of the Discovery Scheduling Order. After hearing arguments of both parties, the trial court on 10 August 1999 denied all of defendant's motions, including his motion to compel arbitration. Defendant appeals.

Although an order denying arbitration is interlocutory, it is immediately appealable because it involves a substantial right. *See* N.C. Gen. Stat. § 1-277 (1999); *Sullivan v. Bright*, 129 N.C. App. 84, 86, 497 S.E.2d 118, 120 (1998). Accordingly, we shall address defendant's contentions. In our review, we are mindful that North Carolina has a strong public policy favoring resolution of disputes through arbitration. *See Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30 (1992). " '[A]ny doubts concerning the scope of arbitrable

issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' " *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) (alteration in original) (*quoting Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 785 (1983)).

[1] Plaintiff first argues that the trial court's order should be affirmed because defendant's motion for arbitration was filed after the deadline for filing dispositive motions set in the court's Scheduling Order. The North Carolina General Assembly has authorized our Supreme Court to promulgate rules of practice and procedure for the superior and district courts. *See* N.C. Gen. Stat. § 7A-34 (1999).

> Pursuant to this authority, our Supreme Court requires the Senior Resident Judge and Chief District Judge in each judicial district to "take appropriate actions [such as the promulgation of local rules] to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion."

Young v. Young, 133 N.C. App. 332, 333, 515 S.E.2d 478, 479 (1999) (alteration in original) (quoting Gen. R. Pract. Super. and Dist. Ct. 2(d), 1999 Ann. R. N.C. 2). Such rules have been propounded in Judicial District 11B, where Local Rule 4 reads in pertinent part:

> a. In every case—without exception—Judge . . . shall enter a Scheduling Order in the same format as Exhibit A attached to this CMP.

Judicial District 11B, Johnston County Superior Court Local Rules, Rule 4(a). This rule also requires the trial court to set a deadline in the Scheduling Order for filing dispositive motions and provides the court discretionary authority to impose sanctions for violations of the Scheduling Order. *See id.*, Rule 4(b) & (e).

In the case at bar, the trial court on 3 March 1999 entered a Scheduling Order setting 30 June 1999 as the deadline for the filing of dispositive motions. Defendant through new counsel filed its motion to compel arbitration on 2 July 1999. In denying defendant's motion, the trial court concluded as a matter of law that "all motions filed by defendant are dispositive motions and are filed outside the period required by the Court's Scheduling Order." We review a trial court's conclusions of law *de novo*. *See Clark v. City of Asheboro*, 136 N.C. App. 114, 524 S.E.2d 46 (1999).

Our research has failed to find a definition of the term "dispositive motion" in any North Carolina case or statute, and we are reluctant now to attempt to concoct a definition to cover all contingencies. In the case at bar, defendant's motion for arbitration requested only that the litigation be stayed pending arbitration. This request was consistent with N.C. Gen. Stat. § 1-567.3(d) (1999), which states that any action subject to arbitration is stayed. In addition, our Supreme Court has observed that the trial court is not "ousted" of its jurisdiction by the application of an arbitration clause. *See Adams v. Nelsen*, 313 N.C. 442, 446 n.3, 329 S.E.2d 322, 324-25 n.3 (1985). Although the dissent correctly states that a confirmed arbitration award is conclusive of all rights and an absolute bar to subsequent action, other outcomes are possible. A party may apply to the court to modify or correct an award pursuant to N.C. Gen. Stat. § 1-567.14 (1999), or to vacate an award pursuant to N.C. Gen. Stat. § 1-567.13 (1999). In other words, although defendant's motion to arbitrate disposed of the issues in the case, it did not dispose of the case itself. Bearing in mind the strong state policy favoring arbitration, we conclude that defendant's motion seeking a stay of trial pending arbitration was not a "dispositive" motion precluded by the Scheduling Order.

[2] Plaintiff next argues that defendant waived arbitration by not pleading it as an affirmative defense pursuant to N.C. Gen. Stat. § 1A-1, Rule 8(c) (1999). However, our Supreme Court has held that the mere filing of pleadings does not manifest waiver of a contractual right to arbitrate. *See Cyclone Roofing Co.*, 312 N.C. 224, 321 S.E.2d 872 (suit filed 5 March 1980, answers and cross-claims filed 7 July 1980, 9 July 1980, and 14 July 1980; on 11 August 1980, allegation that dispute subject to mandatory arbitration made for first time in answer to cross-claim and third-party complaint; order requiring arbitration upheld). Consequently, defendant has not waived arbitration.

[3] In the alternative, plaintiff contends that she has been prejudiced by defendant's delay in seeking arbitration. Our Supreme Court has described the type of prejudice plaintiff must demonstrate in order to prevail.

> A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration.

Servomation Corp. v. Hickory Construction Co., 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986). The prejudice described by plaintiff in the case at bar consists, for the most part, of inconveniences and expenses consistent with normal trial preparation. As in *Servomation*, the record is devoid of evidence of the extent of expenses incurred by plaintiff.

> In any event, we are of the opinion that evidence of expenses related to defendant's interrogatories would have been irrelevant since plaintiff has failed to demonstrate that the judicial discovery procedures used by defendant, or their equivalent, would be unavailable in arbitration. Thus plaintiff might well have incurred the same expense during arbitration.

Id. at 545, 342 S.E.2d at 854-55.

Finally, plaintiff argues that the document before the court at the time of the hearing did not contain the arbitration clause in issue. However, plaintiff did not raise this issue below, did not properly preserve the issue, and has failed to cross-assign error, as required by N.C. R. App. P. 10(d). Accordingly, we will not consider this issue.

Although we understand the trial court's apparent frustration at defendant's tardy filing of its motion to arbitrate, in light of the policy strongly favoring arbitration, we hold that the trial court erred in denying defendant's motion. This case is remanded to the trial court for entry of an order consistent with this opinion.

Reversed and remanded.

Judge MARTIN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority that defendant's motion to compel arbitration was not a "dispositive" motion. I, therefore, dissent.

The Johnston County Superior Court Local Rules (the Rules) require the trial court to set in its Scheduling Order a deadline for filing "dispositive motions." Judicial District 11B, Johnston County Superior Court Local Rules, Rule 4(a), (b). "The deadlines in the Scheduling Order may be modified only with the consent of all coun-

sel or by Order of [the trial court]." *Id.*, Rule 4(d). The trial court has the discretion to refuse to consider "dispositive" motions filed after the deadline set in the Scheduling Order. *Id.*, Rule 4(e). Because the Rules do not define "dispositive," this term must be given its plain meaning. *See Peacock v. Shinn*, 139 N.C. App. 487, 497-98, 533 S.E.2d 842, 849 (2000). The plain meaning of "dispositive" is: "Being a deciding factor; . . . bringing about a final determination." *Black's Law Dictionary* 484 (7th ed. 1999). A motion for arbitration is, therefore, a "dispositive" motion if arbitration of a claim results in a "final determination" of the claim.

The North Carolina Uniform Arbitration Act (the Act) provides "[u]pon application of a party, the court shall confirm an [arbitration] award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award." N.C.G.S. § 1-567.12 (1999); *see also* N.C.G.S. § 1-567.13 (1999) (setting out grounds for vacating arbitration award); N.C.G.S. § 1-567.14 (1999) (setting out grounds for modifying or correcting arbitration award). Additionally, the Act provides: "Upon the granting of an order confirming, modifying or correcting an [arbitration] award, judgment or decree shall be entered in conformity therewith and be docketed and enforced as any other judgment or decree." N.C.G.S. § 1-567.15 (1999). A confirmed arbitration award, therefore, "is conclusive of all rights, questions, and facts in issue, as to the parties and their privies, and as to them constitutes an absolute bar to a subsequent action arising out of the same cause of action or dispute." *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986). Accordingly, an order requiring parties to arbitrate a claim under the Act results in a "final determination" of the claim. It follows a motion to compel arbitration is a "dispositive" motion.[1]

In this case, defendant filed a motion to compel arbitration after the deadline in the trial court's Scheduling Order had passed. The trial court denied defendant's motion, concluding the motion was a "dispositive motion[] . . . filed outside the period required by the Court's Scheduling Order." I agree with the trial court that a motion to compel arbitration is a "dispositive" motion, and there is no

1. The fact that an arbitration award can, under limited circumstances, be vacated or modified does not detract from the dispositive nature of an arbitration award. Indeed, the North Carolina Rules of Civil Procedure set out procedures for seeking amendment to or relief from final judgments. N.C.G.S. § 1A-1, Rules 59, 60 (1999). Nevertheless, a judgment, unless it is interlocutory, is a "final determination of the rights of the parties." N.C.G.S. § 1A-1, Rule 54 (1999).

indication in the record that the trial court abused its discretion by denying defendant's motion on the ground the motion was filed after the deadline set in the Scheduling Order. I, therefore, would affirm the order of the trial court denying defendant's motion to compel arbitration.

IN THE MATTER OF: LEANNA (SARAH) GLEISNER AND TOBIAS (ISAAC) GLEISNER

No. COA99-1585

(Filed 29 December 2000)

1. Child Abuse and Neglect— motion to dismiss petition—properly denied

The trial court properly denied respondent's motion to dismiss a petition alleging that her children were neglected where one child, Sarah, had been left alone for about 3½ hours at about age 8 as a form of discipline; Sarah was found to have a cut on her lip and bruising on her face; respondent's fiancee, Rush, had spanked Sarah at church when she misbehaved and had grabbed and hit Sarah's face when they arrived home; Rush had punched holes in the walls and had once cracked the car windshield with his fist while the children were in the vehicle; respondent was completely uncooperative with social services; the other child, Isaac, had a wound on his lip which respondent insisted was a cold sore but which was later determined to be an infected cut; and respondent herself had a black eye.

2. Appeal and Error— plain error—not extended beyond criminal context

There was no plain error in the court's admission of certain hearsay statements in a juvenile neglect proceeding where it could not be determined whether the court did, in fact, rely upon the hearsay statements in reaching its legal conclusion. Furthermore, there was no reason upon this record to reconsider the extension of the plain error doctrine beyond the criminal context.

3. Child Abuse and Neglect— findings—insufficient

The Court of Appeals was unable to conduct a proper review of a trial court's findings of neglect where the "findings" simply

recited the evidence and did not resolve the numerous disputed issues; the basis for the court's determination of neglect was not clear from the record; it could not be determined whether the court's order was defective in failing to find impairment or a substantial risk of impairment; and there were small but significant inaccuracies in the findings. The case was remanded for new findings, but no additional evidence.

Appeal by respondent from order entered 11 October 1999 by Judge William M. Cameron, III in Onslow County District Court. Heard in the Court of Appeals 7 November 2000.

Onslow County Department of Social Services, by Ed Blackwell, for petitioner-appellee.

McNeil & Gilbert, by Joseph B. Gilbert, for respondent-appellant.

McNamara & Smith, P.L.L.C., by Lynn Smith, for Guardian ad Litem.

FULLER, Judge.

Christine Gleisner (respondent), the mother of the two juveniles in question (Sarah and Isaac), appeals from the 17 May 1999 order of the trial court finding both juveniles neglected. For the reasons set forth herein we remand.

The Onslow County Department of Social Services (petitioner) first investigated the family on 2 June 1997 after receiving a report that Sarah had been left at home unattended. Stacy Specht, a social worker employed by petitioner, went to the family's trailer home that Sunday afternoon and found Sarah, approximately eight years old at the time, alone in the trailer. Conflicting testimony was presented as to how long Sarah had been left alone. Specht testified that Sarah had been left alone for three and a half hours. Respondent testified that Sarah had only been left alone for two and a half hours. Conflicting testimony was also presented regarding Sarah's physical appearance. Specht testified that Sarah had a cut on her lip and bruises on her face, while respondent testified that Sarah had a small cut but no bruises. Conflicting testimony was presented as to the cause of Sarah's physical appearance. Specht testified that Sarah told her that respondent's fiancée, Lonnie Rush, had slapped Sarah in the face. Although this testimony was clearly hearsay, respondent did not object to its admission. Specht also testified without objection that

Rush admitted to her that he had spanked Sarah at church that morning when she had misbehaved, and that after he brought Sarah home, he grabbed her face and hit her face. Respondent, on the other hand, testified that the trailer door had swung open in the wind and had hit Sarah in the face when she returned home from church. Respondent further testified that Rush had never hit Sarah. Rush testified that Sarah had been hit in the face by the trailer door, and that he did not hit Sarah. He also testified that although he had placed his hand over Sarah's mouth at church to get her to stop screaming, he did not believe this could have caused any bruising.

The following day, petitioner continued the investigation by sending Robin Grantham to the family's home. Grantham did not find the family at home, but learned that Sarah had been placed overnight with a neighbor. According to Grantham's testimony, she interviewed Sarah at the neighbor's home and observed three bruises on her right cheek and a split lip. Grantham testified that Sarah told her that Rush had hit her as discipline for disobeying him. This statement was objected to as hearsay, and the trial court sustained the objection. However, the trial court admitted the statement for the limited purpose of explaining the continued investigation by petitioner.

Grantham testified that when she confronted respondent with Sarah's statement about Rush hitting her, respondent told Grantham that Sarah had been hit in the face by the trailer door when it blew open in the wind, and respondent denied that Rush had hit Sarah. Grantham also interviewed Rush on this visit. Grantham testified without objection that Rush admitted that he had punched holes in the walls, and that he had once cracked the car windshield with his fist while the children were in the vehicle. Respondent acknowledged at the hearing that Rush once lost his temper in the car and hit the windshield. Grantham testified that she also interviewed several neighbors on this visit who expressed concern that both children were often left alone all day and were allowed to play unsupervised across the street. This hearsay evidence was not objected to by respondent. Grantham also testified that she found respondent to be completely uncooperative. Respondent testified that Grantham threatened to have her children taken away if respondent did not cooperate.

Approximately nine months later, on 7 March 1998, Specht investigated a report that Isaac had a cut lip. During this second investigation, Specht went to the home and saw that Isaac did, in fact, have a wound on his upper lip. Respondent told Specht that the wound was

a cold sore. A subsequent medical examination showed that the wound was a cut that had become infected and not a cold sore. Conflicting evidence was presented as to the cause of the cut on Isaac's lip. Specht testified without objection that once Isaac and Sarah were placed in petitioner's custody, Isaac told Specht that Rush had hit him five times in the face as a form of discipline, and that Sarah similarly told Specht that Isaac's cut lip was a result of Rush hitting Isaac. Respondent testified that she and Rush have never hit either child other than spanking them.

Specht also testified that respondent had a blackened eye at the time of the second investigation. Conflicting evidence was presented regarding the cause of respondent's blackened eye. Specht testified that respondent told her that she had a blackened eye because she had been wrestling with Isaac and he had kicked her accidentally. Respondent testified that Rush has never hit her. However, Specht testified without objection that once Isaac was placed in petitioner's custody, Isaac told Specht that he had not been wrestling with his mother and had not kicked her.

On the same day as the second investigation, 7 March 1998, petitioner filed a petition alleging neglect with regard to both juveniles, and alleging abuse with regard to Isaac, pursuant to N.C.G.S. § 7A-517 (1996) (repealed effective 1 July 1999, 1998 N.C. Sess. Laws ch. 202, § 5). Following an adjudicatory hearing, the trial court concluded that Isaac was not abused, but found that both children were neglected. The court ordered physical placement of Isaac with his maternal great aunt and uncle, with petitioner retaining legal custody, and further ordered physical and legal custody of Sarah to remain with petitioner for future placement. On appeal, respondent raises three assignments of error.

[1] Respondent first contends the trial court erred in denying her motion to dismiss at the close of petitioner's evidence. Upon a motion to dismiss, the court must view the evidence in the light most favorable to the petitioner, giving the petitioner the benefit of any inference. *In re Cusson*, 43 N.C. App. 333, 335, 258 S.E.2d 858, 860 (1979). The test is whether there is substantial evidence to support petitioner's allegations. *Id.* In the instant case, the petition alleges that both children are neglected juveniles. A "neglected juvenile" is defined as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care;

or who lives in an environment injurious to the juvenile's welfare." G.S. § 7A-517(21). In the instant case, the evidence presented by petitioner, taken in the light most favorable to petitioner, amounts to the following: (1) that Sarah had been left alone, at approximately eight years of age, for approximately three and a half hours by respondent as a form of discipline; (2) that Sarah was found to have a cut on her lip and bruising on her face; (3) that Rush had spanked Sarah at church when she misbehaved, and had grabbed her face and hit her face once they arrived home; (4) that Rush had punched holes in the walls, and that he had once cracked the car windshield with his fist while the children were in the vehicle; (5) that respondent was completely uncooperative with petitioner; (6) that Isaac had a wound on his upper lip which respondent insisted was a cold sore but which was later determined to be an infected cut; and (7) that respondent had a blackened eye. We believe petitioner offered substantial evidence of neglect, and that this evidence was sufficient to withstand the motion to dismiss at the close of petitioner's evidence. Thus, the trial court properly denied respondent's motion to dismiss, and this assignment of error is overruled.

[2] Respondent also contends the trial court's reliance on certain hearsay statements, admitted at the hearing without objection, constitutes plain error. A "plain error" is a fundamental error that is so prejudicial as to result in "a miscarriage of justice or in the denial to appellant of a fair trial." *State v. Holloway*, 82 N.C. App. 586, 586-87, 347 S.E.2d 72, 73 (1986) (citations omitted). A plain error "justifies relief on appeal though not objected to in the trial court." *Id.* at 586, 347 S.E.2d at 73. Respondent acknowledges that this Court has held that the "plain error" rule is intended to apply only in criminal cases, *see Wachovia Bank v. Guthrie*, 67 N.C. App. 622, 626, 313 S.E.2d 603, 606, *disc. review denied*, 311 N.C. 407, 319 S.E.2d 280, *cert. denied*, 312 N.C. 90, 321 S.E.2d 909 (1984), but nonetheless asks us to hold that the doctrine should be applied in this civil case in order to prevent manifest injustice. We decline to do so. In the first place, we are unable to discern from a review of the trial court's order whether or not the trial court did, in fact, rely upon any of the hearsay statements in reaching its legal conclusion. Furthermore, even if it were evident that the trial court had relied upon the hearsay statements, this Court has previously declined to extend the plain error doctrine to child custody cases. *Raynor v. Odom*, 124 N.C. App. 724, 732, 478 S.E.2d 655, 660 (1996). Upon this record, we perceive no reason to reconsider whether the plain error doctrine should be extended beyond the criminal context. This assignment of error is overruled.

[3] Respondent lastly argues that the evidence was insufficient to support the trial court's conclusion that both Sarah and Isaac are neglected. A proper review of a trial court's finding of neglect entails a determination of (1) whether the findings of fact are supported by "clear and convincing evidence," N.C.G.S. § 7A-635 (1996) (repealed effective 1 July 1999, 1998 N.C. Sess. Laws ch. 202, § 5), and (2) whether the legal conclusions are supported by the findings of fact, *see In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 219 (1985). However, in the case *sub judice*, we are unable to conduct a proper review for the following reasons.

First, the "factual findings" in the trial court's order are not actually factual findings at all. For example, the third factual finding states: "Isaac told Ms. Specht that the mother's live-in boyfriend, Lonnie Rush, hit him five times in the mouth." However, the sixth factual finding states: "While [respondent] acknowledged that the March 1998 injuries on Isaac did exist, she did not know of any physical violence which could have produced such an injury." These findings are simply a recitation of the evidence presented at trial, rather than ultimate findings of fact. In a nonjury trial, it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony. *See Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected. *See id.* Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show. *See Davis v. Davis*, 11 N.C. App. 115, 117, 180 S.E.2d 374, 375 (1971). Here, the trial court failed to make ultimate findings of fact resolving the numerous disputed issues.

The second reason we are unable to conduct a proper review is that it is unclear from the record on what basis the trial court determined that Sarah is neglected. The trial court's order states that Isaac was found to be neglected because he lives in an injurious environment, and that Sarah was found to be neglected "based on the incident in March." In the first place, although these are clearly legal conclusions, they are designated factual findings. More importantly, although the court found Sarah to be neglected "based on the incident in March," the incident involving Sarah being left at home occurred in June of 1997, while the incident in March of 1998

involved Isaac's cut lip and did not involve Sarah directly in any way. This vague and apparently inaccurate reference to "the incident in March" as the basis for the court's determination that Sarah is neglected impedes our ability to determine whether the trial court's conclusions are supported by the findings.

Furthermore, we have consistently held that where neglect is based on a failure to receive proper care, supervision, or discipline, it must also be established that there is "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline.' " *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (quoting G.S. § 7A-517(21)). Thus, if the trial court's determination that Sarah is neglected was based on the conclusion that she has not received proper care, supervision, or discipline, the trial court must also reach the legal conclusion that Sarah has suffered some impairment as a result, or that there is a substantial risk that she will suffer some impairment as a result. However, we are unable to discern on what basis Sarah was found to be neglected, and we are therefore unable to determine whether the trial court's order is defective for failing to find impairment or a substantial risk of impairment.

Finally, there are small but significant inaccuracies that appear in the findings. For example, the second finding of fact states: "Lonnie Rush advised Ms. Grantham at the time that he had been angry and had placed his hand over Sarah's mouth, but did not intend to injure her." In fact, Rush had spoken to Specht about this conduct, not Grantham. This discrepancy is significant because, contrary to Rush's testimony, Specht testified that Rush "admitted to grabbing [Sarah's] face and hitting her face." If the court believed that Rush discussed this incident with Grantham, rather than Specht, the court may well have overlooked Specht's conflicting testimony on the matter.

For the foregoing reasons, we remand the case to the trial court with instructions to make ultimate findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact. We further instruct the trial court not to take any additional evidence in the case.

Remanded.

Judges GREENE and WYNN concur.

EDDIE G. JONES, EMPLOYEE-PLAINTIFF-APPELLEE v. WEYERHAEUSER COMPANY, SELF-INSURED, EMPLOYER-DEFENDANT-APPELLANT

No. COA99-742

(Filed 29 December 2000)

1. **Constitutional Law— standing—equal protection—workers' compensation defendant**

The argument of a workers' compensation defendant that it had standing to raise an equal protection argument against a special compensation scheme for workers suffering from asbestosis or silicosis was tenuous at best. The class discriminated against, if any, would be the larger class of employees who have contracted other occupational diseases.

2. **Constitutional Law— equal protection—asbestosis and silicosis compensation**

Defendant-employer's equal protection rights were not violated by N.C.G.S. § 97-61.5, a workers' compensation statute providing special compensation for workers suffering from asbestosis or silicosis. Defendant conceded that there was no suspect class or fundamental right affected by the statute and the classification made by the legislature was rationally related to a legitimate governmental interest, to account for the incurable, latent and unique nature of these diseases, factors not apparent in other occupational diseases.

Judge GREENE concurring.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission entered 25 February 1999. Heard in the Court of Appeals 28 March 2000.

Hilliard & Jones, by Maola Jones, and The Law Offices of Robin E. Hudson, by Samuel A. Scudder, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Robert C. Kerner, Jr. and Tracey L. Jones, for defendant-appellant.

McGEE, Judge.

Weyerhaeuser Company (defendant) appeals an opinion and award of the North Carolina Industrial Commission (the Commission) entered 25 February 1999 pursuant to N.C. Gen. Stat. § 97-86

(1999). A deputy commissioner filed an opinion and award on 30 July 1998 awarding workers' compensation benefits to plaintiff Eddie G. Jones. The Commission entered an opinion and award affirming and modifying the deputy commissioner's award.

The Commission found that plaintiff was employed by defendant for more than thirty-one years as a pipe fitter, maintenance mechanic, and millwright, beginning in 1966. The parties stipulated that plaintiff was exposed to asbestos fibers during his employment with defendant. Defendant transferred plaintiff to the finishing department in 1989 because he was diagnosed with a "probable" asbestos-related lung condition.

The Commission's findings of fact included: (1) plaintiff had proven by the greater weight of the evidence that he had developed asbestosis; (2) plaintiff's employment was a significant contributing factor in the development of his asbestosis; (3) plaintiff's employment placed him at an increased risk of developing asbestosis compared to members of the general public; and (4) plaintiff's last injurious exposure to asbestos fibers ended in 1989 when he was transferred to the finishing department. Based upon its findings of fact, the Commission concluded that plaintiff developed asbestosis as defined by N.C. Gen. Stat. §§ 97-53(24) (1999) and 97-62 (1999). The Commission awarded plaintiff benefits of $376.00 per week for 104 weeks, pursuant to N.C. Gen. Stat. § 97-61.5(b) (1999), and concluded that the provisions of N.C.G.S. § 97-61.5 were not unconstitutional. Defendant appeals.

[1] Defendant argues that the Commission erred in its finding of fact and conclusion of law that the provisions of N.C.G.S. § 97-61.5 are not unconstitutional. Defendant contends that the statute denies it equal protection of the law under both the North Carolina Constitution and the United States Constitution because the statute treats employers with employees who are exposed to asbestos and silica differently than employers with employees who are not exposed to asbestos and silica. In response, plaintiff contends that defendant does not have standing to challenge the constitutionality of N.C.G.S. § 97-61.5.[1]

1. Although plaintiff failed to cross-assign error to this issue in violation of N.C.R. App. P. 10(d), we believe that we may not reach the merits of a constitutional challenge if the challenging party lacks standing. *See, e.g., State v. Waters*, 308 N.C. 348, 355, 302 S.E.2d 188, 193 (1983) (stating that the constitutionality of a statute may only be contested by a litigant who has standing to challenge the statute); *Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 494-95, 263 S.E.2d 323, 326 (1980) (refusing to address defendant's constitutional challenge because defendant "ha[d] no standing to attack the statutes"); *see also Safeco Co. v. City of White House, Tenn.*, 191 F.3d 675, 689 (6th

"The general rule is that 'a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.' " *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974) (citation omitted); *see also Roberts v. Durham County Hospital Corp.*, 56 N.C. App. 533, 289 S.E.2d 875 (1982), *aff'd per curiam*, 307 N.C. 465, 298 S.E.2d 384 (1983); *Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 263 S.E.2d 323 (1980); *State v. Vehaun*, 34 N.C. App. 700, 239 S.E.2d 705 (1977). The statute presently challenged is N.C.G.S. § 97-61.5(b), which states:

> If the Industrial Commission finds at the first hearing that the employee has either asbestosis or silicosis or if the parties enter into an agreement to the effect that the employee has silicosis or asbestosis, it shall by order remove the employee from any occupation which exposes him to the hazards of asbestosis or silicosis, and if the employee thereafter engages in any occupation which exposes him to the hazards of asbestosis or silicosis without having obtained the written approval of the Industrial Commission as provided in G.S. 97-61.7, neither he, his dependents, personal representative nor any other person shall be entitled to any compensation for disablement or death resulting from asbestosis or silicosis; provided, that if the employee is removed from the industry the employer shall pay or cause to be paid as in this subsection provided to the employee affected by such asbestosis or silicosis a weekly compensation equal to sixty-six and two-thirds percent (66 ⅔%) of his average weekly wages before removal from the industry, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 or less than thirty dollars ($30.00) a week, which compensation shall continue for a period of 104 weeks.

The statute thus provides a special compensation scheme for workers suffering from asbestosis or silicosis—a narrow class of occupational disease-suffering employees. Accordingly, the class discriminated against, if any, would be the larger class of employees who have contracted occupational diseases other than asbestosis or silicosis. Defendant's argument, however, is that because its business exposed its workers to asbestos, defendant is "burdened with additional liability for workers compensation benefits, with which similarly situated employers" (whose businesses did not expose their

Cir. 1999) ("Although no party mentions whether Appellants have standing to challenge the constitutionality of the statute, this court must assure itself of jurisdiction.").

workers to asbestos or silica) are not so burdened. Defendant's argument is at best tenuous.

[2] Nonetheless, even assuming *arguendo* that defendant does have standing to assert a constitutional challenge to N.C.G.S. § 97-61.5, we agree with the Commission that the statute is not unconstitutional. *See Roberts*, 56 N.C. App. at 539, 289 S.E.2d at 878-79 ("Assuming that plaintiffs had standing to attack N.C. Gen. Stat. § 1-15(c), the statute is not unconstitutionally discriminatory."). Equal protection, as guaranteed by the United States Constitution and Article I, Section 19 of the Constitution of North Carolina, "requires that all persons similarly situated be treated alike." *Walters v. Blair*, 120 N.C. App. 398, 400, 462 S.E.2d 232, 233 (1995) (citation omitted), *aff'd per curiam*, 344 N.C. 628, 476 S.E.2d 105 (1996). In evaluating the constitutionality of a statute, the *Walters* Court stated,

> If the statute impacts upon a suspect class or a fundamental right, the government must "demonstrate that the classification is necessary to promote a compelling governmental interest" (strict scrutiny). If the statute does not impact upon a suspect class or a fundamental right, it is only necessary to show that the classification created by the statute bears a rational relationship to or furthers some legitimate state interest (minimum scrutiny).

Id. at 400, 462 S.E.2d at 234 (internal citations omitted). Defendant concedes, and we agree, that no suspect class or fundamental right is affected by the statute; however, defendant contends that the statute cannot survive even minimum scrutiny. Our Court has discussed the rational basis test:

> "The constitutional safeguard (of equal protection) is offended only if the classification rests on grounds *wholly irrelevant* to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it."

Roberts, 56 N.C. App. at 539, 289 S.E.2d at 879 (emphasis added) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26, 6 L. Ed. 2d 393, 399 (1961)). Defendant cannot overcome the high hurdle established by application of the rational basis test.

Our Supreme Court has set out the importance of the asbestosis and silicosis statutes and the necessary distinction between those diseases and other occupational diseases:

[P]roper consideration of the special provisions of the statutes relating to asbestosis and silicosis must rest upon a conviction that in passing these laws the Legislature gave due heed to the nature of these diseases.

The definition of silicosis itself makes it plain that the legislators approved the amendment covering occupational diseases with full knowledge that silicosis is a disease of the lungs contracted by breathing air containing silica dust. Besides, an analysis of the pertinent sections as a whole indicates that the lawmakers acted with an awareness of the discoveries of medicine and industry that silicosis is characterized by shortness of breath, decreased chest expansion, lessened capacity for work, reduced vitality, and a marked susceptibility to tuberculosis; that the average time before symptoms of the disease develop is from ten to fifteen years; that silicosis is incurable; that whether silicosis will result in death or disability to a particular worker is dependent on his susceptibility to the affliction and the duration and intensity of his exposure to silica dust; and that silicosis is a progressive disease, the lung changes continuing to develop for one or two years after complete removal of the worker from silica hazard.

. . . .

When the special provisions of the occupational disease amendment relating to asbestosis and silicosis are read in their entirety, it is apparent that they are designed to effect these objects: (1) To prevent the employment of unaffected persons peculiarly susceptible to asbestosis or silicosis in industries with dust hazards; (2) to secure compensation to those workers affected with asbestosis or silicosis, whose principal need is compensation; and (3) to provide compulsory changes of occupations for those workmen affected by asbestosis or silicosis, whose primary need is removal to employments without dust hazards.

Obviously, the Legislature enacted [N.C.G.S. § 97-61.5] for the paramount purpose of securing to an affected worker undergoing a compulsory change of occupation an independent position as a wage earner in some work free from dust hazards. When the language of the statute is considered in the light of the mischief sought to be avoided and the remedies intended to be applied, it becomes manifest that the Legislature has authorized the

> Industrial Commission to order a forced change of occupation for an employee affected by asbestosis or silicosis only in case it appears to the Commission that there is a reasonable basis for the conclusion that such employee possesses the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation free from the hazards of asbestosis and silicosis. . . . [A] contrary interpretation must necessarily be based upon the absurd premise that the lawmakers legislated in ignorance of, or with indifference to, the self-evident facts that the incapacity of a workman affected by asbestosis or silicosis to adapt himself to new employment or the progression of his disease may render it impossible for him to obtain or follow a gainful occupation in a new sphere of activity.

Young v. Whitehall Co., 229 N.C. 360, 365-68, 49 S.E.2d 797, 800-03 (1948) (internal citations omitted).

Moreover, our Supreme Court found significant "the distinction made by the Legislature between asbestosis and silicosis, and other occupational diseases[.]" *Honeycutt v. Asbestos Co.*, 235 N.C. 471, 476, 70 S.E.2d 426, 430 (1952). "An employee does not contract or develop asbestosis or silicosis in a few weeks or months. These diseases develop as the result of exposure for many years to asbestos dust or dust of silica. Both diseases, according to the textbook writers, are incurable and usually result in total permanent disability." *Id.* at 476-77, 70 S.E.2d at 430.

Thus, under *Roberts*, the classification made by the General Assembly is, at a minimum, rationally related to a legitimate governmental interest. 56 N.C. App. at 539, 289 S.E.2d at 879. Although defendant cites *Walters*, 120 N.C. App. 398, 462 S.E.2d 232, in support of its contention that N.C.G.S. § 97-61.5 is unconstitutional, we find that case readily distinguishable. In *Walters*, the plaintiff-employee challenged the constitutionality of N.C. Gen. Stat. § 97-63 (1991), which required claimants suffering from asbestosis or silicosis to have been employed in North Carolina for two years. The purposes of that statute were to "prevent[] [] forum shopping and [to] protect[] against claims for which the employer is not responsible." *Id.* at 401, 462 S.E.2d at 234. Our Court held that, while those were legitimate state interests, "the statute is grossly underinclusive in that it does not include all who are similarly situated." *Id.* (citations omitted).

The statute at issue in *Walters* imposed upon claimants suffering from asbestosis or silicosis an additional burden for recovery not so imposed on claimants with other occupational diseases. The purposes for which the statute was enacted were equally applicable to all claimants suffering from occupational diseases. Conversely, N.C.G.S. § 97-61.5 was enacted as an added benefit to employees suffering from asbestosis or silicosis, and its purpose was to account for the incurable, latent, and unique nature of asbestosis and silicosis, factors not apparent in other occupational diseases. Accordingly, *Walters* is inapplicable to the case before us, and defendant's argument is without merit.

The opinion and award of the Commission is affirmed.

Judge EDMUNDS concurs.

Judge GREENE concurs with a separate opinion.

Judge GREENE concurring.

I write separately because I believe defendant has standing to raise a constitutional challenge to N.C. Gen. Stat. § 97-61.5.

Any party who "alleges some direct injury in fact" has standing to challenge the constitutionality of a statute. *See Greene v. Town of Valdese*, 306 N.C. 79, 88, 291 S.E.2d 630, 636 (1982). Defendant argues in its brief to this Court that employers such as itself "whose workers have had occupational exposure to asbestos and silica are burdened with additional liability for workers[']' compensation benefits, with which similarly situated employers are not so burdened." This alleged additional liability, which is not imposed on similarly situated employers, would cause a direct injury to defendant. Accordingly, defendant has standing to bring its claim that section 97-61.5 is unconstitutional. Otherwise, I fully concur in the majority's opinion.

NORRIS R. DAVIS, PETITIONER v. TOWN OF STALLINGS BOARD OF ADJUSTMENT AND TOWN OF STALLINGS, RESPONDENTS

No. COA99-1513

(Filed 29 December 2000)

1. Zoning— board of adjustment—review of decision

The trial court sits in the posture of an appellate court when reviewing the decision of a board of adjustment. De novo review is proper if a petitioner contends the board's decision was based on an error of law, but the whole record test must be applied if a petitioner contends the board's decision was not supported by the evidence or was arbitrary or capricious. The role of the appellate court is to review the trial court's order for errors of law, determining whether the appropriate scope of review was exercised and whether it was exercised properly.

2. Zoning— de novo standard of review

The trial court appropriately applied the de novo standard of review to the decision of a board of adjustment where petitioner contended that the board erroneously concluded that his video store was an "adult establishment" based on his refusal to testify. This presents a question of law.

3. Constitutional Law— privilege against self-incrimination—civil hearing—possibility of criminal prosecution

A video store owner could properly invoke his constitutional privilege against self-incrimination in a hearing before the board of adjustment where his testimony regarding the sale or rental of certain items could subject him to criminal prosecution.

4. Zoning— refusal to testify—inference of permit violation

It was proper for a board of adjustment to infer a violation of a zoning permit from a video store owner's refusal to testify and to conclude that the store qualified as an adult bookstore where there was evidence giving rise to the probability that a majority of his gross income was derived from the sale or rental of adult publications. The owner's refusal to attempt to refute this evidence is tantamount to a silent admission of the charge against him. It is well established that a trier of fact may infer guilt where a civil party has the opportunity to refute damaging evidence but chooses not to do so.

Appeal by petitioner from order entered 31 August 1999 by Judge William H. Helms in Union County Superior Court. Heard in the Court of Appeals 18 October 2000.

Goodman, Carr, Nixon, Laughrun & Levine, by Miles S. Levine, for petitioner-appellant.

Perry, Bundy, Plyler & Long, L.L.P., by H. Ligon Bundy, and Griffin, Smith, Caldwell, Helder & Lee, P.A., by Betsy L. Glenn and W. David Lee, for the respondent-appellees.

LEWIS, Judge.

Petitioner Norris Davis appeals the trial court's 31 August 1999 order affirming the Town of Stallings Board of Adjustment's determination that petitioner was operating an unauthorized "adult establishment." We affirm the trial court's order.

Davis is the owner and operator of "The Executive Video Club," a video store located in Stallings, North Carolina. On 28 October 1997, Davis obtained a zoning permit for a "change of principal use," allowing a video store with an adult video room. Handwritten on the permit were the following limitations:

> This permit is good for a video store with an adult video room. The majority of all movies must not be adult videos. All parking, entrances, and exits must be paved. No adult video signage allowed.

In February 1998, a Zoning Code Enforcement Officer for the Town of Stallings visited Davis's video store, noting that the front area of the store ("non-adult section") contained approximately 800 non-adult videos on the shelves and 82-250 videos waiting to be shelved. The back area of the store ("adult section") contained approximately 882 adult videos and about 180 adult magazines; another "novelty room" in this adult section contained five different items.

On 24 April 1998, the Zoning Officer issued a violation notice to Davis. The cited violation was as follows:

> You were issued a zoning permit for a video store with an adult video room on 28 October 1997. A condition on the permit stated that the majority of the movies must not be of an adult nature.
>
> Per an investigation, I determined that you were selling adult magazines along with novelty items. This qualifies the use as an

> adult use. Therefore, you must obtain a zoning permit for an ["]adult establishment["] or remove the adult magazines and novelty items. If a zoning permit for an adult establishment is granted, then you must obtain a business license for that use.

On 7 May 1998, Davis appealed from the notice of violation on the basis that his video store did not qualify as an "adult establishment" under the Zoning Ordinance for the Town of Stallings ("the Ordinance"). The Ordinance adopts the definition of "adult establishment" from N.C. Gen. Stat. § 14-202.10(2), which defines the term as "an adult bookstore, adult motion picture theatre, adult mini motion picture theatre, adult live entertainment business, or massage business as defined in this section." The type of "adult establishment" relevant here is an "adult bookstore." N.C. Gen. Stat. § 14-202.10(1) sets forth two definitions for an "adult bookstore." Specifically, an "adult bookstore" is one:

a. Which receives a majority of its gross income during any calendar month from the sale or rental of publications (including books, magazines, other periodicals, videotapes, compact discs, other photographic, electronic, magnetic, digital, or other imaging medium) which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section; or

b. Having as a preponderance (either in terms of weight and importance of the material or in terms of greater volume of materials) of its publications (including books, magazines, other periodicals, videotapes, compact discs, other photographic, electronic, magnetic, digital, or other imaging medium) which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specific sexual activities or specified anatomical areas, as defined in this section.

In addition, N.C. Gen. Stat. § 14-202.10(9) defines "sexually oriented devices" as, "without limitation[,] any artificial or simulated specified anatomical area or other device or paraphernalia that is designed principally for specified sexual activities but shall not mean any contraceptive device."

In his appeal to the Board, Davis asserted two grounds for reversal of the Zoning Officer's determination: (1) his selling of "sexually

oriented devices" should not factor into whether his business was an "adult bookstore" since such devices are not "publications, books, magazines, or other periodicals" under N.C. Gen. Stat. § 14-202.10(1)(a) or (b), and (2) the "preponderance" of "publications" sold at the video store were not distinguished or characterized by their emphasis on matter related to specified sexual activities or specified anatomical areas, as required under G.S. 14-202.10(1)(b).

On 21 July 1998 and 18 August 1998, a hearing was held before the Town of Stallings Board of Adjustment ("the Board"). At the hearing, the Zoning Officer presented evidence of items contained in Davis's video store on his first visit, along with evidence of additional items discovered on a second visit on 22 July 1998. The second time, the Zoning Officer encountered approximately 1884 videos and 300 comic books in the non-adult section, and approximately 1665 videos, 300 magazines and books, 160 novelty items, and 80 CDS in the adult section. At this hearing, both Davis and his wife invoked their Fifth Amendment right against self-incrimination and refused to testify.

The Board essentially concluded (1) that by displaying on the premises of his video store items other than videos, Davis violated the zoning permit issued to him on 28 October 1997, and (2) that because Davis and his wife refused to testify, they prevented the Board from conducting a full and complete hearing of the relevant evidence needed to determine the applicable issues, giving rise to an inference that his video store constituted an unauthorized "adult establishment." In its mandate, the Board stated that the zoning permit restricted Davis to the rental or sale of *videos only*, the majority of which must not be adult pursuant to N.C. Gen. Stat. § 14-202.10. The Board also mandated that Davis's video store must not constitute an "adult establishment" as defined under the Ordinance. The order allowed Davis thirty days in which to comply.

Davis filed a petition for writ of certiorari with the Union County Superior Court on 20 October 1998 and a writ of certiorari was issued on 5 November 1998. On 31 August 1999, a hearing was conducted by the trial court, which entered a judgment affirming the Board's decision. Davis now appeals.

[1] 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 of 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. App. 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.*

[2] Accordingly, we first decide whether the trial court exercised the appropriate scope of review. In this appeal, Davis assigns as error the Board's conclusion that his video store was an "adult establishment" based on his refusal to testify. This presents a question of law warranting de novo review. *Id.* 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.*

[3] The constitutional privilege against self-incrimination assures all individuals that they will not be compelled to give testimony which will tend to incriminate them or which will tend to subject them to fines, penalties or forfeiture. *Cantwell v. Cantwell*, 109 N.C. App. 395, 397, 427 S.E.2d 129, 130 (1993). Here, Davis's testimony regarding the sale or rental of certain items could subject him to criminal prosecution under N.C. Gen. Stat. § 14-202.11(a) if such testimony leads to the conclusion that his video store is an "adult establishment." Thus, Davis and his wife could properly invoke the privilege at the hearing before the Board.

[4] Having established that Davis and his wife properly invoked the constitutional privilege against self-incrimination, we turn to whether the Board could use their assertion of that privilege to infer that Davis was running an unauthorized "adult establishment." It is well established that a trier of fact may infer guilt on a civil party who has the opportunity to refute damaging evidence but chooses not to. *McKillop v. Onslow County*, 139 N.C. App. 53, 63, 532 S.E.2d 594, 601 (2000). The finder of fact in a civil action may use a witness's invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him. *Fedoronko v. American Defender Life Ins. Co.*, 69 N.C. App. 655, 657-58, 318 S.E.2d 244, 246 (1984). The foregoing principle was applied in *Gray v. Hoover*, 94 N.C. App. 724, 726, 381 S.E.2d 472, 473, *disc. review denied*, 325 N.C. 545, 385 S.E.2d 498 (1989), an action for divorce that included a charge of adultery. The evidence of adultery consisted of plaintiff's wife going into a condominium with the defendant at night, turning out the lights inside, and not exiting until daytime. *Id.* at 729, 381 S.E.2d at 474-75. At trial the defendant refused to answer questions on the grounds that he might incriminate himself. *Id.* The Court stated:

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

Id. at 729, 381 S.E.2d at 475 (quoting *Warner v. Torrence*, 2 N.C. App. 384, 163 S.E.2d 90 (1968)). The rationale underlying this principle has been stated as follows:

> "The privilege of the witness is to prevent testimony which might be used against him in a subsequent criminal suit, and not to keep out probative evidence or any inferences to be drawn from the claim of privilege which might be relevant to the issues in the matter before the court. So, while the claim of privilege may not be used against defendant [or a witness] in a subsequent criminal prosecution, an inference that his testimony would have been unfavorable to him is available to his opponent in a civil cause in which defendant [or a witness] pleads the privilege."

Fedoronko, 69 N.C. App. at 657, 318 S.E.2d at 246 (quoting 98 C.J.S. *Witnesses* § 455, at 308 (1957) (footnotes omitted)).

We find the foregoing cases inferring guilt on a civil defendant who refuses to refute damaging evidence dispositive. Here, the evidence before the Board revealed a relatively small disparity between the number of adult and non-adult items qualifying as "publications" in Davis's video store—2045 adult publications and 2184 non-adult publications. This evidence gives rise to the probability that a majority of Davis's gross income was derived from the sale or rental of these adult publications, and thus, fulfills the first definition of "adult bookstore" under G.S. 14-202.10(1)(a). Given this evidence, Davis's refusal to attempt to refute the Zoning Officer's evidence is tantamount to "a silent admission of the charge made against him." *Gray*, 94 N.C. App. at 729, 381 S.E.2d at 475 (citation omitted). This silent admission logically gives rise to an inference of guilt. *In Re Estate of Trogdon*, 330 N.C. 143, 152, 409 S.E.2d 897, 902 (1991). It was therefore proper for the Board to infer a violation from his refusal to testify and thus to conclude that his video store qualified as an "adult bookstore" under G.S. 14-202.10(1).

In light of the foregoing, we conclude the trial court properly exercised its scope of review in upholding the determination of the Board.

Affirmed.

Judges WYNN and HUNTER concur.

LIBERTY MUTUAL INSURANCE CO., PLAINTIFF v. JUDY BASS PENNINGTON AND RICK PENNINGTON, DEFENDANTS

No. COA99-1335

(Filed 29 December 2000)

1. Insurance— automobile—UIM—notification—statute of limitations

The statute of limitations for tort claims generally does not impact the notification provisions of N.C.G.S. § 20-279.21(b)(4), which deals with underinsured motorist claims. The statute does not require that an underinsured motorist carrier be notified of a

claim within the statute of limitations governing the tortfeasor. However, an underinsured motorist carrier's liability is derivative of the tortfeasor's liability and it follows that an insured may not recover from her underinsured motorist carrier when the statute of limitations bars her from recovering from the tortfeasor.

2. Insurance— automobile—UIM—notification—not prompt—good faith—prejudice

The trial court erred by granting summary judgment for plaintiff-insurance company in a declaratory judgment action to determine whether defendants were entitled to underinsured motorist coverage. Although plaintiff contended that defendants failed to comply with the notification provision of the policy, and defendants acknowledge that their notification was not given as soon as practicable, an insurer may not automatically deny coverage when an insured fails to follow a policy's notification provisions, but must follow a three step test. In this case, there were issues of fact as to whether defendants acted in good faith and whether plaintiff's ability to investigate and defend was materially prejudiced. As to whether loss of subrogation rights constitutes prejudice, plaintiff opted not to advance funds after the notice; having failed to preserve its right of subrogation, it cannot now complain of defendants' efforts to seek UIM coverage.

Appeal by defendants from judgment entered 24 August 1999 by Judge Robert L. Farmer in Superior Court, Wake County. Heard in the Court of Appeals 14 September 2000.

Cranfill, Sumner & Hartzog, L.L.P., by Edward C. LeCarpentier III, for plaintiff-appellee.

Thompson, Smyth & Cioffi, L.L.P., by Theodore B. Smyth, and Pipkin, Knott, Clark and Berger, L.L.P., by Joe T. Knott, III, for defendants-appellants.

WYNN, Judge.

On 9 December 1993, Judy Pennington and her daughter Christy were involved in a vehicular accident with Clee Earp, who was driving a truck owned by his employer Blackburn Logging, Inc. The next day, Pennington informed her insurance carrier, Liberty Mutual Insurance Co., of the accident. Liberty Mutual obtained the police report of the accident then interviewed witnesses to the accident. In

January 1994, Liberty Mutual paid $500.00 of the Penningtons' medical expenses.

On 5 June 1996, the Penningtons brought a negligence action against Mr. Earp and Blackburn Logging in the case *Pennington v. Earp, et al.*, 96 CVS 5586 ("the underlying tort action"). Blackburn Logging's insurance carrier, Atlantic Casualty, provided a defense in the action. The matter came on for mediation on 10 December 1997, at which point the Penningtons learned for the first time that Blackburn Logging had $25,000/$50,000 liability limits.

Having determined that Blackburn Logging's policy would not fully cover their damages, the Penningtons notified Liberty Mutual of their intent to claim benefits under their $50,000/$100,000 underinsured motorist policy with Liberty Mutual. In response, one of Liberty Mutual's claims adjusters commented in his notes, "I find it unusual that a logging company only has a 25K policy limit." Liberty Mutual opted not to advance funds to the Penningtons and filed a notice of appearance in the underlying tort action. However, the Penningtons resolved that action by entering into a settlement agreement with Atlantic Casualty in which they reserved the right to pursue an underinsured motorist claim against Liberty Mutual.

Thereafter, Liberty Mutual brought this declaratory judgment action to determine whether the Penningtons were entitled to underinsured motorist coverage. Liberty Mutual contended that the Penningtons failed to comply with the notification provision of their insurance policy and that they failed to notify Liberty Mutual of their claim prior to the expiration of the three year statute of limitations period provided by N.C. Gen. Stat. § 1-15(a) (1983) and N.C. Gen. Stat. § 1-52(1), 1-52(2) or 1-52(16) (1983). The trial court granted Liberty Mutual's motion for summary judgment and the Penningtons appealed to this Court.

The issue on appeal is whether the trial court properly granted summary judgment for Liberty Mutual based on the running of the statute of limitations or the failure of the Penningtons to give timely notice of their claim for underinsured motorist benefits. We reverse the decision of the trial court.

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[1] We address first the question of whether the statute of limitations controlling the underlying tort action governs the time within which an insured must notify her underinsured motorist carrier of a potential claim.

Underinsured motorist coverage is governed by the Financial Responsibility Act, N.C. Gen. Stat. § 20-279.1, et seq. (1993). The purpose of the Act is to protect innocent victims of financially irresponsible motorists. *See Sutton v. Aetna Casualty & Surety* Co, 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). The Act is to be liberally construed, and if a motorist's policy conflicts with the Act, the Act prevails. *See id.*; *Wilmoth v. State Farm Mut. Auto Ins. Co.*, 127 N.C. App. 260, 262, 488 S.E.2d 628, 630, *review denied*, 347 N.C. 410, 494 S.E.2d 601 (1997).

Under N.C. Gen. Stat. § 20-279.21(b)(4) (1993),

> A party injured by the operation of an underinsured highway vehicle who institutes a suit for the recovery of moneys for those injuries and in such an amount that, if recovered, would support a claim under underinsured motorist coverage shall give notice of the initiation of the suit to the underinsured motorist insurer as well as to the insurer providing primary liability coverage upon the underinsured highway vehicle. Upon receipt of notice, the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party. The underinsured motorist insurer may elect, but may not be compelled, to appear in the action in its own name and present therein a claim against other parties . . . .

This provision does not require that an underinsured motorist carrier be served with pleadings as a party, nor does it require that such carrier appear in the action. Indeed, the subsection allows the underinsured motorist carrier to proceed in an action *as if* it were a party, without being named as such. Further, this provision does not provide a specific time within which an insured must notify her insurer, nor does it dictate how the insured must notify her carrier about the claim. We discern no hint from the statute that an underinsured motorist carrier must be notified within the statute of limitations governing the tortfeasor.

We compare this provision to N.C. Gen. Stat. § 20-279.21(b)(3) (1993), which governs notification to an *uninsured* motorist carrier. That subsection, unlike the underinsured motorist subsection, envisions *serving* the uninsured motorist carrier with a copy of the summons and complaint, and requires that the uninsured motorist carrier be a party to the action. Because these requirements are strikingly absent from subsection (b)(4), which governs underinsured motorist

claims, our General Assembly must have intended for the notification provisions of the two statutes to be construed differently. It follows that subsection (b)(4) does not require that an underinsured motorist carrier be notified of a claim within the statute of limitations governing the tortfeasor.

Nonetheless, it should be noted that an insured would, for instance, be barred from seeking coverage if she failed to bring an action against a tortfeasor within the statute of limitations governing tort actions. An underinsured motorist carrier's liability is derivative of the tortfeasor's liability. *See, e.g., Buchanan v. Buchanan*, 83 N.C. App. 428, 429, 350 S.E.2d 175, 176 (1986), *review denied*, 319 N.C. 224, 353 S.E.2d 406 (1987). It follows that an insured may not recover from her underinsured motorist carrier when the statute of limitations bars her from recovering from the tortfeasor.

In sum, while the statute of limitations would serve to bar underinsured motorist coverage when the insured fails to bring a timely claim against a tortfeasor, the statute of limitations for tort claims generally does not impact the notification provisions of N.C. Gen. Stat. § 20-279.21(b)(4).

[2] Next, we examine whether the Penningtons' claim is otherwise barred by their failure to notify Liberty Mutual in a timely manner. The Penningtons' policy contains no specific time within which they had to notify Liberty Mutual about an underinsured motorist claim. Instead, Liberty Mutual's policy provides that the Penningtons must:

> Promptly send us copies of the legal papers if a suit is brought. A suit may not be brought by an insured until 60 days after that person notifies us of their belief that the prospective defendant is an uninsured motorist.

The Penningtons do not dispute that they did not notify Liberty Mutual of the suit against Mr. Earp and Blackburn Logging until about 16 months after bringing suit, and they acknowledge that this was not prompt notification. However, they correctly argue that an insurer may not automatically deny coverage when an insured fails to follow a policy's notification provisions; rather, the insurer must show that it meets the three-step test adopted by our Supreme Court in *Great American Ins. Co. v. C. G. Tate Constr. Co.*, 303 N.C. 387, 279 S.E.2d 769 (1981), *appeal after remand*, 315 N.C. 714, 340 S.E.2d 743 (1986) (hereafter "*Tate*").

That three-part test provides:

> When faced with a claim that notice was not timely given, the trier of fact must first decide whether the notice was given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, *e.g.*, that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.

Tate, 303 N.C. at 399, 279 S.E.2d at 776; *see also*, *Nationwide Mut. Ins. Co.* v. *State Farm Mut. Auto Ins. Co.*, 122 N.C. App. 449, 470 S.E.2d 556 (1996).

As to the first part of the *Tate* test, the Penningtons concede in their brief that they did not notify Liberty Mutual as soon as practicable. In light of that concession, the second question under *Tate* is whether the insured acted in "good faith."

The determination of whether an insured acted in good faith in failing to notify the insured "as soon as practicable" is generally a question for the jury. *See Tate*. In this case, Liberty Mutual offers a number of facts to support its contention that the Penningtons did not act in good faith, such as the fact that the Penningtons did not pursue discovery. However, the Penningtons counter by pointing out other facts indicating that they did act in good faith. In light of this conflicting evidence, it is imprudent for this question to be decided as a matter of law; rather, a jury must weigh this evidence and render a decision. *See id.*

In the absence of being able to show as a matter of law that the insured acted in bad faith, under the third prong of the *Tate* test, the burden shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay. Again, the record shows conflicting views by the parties on this issue which leads us to conclude that this question is a matter for the jury to decide. *See id.*

Nonetheless, Liberty Mutual asserts in its brief that,

> [U]nlike the *Tate* case and other similar *liability insurance* "failure to notify" cases, the instant case involves *more than* the UIM carrier's ability to investigate and defend claims. Due to the very nature of a UIM claim under the North Carolina UIM statute,

> Liberty Mutual has been irretrievably stripped of its subrogation rights against the underinsured motorist and his employer.

Yet, Liberty Mutual cites no authority to support this argument. Indeed, in *Wilmoth v. State Farm*, *supra*, this Court held that an insurance carrier may not use its own failure to preserve its subrogation rights to act as a bar to coverage of an underinsured motorist claim. *See also Sutton*, *supra*; *Gurganious v. Integon General Ins. Corp.*, 108 N.C. App. 163, 165, 423 S.E.2d 317, 319 (1992), *review denied*, 333 N.C. 538, 429 S.E.2d 558 (1993). Further in *Wilmoth*, we concluded:

> Were an UIM carrier permitted to waive its subrogation rights against a tortfeasor while its insured remained barred, by virtue of settlement with the tortfeasor without legal action, from proceeding in a direct action against the carrier on grounds the insured "was not legally entitled to recover," the UIM carrier would be in a position to thwart its insured's legitimate efforts to seek coverage contractually agreed upon.

Wilmoth, 127 N.C. App. at 264, 488 S.E.2d at 631-32.

While this Court has not addressed the question of whether a voluntary waiver of subrogation rights might bar recovery under the *Tate* test, the rationale of *Wilmoth* leads us to conclude that the answer is "no." Since Liberty Mutual made the choice of whether to waive its rights, it cannot now use that waiver to argue that it was prejudiced.

Moreover, this is not a case where the Penningtons entered into a general release against the tortfeasor, thereby relieving Liberty Mutual of any underinsured motorist liability. *See Spivey v. Lowery*, 116 N.C. App. 124, 446 S.E.2d 835, *review denied*, 338 N.C. 312, 452 S.E.2d 312 (1994). Instead, like the insurance carrier in *Wilmoth*, Liberty Mutual "failed to preserve its right of subrogation" and "cannot now 'complain' of plaintiffs' efforts to seek UIM coverage." *Wilmoth*, 127 N.C. App. at 264, 488 S.E.2d at 631. Significantly, if we held that an insurer's failure to exercise its subrogation rights constitutes a bar to coverage, an insurer could successfully avoid providing coverage by first claiming that the insured was not covered, then waiving its subrogation rights. That result would be at odds with the liberal construction policy behind the Financial Responsibility Act to compensate the innocent victims of financially irresponsible motorists. *See Sutton*, *supra*.

In sum, summary judgment is appropriate when there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c). Since there are questions of fact that need to be resolved, the trial court erred when it granted summary judgment for Liberty Mutual. The finder of fact must consider this matter in accordance with this decision and the *Tate* test. *See also Nationwide Mut., supra.*

Reversed and remanded.

Judges McGEE and TIMMONS-GOODSON concur.

STACEY J. CHAPPELL, PLAINTIFF v. ANTHONY W. ROTH AND TONY ROTHE, DEFENDANTS

No. COA00-517

(Filed 29 December 2000)

Arbitration and Mediation— automobile accident—motion to enforce mediated settlement agreement

The trial court erred in a case arising out of an automobile accident by denying plaintiff's motion to enforce a mediated settlement agreement even though the parties failed to agree on a particular release provision, and the case is remanded for a determination of: (1) whether the contested provision is a material term of the settlement agreement in light of all the circumstances, and whether defendants waived their right to argue the provision is material by failing to address it during mediation; (2) whether the contested provision is really necessary to protect defendants against the possibility of having to pay both the injured claimant and a medical provider for identical losses; and (3) the implications of the holdings of two prior Court of Appeals cases.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 6 April 2000 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 19 December 2000.

Donaldson & Black, P.A., by Arthur J. Donaldson and Rachel Scott Decker, for plaintiff-appellant.

Frazier & Frazier, L.L.P., by Torin L. Fury, for defendant-appellees.

FULLER, Judge.

Stacey J. Chappell (plaintiff) appeals an order entered 6 April 2000 in favor of Anthony W. Roth (a.k.a. Tony Rothe or Tony Roth) and unnamed defendant State Farm Mutual Automobile Liability Insurance Company (together defendants) denying plaintiff's motion to enforce a mediated settlement agreement.

On 11 February 1999, plaintiff filed a complaint to recover compensatory damages from defendants for personal injuries sustained in an automobile accident on 8 March 1996. Defendants answered and alleged contributory negligence. After participating in a court-ordered mediated settlement conference on 21 December 1999, the parties reached a settlement agreement with the following terms and conditions: "Defendant will pay $20,000 within [two] weeks of date of settlement in exchange for voluntary dismissal (with prejudice) and full and complete release, mutually agreeable to both parties."

Subsequent to mediation, defendants presented plaintiff with a proposed "Release of All Claims." Plaintiff objected to the final provision in the release, contending that "it imposed burdens on the plaintiff which were not discussed at the conference and which are greater than those required by North Carolina law." Plaintiff suggested alternatives to the release language, and defendants responded by requesting a return of the settlement draft. On 21 February 2000, plaintiff moved to enforce the agreement. The trial court, however, denied plaintiff's motion on 6 April 2000.

This Court has held that a settlement agreement "is a contract, to be interpreted and tested by established rules relating to contracts." *Futrelle v. Duke University*, 127 N.C. App. 244, 251, 488 S.E.2d 635, 640 (quoting *Casualty Co. v. Teer Co.*, 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959)), *disc. review denied*, 347 N.C. 398, 494 S.E.2d 412 (1997). It is also clear that a valid contract does not exist if the parties have not reached a meeting of the minds as to all essential terms of the agreement, or if material portions are left open for future agreement. *See Miller v. Rose*, 138 N.C. App. 582, 587, 532 S.E.2d 228, 232 (2000).

Here, defendants argue that a valid contract was not formed because (1) the parties failed to agree upon the terms of a release that would follow mediation, and (2) the release is a material term of the settlement agreement. We are concerned that, were we to accept such a perspective, our holding would permit, and might even encourage, parties to renege on settlement agreements reached through court-ordered mediation simply by proposing that potentially objectionable provisions, not addressed during the mediation, be included in the release which is necessarily drafted and exchanged subsequent to the mediation conference.

We believe defendants have oversimplified the issue by suggesting that the parties here generally failed to agree upon the terms of the release. In fact, the parties failed to agree upon only one particular provision, proposed by defendants, in a lengthy and otherwise fairly standard release:

> The undersigned further warrants that she shall honor and pay all claims and liens, of whatever sort, as by law provided and the undersigned shall hold the releasees harmless on account of the undersigned's failure to pay any claim or lien as by law provided.

As to every other provision in the release, and all other terms of the settlement, the parties are apparently in agreement. Thus, the issue is whether this particular release provision upon which the parties failed to agree is a material term of this particular settlement agreement.

It should first be noted that the contested provision purports to apply to "the undersigned," and the release provides for the signatures of both plaintiff and plaintiff's counsel. However, the North Carolina State Bar, in Ethics Opinion RPC 228, has opined that an attorney representing an injured party may not execute an agreement to indemnify a tortfeasor's insurance carrier against unpaid liens of medical providers since such an agreement might result in a conflict of interest in violation of Rule 1.7(b) of the Revised Rules of Professional Conduct. It is presumed, therefore, that the contested provision is intended to apply only to plaintiff, since plaintiff's counsel is ethically prohibited from executing such an agreement.

In the instant case, the trial court ordered the parties to attend a mediated settlement conference pursuant to N.C.G.S. § 7A-38.1 (1999). The mediator's report, filed with the court, states that the par-

ties did, indeed, reach an agreement on all issues during the conference. Such a settlement agreement is not lightly to be entered into, nor lightly to be set aside. The public policy underlying court-ordered mediated settlement conferences is "to make civil litigation more economical, efficient, and satisfactory to litigants and the State." G.S. § 7A-38.1(a). This policy warrants a strong presumption that a settlement agreement reached by the parties through court-ordered mediation under the guidance of a mediator is a valid contract that serves to minimize the expenditure of time and money by the parties, and to bring the benefit of final resolution to our jurisprudence. Accordingly, a party who subsequently claims that such a settlement agreement is invalid and unenforceable should have to overcome that presumption.

Upon remand, the trial court should conduct a hearing to determine, at the outset, whether the contested provision is indeed a material term of the settlement agreement in light of all the circumstances. On this issue, the burden should be on defendants, as the party seeking to invalidate the agreement, to show that the provision is reasonably necessary to protect defendants' rights under the particular circumstances. If defendants fail to so prove, the settlement agreement should be enforced.

The trial court should also determine whether the contested provision is really necessary, and thus material, to protect defendants against the possibility of having to pay both the injured claimant and a medical provider for identical losses pursuant to our Supreme Court's decision in *Charlotte-Mecklenburg Hosp. Auth. v. First of GA. Ins. Co.*, 340 N.C. 88, 455 S.E.2d 655, *reh'g denied*, 340 N.C. 364, 458 S.E.2d 186 (1995). In that case, the Supreme Court interpreted N.C.G.S. §§ 44-49 and 44-50 (1999) to provide that a lien in favor of a medical provider for unpaid medical expenses attaches to the money held by the tortfeasor's insurance company immediately upon the reaching of a settlement agreement. *Id.* at 90-91, 455 S.E.2d at 656-57. The Court upheld the medical provider's right to enforce such a lien against an insurance company, even though the insurance company had already paid the full settlement amount to the injured party. *Id.* at 91, 455 S.E.2d at 657. However, this holding presumably applies only where an insurance company is put on notice of a lien in favor of a third party prior to making payment to the injured party. *See* Carol A. Crocca, Annotation, *Construction, Operation, and Effect of Statute Giving Hospital Lien Against Recovery from Tortfeasor Causing Patient's Injuries*, 16 A.L.R. 5th 262, § 49 (1993). In the

instant case there is nothing in the record to indicate that defendants were, in fact, put on notice of any such liens prior to reaching the settlement agreement.[1]

Lastly, the trial court should also consider the implications of our holding in *Triangle Park Chiropractic v. Battaglia*, 139 N.C. App. 201, 532 S.E.2d 833 (2000), *disc. review denied*, 352 N.C. 683, — S.E.2d — (2000). In that case this Court held that a medical provider may enforce a valid lien against an injured party's attorney where the attorney was on notice of the lien but chose to pay the entire settlement amount directly to his client. We believe this holding, clarifying an attorney's obligations to honor medical provider liens, is likely to increase the frequency with which medical providers are reimbursed, which may, in turn, affect the need for the contested release provision. In sum, the materiality of the contested provision should be determined by the trial court on the facts presented in this case, and in light of the holdings in *Charlotte-Mecklenburg* and *Battaglia*.

If the contested provision is a material term of this settlement agreement, the trial court should proceed to determine whether Defendants, by failing to address the contested provision during mediation, thereby waived their right to argue that the provision is material. The very fact that Defendants did not specifically address the contested provision during mediation in and of itself raises a question as to whether the provision is a material term in this particular case. As before, the burden should be on defendants to explain why this allegedly material term was not addressed and resolved at mediation.

To avoid undermining the objectives of our court-ordered mediation system, the trial court should be reluctant to allow any party easily to escape the terms of a settlement agreement that was reached through court-ordered mediation.[2]

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1. Mediated Settlement Conference Rule 4C requires parties to notify any lien holder, who has given notice of a lien, of the mediated settlement conference. In the absence of any mention in the record of a lien holder attending the mediation conference, we presume Defendants did not receive any such notice.

2. Pragmatically, the existence of a "Standard Release" form would prevent similar disputes in the future. Surely, one of our voluntary bar groups with members from both sides of the aisle could create such a form, which could then be incorporated by reference into a settlement agreement, or which would at least provide the impetus for addressing at mediation any specific provision to be included or omitted.

Reversed and Remanded.

Judge WALKER concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The issue in this case is whether the parties had a settlement agreement or a contract that was enforceable. A contract is enforceable only if the parties "assent to the same thing in the same sense," and their minds "meet as to *all* the terms." *MCB Ltd. v. McGowan*, 86 N.C. App. 607, 608, 359 S.E.2d 50, 51 (1987) (citations omitted). "If *any* portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Id.* at 608-09, 359 S.E.2d at 51.

In this case, defendants were agreeing to pay $20,000.00 in exchange for a "full and complete release, mutually agreeable to both parties." The terms of the release were not agreed upon, and there was no method established to settle the terms of the release. Thus, there simply was no agreement to enforce and the trial court correctly denied plaintiff's motion to enforce the alleged agreement. I, therefore, respectfully dissent.

JIMMY R. WEBB, EMPLOYEE-PLAINTIFF v. POWER CIRCUIT, INC., D/B/A HOKE ELECTRIC, EMPLOYER-DEFENDANT AND STATE AUTO INSURANCE COMPANIES, CARRIER-DEFENDANT

No. COA99-1437

(Filed 29 December 2000)

1. Workers' Compensation— work-related injury—sufficiency of evidence

The Industrial Commission did not err in a workers' compensation action by finding and concluding that plaintiff had met his initial burden of proving a work-related injury where plaintiff testified that he suffered severe pain as a result of bending over and picking up a drop cord; he reported this to his supervisor and soon had to cease work, being unable even to remove his tools from the truck; he was treated by a doctor for three months at the

recommendation of the Division of Vocational Rehabilitation; the doctor testified that plaintiff suffered from a herniated disc and a protruding disc and that such an injury was consistent with plaintiff's complaints of pain; and plaintiff testified that the pain had continued since the injury, that he could not stand for more than forty-five minutes or sit for more than two hours, that he was unable to perform any of his previous physical activity, and that he had become increasingly depressed as a result of the accident.

2. Workers' Compensation— disability—availability of suitable jobs

Defendants in a workers' compensation action did not meet their burden of establishing that suitable jobs were available to a plaintiff who had shown disability from a back injury where plaintiff testified that he had been engaged in manual labor all his life with only an eighth-grade education, that he would like to return to work but had not looked because he could not keep a job as a result of his back pain, and it was then incumbent on defendant-employer to come forward with evidence that unexplored employment exists for plaintiff given his age, education, physical limitations, vocational skills, and experience.

3. Workers' Compensation— depression—increase since injury—non-expert testimony

The Industrial Commission in a workers' compensation action had competent evidence before it in plaintiff's testimony to support a finding that plaintiff's depression had increased. Although it has been held that expert testimony is required to establish the cause of an injury in certain situations, the Commission here relied on plaintiff's testimony to support a finding that plaintiff's depression had increased, not in support of a causation finding.

4. Workers' Compensation— calculation of compensation—hours worked before injury—credibility of evidence

The Industrial Commission in a workers' compensation action correctly calculated plaintiff's compensation rate where defendant contended that plaintiff never reached 40 hours a week, but plaintiff testified that he worked five days a week, eight hours a day, and that he was often loaned out to another company owned by defendant-employer in order to keep him fully employed. The Commission found plaintiff's evidence unchallenged and more credible.

Appeal by defendants from opinion and award entered 30 July 1999 and filed 3 August 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 October 2000.

Frederick R. Stann for plaintiff-appellee.

Morris York Williams Surles & Barringer, LLP, by C. Michelle Sain and Kelly F. Miller, for defendants-appellants.

WALKER, Judge.

On 7 November 1996, plaintiff alleges he injured his back while attempting to pick up a drop cord in the course of his employment with defendant Power Circuit, Inc. Plaintiff filed a workers' compensation claim which was denied by defendants. After a hearing, the deputy commissioner found that plaintiff had suffered a specific traumatic injury and awarded plaintiff temporary total disability compensation, medical expenses and attorney fees. Defendants appealed to the Full Commission (Commission) which affirmed the decision of the deputy commissioner.

The Full Commission's findings include, in pertinent part:

6. Prior to plaintiff's injury, he was in good physical health. Plaintiff did suffer from depression prior to the accident. This depression had been diagnosed by plaintiff's family physician and plaintiff had continuously received treatment since the diagnosis in 1985. Plaintiff was taking Prozac, an anti-depressant, at the time of the injury; however, plaintiff considered himself to be dealing with his depression and that it had stabilized and the Full Commission concurs in this assessment.

7. On November 7, 1996, plaintiff was scheduled to work for the defendant-employer at a residence. Plaintiff was to install several receptacles and a ceiling fan electrical box. Plaintiff was loading his truck with ladders and wire when Kenneth Stroupe, the owner of the business, beckoned plaintiff to come into the shop and get some nails. As plaintiff was getting a handful of nails, he spotted a hundred foot extension cord on the floor that he thought he might need at the job site. Plaintiff bent down and reached for the extension cord and as he was coming up, he felt an intense pain burst across his lower back. This constituted a specific traumatic incident of the work assigned and led to

inability to earn wages and is thus compensable under the Workers' Compensation Act.

[. . .]

9. Plaintiff indicated to Mr. Stroupe that he had hurt his back and he would go out on the job to see what he could do.

10. Plaintiff's pain increased while he was driving to the job site. At the job site, plaintiff was unable to install the receptacles because of his pain and attempted to install the ceiling fan box. Plaintiff went into the attic in order to begin the installation only he felt so much pain that he was unable to install the box. Plaintiff drove back to the shop and told Mr. Stroupe he could not work because of the pain. Mr. Stroupe expressed anger and indicated that plaintiff should take his tools off the truck. Plaintiff was unable to do this, so Mr. Stroupe removed the tools and placed them in the trunk of plaintiff's car.

. . .

14. Plaintiff contacted the Division of Vocational Rehabilitation of North Carolina and was accepted in the program. Plaintiff was sent to R.S. Humble, M.D.

15. Dr. Humble treated plaintiff for a period of three (3) months at the expense of the Division of Vocational Rehabilitation of North Carolina. Initially, plaintiff was diagnosed with a lumbar strain, but ultimately it was determined that plaintiff had a herniated disc at L4, L5 and a protruding disc at L5, S1. Dr. Humble thought these discs would not benefit from surgical intervention, but plaintiff is entitled to seek further medical advice and/or surgery with respect to his back injury.

16. Dr. Humble prescribed steroid medication and physical therapy. This conservative treatment was unsuccessful and Dr. Humble told plaintiff that there was nothing more than [sic] he could do for him. Dr. Humble released plaintiff not because plaintiff was cured but because there was nothing else Dr. Humble felt he could do for his patient. Plaintiff has not reached MMI and continues to have significant medical problems.

17. A Functional Capacity Evaluation was recommended and upon the evaluation having been taken, plaintiff was released with restrictions in March 1997. The restrictions and the continu-

ing chronic pain preclude plaintiff from employment in the only work he is able to do for pay.

18. In the days following his injury, plaintiff had to spend from sixteen to eighteen hours a day lying down to relieve his severe pain. Asked to describe his pain level based upon a scale of one to ten where one is a pain you could easily ignore and ten is the most severe pain imaginable, plaintiff stated that on the day he went to Gaston Memorial Hospital his pain was between an eight and one-half and a nine and one-half. At the time of the hearing, plaintiff's daily pain levels were about three and one-half to four and one-half, but after any activity whatsoever, his pain would accelerate to between six and seven and he would have to lie down to relieve his pain.

. . .

20. Since the injury plaintiff can only stand for 45 minutes at one time before his pain becomes too great to tolerate. Plaintiff can sit for about one and one-half to two hours at a time. Plaintiff performs no chores around the boarding house where he lives, not even cleaning his room, as was required. After his injury plaintiff attempted to sweep his room one time but had to get someone else to finish it for him.

21. Plaintiff would like to return to work. He was happier when he was able to work and was working. However, plaintiff has not looked for work because he could not hold down a job due to his chronic and debilitating back pain.

22. Plaintiff's injury and subsequent pain are a direct and proximate result of the specific traumatic incident of November 7, 1996.

23. Plaintiff's pain and symptoms relating to depression have increased since the time of his injury. Plaintiff's depression makes it hard for him to deal with his job-caused chronic pain and his job-caused chronic pain exacerbates his depression. Plaintiff's job-caused chronic pain has made it impossible for him to be gainfully employed since November 6, 1996.

[1] Defendants first assign as error the Commission's finding that plaintiff met his initial burden of proving that he is disabled and thus entitled to compensation. "The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent

evidence." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000). This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.*

In order to show eligibility for disability compensation, the plaintiff has the initial burden of proving the existence and extent of his disability. *See Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382 (1996). "Disability" is defined as an "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (1999). A plaintiff may show such incapacity in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work-related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). In determining if plaintiff has met this burden, the Commission must consider not only the plaintiff's physical limitations, but also his testimony as to his pain in determining the extent of incapacity to work and earn wages such pain might cause. *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 265, 423 S.E.2d 532, 535 (1992).

In the case at bar, plaintiff testified that he suffered severe pain as a result of his bending over and picking up the drop cord. He immediately reported this to his supervisor and soon thereafter had to cease work. He was unable to even remove his tools from the truck. On the recommendation of the Division of Vocational Rehabilitation, plaintiff was seen and treated by Dr. R.S. Humble over the next three months. Dr. Humble testified that plaintiff suffered from a herniated disc and a protruding disc in his back and that such an injury was consistent with plaintiff's complaints of pain. Furthermore, plaintiff testified that the pain has continued since the injury, that he cannot stand for more than forty-five minutes or sit for more than two hours, that he is unable to perform any of his previous physical activity and that he has become increasingly depressed as a

result of the accident. This testimony provides competent evidence to support the Commission's findings and conclusions that plaintiff met his initial burden of proving a work-related injury.

[2] Once the employee has shown a disability, the burden then shifts to the employer to "produce evidence that suitable jobs are available for the employee and that the employee is capable of getting one, taking the employee's physical and vocational limitations into account." *Franklin* at 206, 472 S.E.2d at 386. "A job is suitable if the employee is capable of performing the job, given her age, education, physical limitations, vocational skills, and experience." *Id.* "An employee is capable of getting a job if there is a reasonable likelihood that she would be hired if she diligently sought the job." *Id.*

Plaintiff testified that he has been engaged in manual labor all his life with only an eighth grade education. He testified that he would like to return to work, but that he has not looked for work because he could not keep a job as a result of his back pain. It was then incumbent on the defendant-employer to come forward with evidence that employment opportunities exist for plaintiff which he has not explored given his "age, education, physical limitations, vocational skills, and experience." Thus, we find defendants failed to meet their burden of establishing that "suitable jobs are available to plaintiff."

[3] Defendants next contend that there is no competent evidence to support the Commission's determination that plaintiff's depression increased after the accident. Defendants cite *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E.2d 389 (1980), in support of the proposition that "only an expert can give competent opinion evidence as to the cause of the injury." Defendants argue that because the Commission relied only on the plaintiff's testimony that his depression worsened after his injury, there is no competent evidence to support this finding.

In *Click*, our Supreme Court held that expert testimony is required to establish the cause of an injury in certain situations. In the case at bar, the Commission found that plaintiff's depression had "increased since the time of the accident" and that "[p]laintiff's depression makes it hard for him to deal with his job-caused chronic pain and his job-caused chronic pain exacerbates his depression." Thus, the Commission properly relied on plaintiff's testimony to support a finding that his depression has increased, not in support of a finding of causation.

[4] The defendants' final assignment of error is that the Commission incorrectly calculated plaintiff's compensation rate based on the hours he worked prior to the injury. The Commission found that plaintiff worked a 40 hour work week; however, defendants assert that the Form 22 showed that plaintiff only worked 14 to 15 hours per week initially with his hours increasing over time, but never reaching 40 hours per week. Plaintiff testified that he worked five days a week, eight hours a day, and that he was often "loaned out" to another company owned by the defendant-employer in order to keep him fully employed. The Commission found this evidence was "unchallenged" and more credible. The opinion and award of the Commission is

Affirmed.

Judges McGEE and HORTON concur.

THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR, PLAINTIFF v. REGINALD L. FRAZIER, DEFENDANT

No. COA99-1367

(Filed 29 December 2000)

1. Appeal and Error— cross-assignments of error—appellate rules

Issues were not considered where defendant attempted to raise cross-assignments of error without following the requirements of N.C. R. App. P. 10(d) and 28(c).

2. Attorneys— disbarred attorney—practicing law—subject to contempt

Defendant was subject to the contempt power of the Disciplinary Hearing Commission of the N.C. State Bar even though he had already been disbarred.

3. Attorneys— State Bar—contempt power

The Disciplinary Hearing Commission of the N.C. State Bar had the authority to exercise contempt power against an attorney who was practicing law in violation of a disbarment order.

Appeal by plaintiff from order entered 3 September 1999 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 11 October 2000.

The North Carolina State Bar, by Carolin Bakewell and A. Root Edmonson, for plaintiff-appellant.

Michaux & Michaux, P.A., by Eric C. Michaux, for defendant-appellee.

EDMUNDS, Judge.

Plaintiff The North Carolina State Bar appeals an order dismissing its contempt action, declaring the judgment of contempt issued by the Disciplinary Hearing Commission of the North Carolina State Bar (DHC) on 20 January 1995 null and void, and releasing defendant from imprisonment. We reverse.

Although this Court has previously set out relevant facts pertaining to this case, *see Frazier v. Murray*, 135 N.C. App. 43, 519 S.E.2d 525 (1999), *appeal dismissed*, 351 N.C. 354, 542 S.E.2d 209 (2000), we shall recount them here to ensure a complete understanding of the history of this and related proceedings. Defendant has a history of behavior that has resulted in discipline by plaintiff, including the following: defendant's law license was suspended for one year, shortly following his admission to practice law, after he improperly retained funds belonging to a client, *see State Bar v. Frazier*, 269 N.C. 625, 153 S.E.2d 367 (1967); defendant was censured in 1978 for failing to perfect an appeal for a client and for retaining a fee after he failed to perform services for a client; defendant's law license was suspended for one year in 1981 for failing to notify his client of a hearing, advising his client not to attend a hearing, failing to attend a hearing on his client's behalf, filing a voluntary dismissal of his client's claim without adequate preparation, failing to perfect an appeal for his client, and having his client sign a release, which attempted to exonerate him from liability, *see N.C. State Bar v. Frazier*, 62 N.C. App. 172, 302 S.E.2d 648 (1983); defendant was suspended from the practice of law for two years in 1988 for neglecting a legal matter in which he represented Willis Jarman (Jarman) and for pressuring Jarman to withdraw a grievance against him; and defendant was disbarred from the practice of law on 6 November 1989 for attempting to persuade Jarman to recant prior truthful testimony, which Jarman had given in a 1988 disciplinary case against defendant.

Although defendant filed notice of appeal from the 6 November 1989 disbarment order, defendant's failure to perfect the appeal resulted in its dismissal. Since that time, defendant has not been reinstated to the practice of law in the State of North Carolina. Although defendant has filed numerous pleadings and petitions challenging the order of disbarment, none has ever been upheld by DHC or by any court.

In 1991, upon discovering that defendant was practicing law in violation of the 6 November 1989 disbarment order, plaintiff initiated a criminal contempt proceeding in Craven County Superior Court. A hearing was held in April 1991, and defendant was found guilty of indirect criminal contempt. He was sentenced to thirty days in jail and served his sentence in 1991.

In 1994, plaintiff again received notice that defendant was practicing law in violation of the 6 November 1989 disbarment order. After plaintiff's attempts to persuade the Craven County District Attorney to prosecute plaintiff for unauthorized practice of law proved unsuccessful, plaintiff requested Superior Court Judge D. Marsh McClelland to hold defendant in criminal contempt. Defendant filed a motion to dismiss, and on 18 February 1994, Judge McLelland granted defendant's motion. In his order of dismissal, the judge noted that there was no basis in law for enforcing a disbarment order by contempt proceeding and that there were no grounds for punishing defendant for contempt because he neither violated nor attempted to violate the parol order of the presiding judge ordering defendant not to represent clients in criminal cases set for trial at the February 1994 session. Plaintiff did not appeal this ruling.

In August 1994, plaintiff received new allegations that defendant was continuing to practice law, even placing an advertisement for legal services in the local newspaper. Accordingly, plaintiff instituted a show cause proceeding before the DHC. Defendant filed a series of motions in September, November and December of 1994 alleging indigency, seeking appointment of counsel, attempting to discharge appointed counsel, seeking a continuance, and attempting to remove the contempt proceeding to federal court. A hearing was held on 19 December 1994, at which defendant failed to appear. Plaintiff entered a judgment of contempt on 20 January 1995 finding defendant guilty of sixteen counts of contempt, sentencing him to thirty days in jail for each count, and imposing a fine of $200 for each count. Additionally, defendant was ordered to pay the costs of the proceedings.

On 23 January 1995, plaintiff obtained an order for arrest from the Wake County Superior Court. Pursuant to this order, defendant was arrested and taken to the Craven County jail, where he was held until 30 January 1995, at which time he was transported to the Wake County jail. Subsequently, he was transferred to the North Carolina Department of Correction.

In May 1995, defendant filed a habeas corpus proceeding in the United States District Court for the Eastern District of North Carolina. After a hearing in November 1995, the federal district court on 25 November 1995 ordered that defendant be released from jail pending a final ruling in the case. The next day, the federal district court issued a final order holding that plaintiff had failed to provide defendant with proper notice of both his right to appeal from the DHC judgment of contempt and his right to seek a *de novo* jury trial in Wake County Superior Court. Specifically, the court found:

> The circumstances and procedures surrounding Mr. Frazier's criminal contempt conviction establish that he was not sufficiently appraised of his right to contest the conviction and obtain a trial by jury on the issue of his criminal contempt. He was entitled to be notified of this right by the court so that he could either elect to pursue the right to trial by jury, or knowingly and willfully abandon that right. Because of this error, the court will issue a writ of habeas corpus on the terms and conditions set out in this order. Accordingly, this court orders the issuance of a writ of habeas corpus releasing Mr. Frazier from the conviction and sentence heretofore imposed by the Disciplinary Hearing Commission of the North Carolina State Bar, unless within 30 days from the entry of this order, the DHC affords Mr. Frazier notice of his right to appeal to the Superior Court of Wake County upon the times and terms provided for in the General Statutes of North Carolina.
>
> In the event that the petitioner fails to exercise his right to appeal or waives or abandons that right, then the sentence previously imposed may be executed to its full term, and this writ shall be dissolved.
>
> In the event that the petitioner exercises his rights to further proceedings within the Superior Court of Wake County and the courts of North Carolina, then the judgment and order of that court shall control, and this writ shall no longer operate to interfere with the determination of that court. This court will retain

> only such jurisdiction as may be necessary to conclude this proceeding consistent with the order entered herein.

Frazier v. French, No. 5:95-HC-463-BO, slip op. at 13-14 (E.D.N.C. Nov. 25, 1996).

In accordance with this order, plaintiff filed on 5 December 1996 a notice respecting defendant's right to appeal to Wake County Superior Court. Defendant filed notice of appeal to that court on 13 December 1996 and then filed motions to dismiss in May 1997 and September 1998. These motions were granted on 3 September 1999. Plaintiff appeals.

[1] Defendant gave notice of cross-appeal on 15 September 1999, but later abandoned this cross-appeal in his appellate brief. Defendant nevertheless purports to present alternative valid grounds for the trial court's decision, claiming that the doctrines of res judicata and collateral estoppel require the court's decision to be affirmed. However, a party may cross-assign "any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order or other determination from which appeal has been taken." N.C. R. App. P. 10(d). It appears that defendant is attempting to raise issues which may be properly developed through cross-assignments of error, but without following the requirements of N.C. R. App. P. 10(d) and 28(c). Accordingly, we shall not consider the issues raised by defendant in Part I of his brief.

Although plaintiff sets out a number of assignments of error, the central issues on appeal are: (1) whether defendant is subject to the contempt power of plaintiff even though he was disbarred; and (2) whether plaintiff can lawfully exercise contempt power. Both issues have already been decided in the affirmative by this Court in *Frazier*, 135 N.C. App. 43, 519 S.E.2d 525. This panel is bound by those holdings. *See, e.g., State v. Woods*, 136 N.C. App. 386, 390, 524 S.E.2d 363, 365, *disc. review denied*, 351 N.C. 370, 543 S.E.2d 147 (2000) (stating that "[a]bsent modification by our Supreme Court, a panel of this Court is bound by the prior decision of another panel addressing the same issue").

[2] As to the first issue, whether defendant is subject to the contempt power of plaintiff even though he was disbarred, this Court stated:

> The Disciplinary Hearing Commission clearly had authority to discipline and disbar plaintiff. N.C. Gen. Stat. § 84-28.1(b) autho-

rizes the Disciplinary Hearing Commission to "hold hearings in discipline, incapacity and disability matters, to make findings of fact and conclusions of law after such hearings, and to enter orders necessary to carry out the duties delegated to it by the council."

Id. at 49, 519 S.E.2d at 529 (internal citations omitted).

[3] As to whether plaintiff can exercise contempt power, the Court found:

> Moreover, the General Assembly intended to vest the Disciplinary Hearing Commission with the statutory authority to enforce its order of disbarment by criminal contempt powers comparable to those of the general courts of justice. N.C. Gen. Stat. § 84-28.1(b) provides that "[t]he disciplinary hearing commission of the North Carolina State Bar, or any committee thereof, acting through its chairman, *shall have the power to hold persons, firms or corporations in contempt as provided in Chapter 5A.*" Chapter 5A outlines the criminal contempt powers of the general courts of justice. Since the Disciplinary Hearing Commission was acting within its statutory authority in exercising its contempt powers, any claim for negligence in the performance of its duties would come within the public duty doctrine.

Id. (citation omitted). Because these issues have been resolved against defendant, it is not necessary to discuss plaintiff's remaining assignments of error. The case is reversed and remanded to the trial court for disposition consistent with this opinion.

Reversed and remanded.

Judges GREENE and MARTIN concur.

BETTY EVANS, PLAINTIFF v. FAMILY INNS OF AMERICA, INC., FAMILY INNS OF AMERICA FRANCHISING, INC., INNCO MANAGEMENT CORPORATION, ROWLAND ASSOCIATES, LTD. A LIMITED PARTNERSHIP, BILL THOMAS, KENNETH SEATON, WAYNE DAVIS, AND GERALD WILLIAMSON, DEFENDANTS

No. COA99-1242

(Filed 29 December 2000)

1. **Appeal and Error— preservation of issues—reliance on companion case—no additional argument**

The trial court did not err by granting summary judgment in favor of all defendants on the issue of punitive damages in a case where plaintiff was a victim of an armed robbery while staying at defendants' motel, because: (1) plaintiff incorporated arguments regarding these claims from a companion case, and the Court of Appeals upheld the trial court's grant of summary judgment as to punitive damages in the companion case; and (2) plaintiffs failed to make any additional argument as to punitive damages in this case.

2. **Negligence— armed robbery of motel patron—reasonable foreseeability—summary judgment improper**

The trial court erred by granting summary judgment on the issue of negligence in favor of the first set of defendants in a case where plaintiff was a victim of an armed robbery while staying at defendants' motel, because the evidence before the trial court raised triable issues as to whether defendants should have reasonably foreseen that the conditions on its motel premises were such that its guests might be exposed to injury by the criminal acts of third persons.

3. **Appeal and Error— preservation of issues—rulings on motions in limine**

Although plaintiff contends the trial court erred in its evidentiary rulings on eighteen motions in limine, five of which were held open pending a proffer of evidence at trial, the evidentiary issues raised in plaintiff's brief are not properly before the Court of Appeals and will not be addressed because: (1) this case was dismissed at the summary judgment stage and there was never an opportunity by either party to introduce evidence at trial; and (2) the trial court ruled on the motions in limine after the entry of the trial court's order for summary judgment.

Appeal by plaintiff from order entered 28 May 1999 and order entered 22 July 1999 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 28 August 2000.

Parker, Poe, Adams & Bernstein, L.L.P., by Jack L. Cozort and Stephen D. Coggins, for the plaintiff-appellants.

Young, Moore & Henderson, P.A., by John A. Michaels and Kathryn H. Hill, for the defendant-appellees.

LEWIS, Judge.

At approximately 2 a.m. on 17 August 1994, plaintiff Betty Evans was a victim of an armed robbery while staying at the Family Inn motel in Rowland, North Carolina ("Family Inn"). More than one gunmen entered plaintiff's room, where she was staying with Willie Izzard, and ordered her to cover her head with the sheets. The assailants left with plaintiff's purse, her Bible, cash that she had placed in the Bible, her grandchildren's pictures, change, a watch, a camera and the keys to her rental car; however, they never took anything from the car. Plaintiff was not physically injured as a result of the robbery. After the incident, plaintiff reported the robbery, but had no specific conversation with the desk clerk about the events of the robbery. The Family Inn offered plaintiff and Mr. Izzard another room for the night, which they accepted, and left the next day.

On 16 March 1998, plaintiff brought suit against numerous defendants variously associated with the Family Inn, asserting claims of (1) negligence, (2) negligent infliction of emotional distress, (3) intentional infliction of emotional distress and (4) unfair trade practices, requesting compensatory, punitive and treble damages.

On 18 March 1999, defendants (1) Family Inns of America Franchising, Inc., (2) Rowland Associates, Ltd., (3) Kenneth Seaton, and (4) Gerald Williamson ("first set of defendants"), moved for summary judgment on *all* claims. The trial court granted summary judgment on *all* claims in favor of this *first* set of defendants. In addition, defendants (5) Family Inns of America, Inc., (6) Innco Management Corporation, (7) Bill Thomas and (8) Wayne Davis ("second set of defendants") moved for *partial* summary judgment dismissing all of plaintiff's claims *except* for the sole claim of negligent infliction of emotional distress. Although the parties do not address it on appeal, in its order allowing partial summary judgment, the trial court mistakenly stated that the second set of defendants did not seek dismissal of plaintiff's claims of *negligence* and negligent infliction of

emotional distress. Ultimately, the trial court granted *partial* summary judgment on the claims of intentional infliction of emotional distress, punitive damages, and unfair trade practices in favor of the *second* set of defendants. This leaves pending plaintiff's claims for negligence and negligent infliction of emotional distress only against the *second* set of defendants. Plaintiff appeals from the summary judgment order and from the trial court's order ruling on certain of both parties' motions in limine.

As previously noted, the trial court granted summary judgment as to the claims of intentional infliction of emotional distress and unfair trade practices as to *all* defendants. We begin by addressing plaintiff's contention that the evidence creates a triable issue as to these claims. In making this contention, plaintiff incorporates the arguments regarding these claims from a companion case also filed this day, *Connelly v. Family Inns, Inc.*, COA No. 99-1241 (N.C. Ct. App. Dec. 29, 2000). However in *Connelly*, we concluded plaintiffs ultimately abandoned their argument as to these claims on appeal. Accordingly, we will not address them here and leave undisturbed summary judgment as to the claims of intentional infliction of emotional distress and unfair trade practices.

[1] As previously mentioned, the trial court granted summary judgment as to punitive damages in favor of *all* defendants in this case. Plaintiff contends this was error. In making this contention, plaintiff again incorporates the argument from the companion case of *Connelly*. In *Connelly*, we upheld the trial court's grant of summary judgment as to punitive damages in favor of all defendants. In the absence of any additional argument as to punitive damages in this case, we again conclude the trial court did not err in granting summary judgment as to punitive damages.

Next, plaintiff contends the trial court erred in dismissing the claims of negligence and negligent infliction of emotional distress against the *first* set of defendants only, as those claims still remain pending before the trial court against the *second* set of defendants. In *Connelly*, we held plaintiffs failed to preserve their claim for negligent infliction of emotional distress. Absent any argument in this case expounding on this contention, we will not address it here. We have left undisturbed the trial court's grant of summary judgment as to the claim of negligent infliction of emotional distress in favor of the *first* set of defendants.

[2] As to the claim of negligence, in *Connelly*, we determined that the risk of crime at the Family Inn was foreseeable, and thus, created a duty in the Family Inn to safeguard its guests against the criminal attacks of third parties. That analysis, which rested on the existence of prior criminal activity in the intersection surrounding the Family Inn, also applies here. Although not necessary to our conclusion, we take into consideration the armed robbery occurring in *Connelly* as bearing on the issue of foreseeability in this case. We thus conclude that the evidence before the trial court raised triable issues as to whether defendants should have reasonably foreseen that the conditions on its motel premises were such that its guests might be exposed to injury by the criminal acts of third persons. Accordingly, we reverse summary judgment only as to plaintiff's claim for negligence in favor of the *first* set of defendants.

[3] Next, we address plaintiff's contention that the trial court erred in its ruling on eighteen motions in limine, five of which were held open pending a proffer of evidence at trial. A motion in limine seeks "pretrial determination of the admissibility of evidence proposed to be introduced at trial," and is recognized in both civil and criminal trials. *State v. Tate*, 44 N.C. App. 567, 569, 261 S.E.2d 506, 508, *rev'd on other grounds*, 300 N.C. 180, 265 S.E.2d 223 (1980). Rulings on these motions are merely preliminary and thus, subject to change during the course of trial, depending on the actual evidence offered at trial. *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 620, 504 S.E.2d 102, 105 (1998). Thus, an objection to an order granting or denying the motion "is insufficient to preserve for appeal the question of the admissibility of evidence." *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845 (1995).

"A party objecting to an order granting or denying a motion in limine, in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted)." *Southern Furn. Hdwe., Inc. v. Branch Banking & Tr. Co.*, 136 N.C. App. 695, 701, 526 S.E.2d 197, 200 (2000). On appeal, then, the issue is not whether the granting or denying of the motion in limine was error since that issue is not appealable, but instead whether the evidentiary rulings of the trial court made during the trial are error. *Id.*

This case was dismissed at the summary judgment stage, and there was never an opportunity by either party to introduce evidence at trial. Accordingly, the evidentiary issues raised in plaintiff's brief

are not properly before this Court and will not be addressed. Nonetheless, we note plaintiff's contention that the trial court's rulings on these motions in limine "manifest multiple legal misapprehensions" in the court's ruling on summary judgment in this case. To the contrary, the trial court ruled on the motions in limine in this case on 22 July 1999—*after* the entry of the trial court's order for summary judgment on 21 May 1999. Plaintiff nonetheless contends this Court should provide specific guidance to the trial court regarding the admissibility of evidence at trial. To that end, we note that our analysis as to the question of foreseeability in *Connelly* should be instructive as to the admissibility of evidence on that issue.

In sum, we affirm the trial court's grant of summary judgment on all claims *save* the claim of negligence. We reverse the trial court's grant of summary judgment only as to the claim of negligence in favor of the *first* set of defendants—(1) Family Inns of America Franchising, Inc., (2) Rowland Associates, Ltd., (3) Kenneth Seaton, and (4) Gerald Williamson. That leaves pending on remand the claim of negligence as to *all* defendants, and the claim of negligent infliction of emotional distress as to the *second* set of defendants.

Affirmed in part, reversed in part, and remanded.

Judges WALKER and HUNTER concur.

STATE OF NORTH CAROLINA v. JIMMY ROGER TENNANT

No. COA99-1324

(Filed 29 December 2000)

Probation and Parole— indecent liberties—knowing and willful violation of probation condition—activation of sentence

The trial court did not err in an indecent liberties case by revoking defendant's probation and activating his sentence based on his knowing and willful violation of the condition of probation that he have no contact with the victim, even though defendant contends he did not have contact with the victim when he went to the victim's mother's residence where the victim lived, because: (1) the evidence was uncontested that defendant had

been told by a probation officer on numerous occasions that he could not have contact with the victim, and that the probation officer repeatedly explained to defendant what was meant by contact; (2) defendant willfully telephoned the victim's mother at her home, drove there, and went inside without a lawful excuse for his action; and (3) defendant's suggestion that he must have touched or visually observed the victim in order to have had contact with her is unpersuasive in light of the fact that defendant was repeatedly instructed to stay away from the victim's home and place of employment, and to cease all communication with her.

Appeal by defendant from judgment entered 23 June 1999 by Judge L. Oliver Noble, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 October 2000.

Michael F. Easley, Attorney General, by Claud R. Whitener, III, Assistant Attorney General, for the State.

Isabel Scott Day, Public Defender, by Julie Ramseur Lewis, Assistant Public Defender, for defendant-appellant.

EDMUNDS, Judge.

Defendant appeals from a judgment revoking his probation and activating his sentence. We affirm.

Defendant was arrested on 2 October 1996 and charged with taking indecent liberties with a minor in violation of N.C. Gen. Stat. § 14-202.1 (1999). Defendant pled guilty to the charge on 18 March 1997 and was sentenced to a term of imprisonment of sixteen to twenty months. The sentence was suspended, and defendant was placed on supervised probation for a period of thirty-six months. Among the conditions of probation was a requirement that he have no contact with the victim (hereinafter referred to as "X").

On 26 May 1999, defendant's probation officer, James Donoghue (Donoghue), was contacted by X's mother, who informed Donoghue that defendant had recently telephoned her and was on his way to her house. In response, Donoghue drove past the mother's home, where he observed defendant inside the house speaking with the mother. When Donoghue turned his car around, he saw defendant walking out of the mother's residence and placed him under arrest. Donoghue then went inside the house where he saw X.

Donoghue's probation violation report charged defendant with violating the condition of his probation, which mandated that he "[h]ave no contact with [X]." At the probation violation hearing, Donoghue testified for the State that he had instructed defendant on many occasions not to go to the house where X was living and not to have any contact by telephone or letter with X. On cross-examination, Donoghue testified that although he did not know if defendant had actually communicated with X on 26 May 1999, he determined that X had been inside her mother's residence when defendant was present. Defendant stipulated to Donoghue's recitation of the facts and did not present any evidence. After considering the evidence and arguments of the parties, the court found that defendant wilfully and without lawful excuse violated a condition of his probation and that the violation was a sufficient basis to revoke his probation. Accordingly, the court activated defendant's sentence. Defendant appeals.

Our Supreme Court has held that "[a] person convicted of [a] crime is not given a right to probation by the United States Constitution." *State v. Hewett*, 270 N.C. 348, 351, 154 S.E.2d 476, 478 (1967) (citations omitted). Rather, "[p]robation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime." *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967) (citing *Escoe v. Zerbst*, 295 U.S. 490, 79 L. Ed. 1566 (1935)). An individual on probation is said to "carr[y] the keys to his freedom in his willingness to comply with the court's sentence." *State v. Robinson*, 248 N.C. 282, 285, 103 S.E.2d 376, 379 (1958).

A proceeding "to revoke probation [is] often regarded as informal or summary," *Duncan*, 270 N.C. at 246, 154 S.E.2d at 57 (citing 21 Am. Jur. 2d, *Criminal Law* § 568), and the court is not bound by strict rules of evidence, *see id.* at 245, 154 S.E.2d at 57. An alleged violation by a defendant of a condition upon which his sentence is suspended "need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." *Robinson*, 248 N.C. at 285-86, 103 S.E.2d at 379 (internal citations omitted). "The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion." *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960) (citations omitted).

" '[O]ur Courts have continuously held that a suspended sentence may not be activated for failure to comply with a term of probation unless the defendant's failure to comply is willful or without lawful excuse.' " *State v. White*, 129 N.C. App. 52, 57, 496 S.E.2d 842, 846 (1998) (quoting *State v. Sellers*, 61 N.C. App. 558, 560, 301 S.E.2d 105, 106 (1983)), *aff'd in part*, 350 N.C. 302, 512 S.E.2d 424 (1999). "[T]he burden of proof is upon the State to show that the defendant has violated one of the conditions of his probation." *State v. Seagraves*, 266 N.C. 112, 113, 145 S.E.2d 327, 329 (1965).

Defendant's assignments of error relate to the sufficiency of evidence presented at the probation violation hearing. Focusing on the word "contact," defendant argues that he did not "contact" X, because there was no evidence that he touched or spoke with her or that she even saw or heard him while he was inside X's mother's residence. However, the evidence was uncontested that defendant had been told by probation officer Donoghue on numerous occasions that he could not "contact" X. Donoghue testified at the 23 June 1999 hearing that he had repeatedly explained to defendant what was meant by "contact." Specifically, Donoghue stated:

> Q: And had you spoke with Mr. Tennant about the fact that he was not to have any contact with [X]?
>
> A: Numerous times. When I spoke to him I explained to him, I even asked, he had asked me about going over to that house and we told him he couldn't go to that house because the victim was there. He couldn't have any contact by phone, letter, couldn't go to her place of employment. Any of these places constitute having contact.

Therefore, defendant was on notice of the meaning of "contact" in the context of his probation. In addition, he was instructed with precision as to conduct that would constitute a violation of probation. Nevertheless, evidence was presented that defendant wilfully telephoned X's mother at her home, then drove there and went inside. Defendant presented no evidence of a lawful excuse for his action. This evidence is sufficient to support a finding that defendant wilfully and knowingly violated a condition of his probation. *See, e.g.*, *Hewett*, 270 N.C. 348, 154 S.E.2d 476 (holding revocation of defendant's probation was proper because there was enough competent evidence in the record to support that defendant had wilfully failed to avoid injurious or vicious habits); *Duncan*, 270 N.C. 241, 154 S.E.2d

53 (finding competent evidence to support revocation of defendant's probation where defendant failed to satisfy the conditions that he work faithfully at suitable, gainful employment, that he remain in a specified area, and that he report to his probation officer at specified times); *State v. Morton*, 252 N.C. 482, 114 S.E.2d 115 (1960) (stating there was competent evidence to support revocation of defendant's probation where defendant failed to make weekly support payments for his family); *White*, 129 N.C. App. 52, 496 S.E.2d 842 (upholding revocation of probation where defendant was wilfully in presence of victim by not immediately leaving premises of individual who called victim over to his property); *State v. Tozzi*, 84 N.C. App. 517, 353 S.E.2d 250 (1987) (affirming revocation of probation where defendant left his authorized residence without permission from his probation officer and missed several probation meetings); *State v. Darrow*, 83 N.C. App. 647, 351 S.E.2d 138 (1986) (holding revocation of probation was proper where defendant violated condition of his probation by contacting victim); *State v. Monroe*, 83 N.C. App. 143, 349 S.E.2d 315 (1986) (finding revocation of probation valid where evidence established that defendant breached a condition of his probation by knowingly writing bad checks); *Crouch*, 74 N.C. App. 565, 328 S.E.2d 833 (affirming revocation of probation where defendant failed to make payments to the clerk of court as required as a condition of his probation); *State v. Coffey*, 74 N.C. App. 137, 327 S.E.2d 606 (1985) (finding that the evidence supported the court's finding that defendant failed to report to her probation officer as required, which was sufficient to support the court's order revoking her probation); *State v. Williamson*, 61 N.C. App. 531, 301 S.E.2d 423 (1983) (affirming revocation of probation where defendant was in arrears in his restitution payments, which he had been ordered to pay as a condition of probationary judgment); *State v. Camp*, 59 N.C. App. 38, 295 S.E.2d 766 (1982) (holding revocation of probation was valid where defendant violated a condition of his suspended sentence by communicating with the Polk County Sheriff's Department by telephone without justifiable reason); *State v. Lucas*, 58 N.C. App. 141, 292 S.E.2d 747 (1982) (finding revocation of probation was proper where evidence supported the judge's finding that defendant wilfully and without lawful excuse violated a condition of his probation by refusing to attend and complete the Hegira House program); *State v. Blevins*, 54 N.C. App. 147, 282 S.E.2d 524 (1981) (holding no abuse of discretion in trial court's finding that defendant wilfully violated the conditions of his suspended sentence by failing to pay restitution to victim of his crime of false pretenses).

Defendant's suggestion that he must have touched or visually observed X in order to have had contact with her is unpersuasive. Although defendant makes the hypothetical argument that he could shop at a grocery store where X is employed without violating his probation as long as X is working in a back room where defendant cannot communicate with her, we decline the invitation to adopt a restrictive interpretation of "contact" that would require physical touching or verbal communication. Defendant's construction would allow a sex offender to visit the home of his victim every day as long as the victim was some place in the home where the perpetrator could not visually observe the victim, or go to the victim's school or workplace if he stood in the parking lot or at a distance away from the victim. Defendant's interpretation is not plausible, particularly in view of the evidence here that defendant was repeatedly instructed to stay away from the victim's home and place of employment and to cease all communication with her.

Accordingly, we hold that the trial court did not abuse its discretion in finding that defendant's actions constituted a knowing and wilful violation of his probation. The action of the trial court is affirmed.

Affirmed.

Judges GREENE and MARTIN concur.

STATE OF NORTH CAROLINA v. CARLTON DALE WALL, AKA CARLTON MOONIE WALL

No. COA99-1208

(Filed 29 December 2000)

Sentencing— habitual felon—evidence—faxed copy of prior conviction

The trial court in an habitual felon prosecution properly admitted a faxed certified copy of a prior conviction. Defendant challenged the exhibit only under N.C.G.S. § 14-7.4, not under the Rules of Evidence; although N.C.G.S. § 14-7.4 contemplates the most appropriate means to prove prior convictions, it does not exclude other methods of proof. The trial court in this case care-

fully examined the facsimile, noting that it was stamped with a seal showing it to be a true copy of the original signed by a clerk of superior court, found that the seal was a reasonable copy, and concluded that the exhibit sufficed to be introduced into evidence. The Court of Appeals concluded that the faxed, certified copy was a reliable source of the prior conviction based on the trial court's observations and its own examination of the exhibit. Finally, defendant admitted under oath that he was convicted of the crimes listed therein.

Appeal by defendant from judgment entered 13 April 1999 by Judge Henry E. Frye, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 18 September 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Ted R. Williams, for the State.

Richard M. Dailey, Jr. for defendant-appellant.

TIMMONS-GOODSON, Judge.

Carlton Dale Wall ("defendant") was indicted on 19 January 1999 for possession with intent to sell and deliver a counterfeit controlled substance, sale and delivery of a counterfeit controlled substance, and as an habitual felon. Defendant's habitual felon indictment was based on two 13 July 1989 convictions for felony larceny, a 4 October 1991 conviction for common law robbery, and a 24 April 1995 conviction for assault with a deadly weapon inflicting serious bodily injury.

During the habitual felon phase of defendant's trial and out of the presence of the jury, the State presented copies of court records as evidence of defendant's alleged prior felony convictions. Defendant objected to the introduction of one of the court records, exhibit S-1, arguing that it was not a certified copy of a court record in compliance with section 14-7.4 of the North Carolina General Statutes. Exhibit S-1 referenced defendant's two alleged 13 July 1989 convictions in Superior Court, Alamance County for felony larceny. The State explained that exhibit S-1 was a facsimile of a certified copy and further noted that although one could not "feel" the certification seal on exhibit S-1, it was visible. Defendant argued that it was unclear, when viewing the seal, who certified the record or whether that person was qualified to certify the record. The State asserted, among other arguments, that the facsimile was submitted as evidence to corroborate defendant's testimony in the first phase of the trial,

where he admitted that he had indeed been convicted of larceny. On cross-examination during phase one of trial, defendant did admit that in July 1989, he was convicted of two counts of felony larceny.

The trial court noted that exhibit S-1 contained a "fax cover sheet, . . . the judgment and commitment, an indictment, another indictment, [and] transcript of plea" and was stamped with a seal "showing this is a true copy of the original which was signed by a clerk of Superior Court [,] April 9, 1999." The court found that "although not the original, the facsimile [was] a reasonable copy of the seal from Alamance County." The court concluded that exhibit S-1 "suffices [sic] the statute to be introduced into evidence[.]"

Although exhibit S-1 contained references to two 13 July 1989 felony larceny convictions, the State utilized only one larceny conviction to establish defendant's status as an habitual offender. Along with the felonious larceny conviction referenced in exhibit S-1, the State presented evidence of two other felony convictions, exhibits S-2 and S-3. Defendant did not object to the admission of either exhibit S-2 or exhibit S-3 into evidence.

A jury found defendant guilty of selling and delivering a counterfeit controlled substance and of habitual felon status. The trial court sentenced defendant to a term of 107 to 138 months imprisonment. Defendant now appeals.

Although defendant presents several assignments of error in the record on appeal, he argues only one in his appellate brief. We therefore deem the remaining assignments of error abandoned. *See* N.C.R. App. P. 28(b)(5).

Defendant asserts that the trial court committed reversible error in admitting into evidence a facsimile transmission of a certified copy of court records evincing his prior felony larceny conviction (exhibit S-1) for the purpose of establishing his status as an habitual felon. Defendant does not challenge the admissibility of exhibit S-1 under our Rules of Evidence but asserts a challenge to the statutory interpretation of section 14-7.4 of our General Statutes. Defendant argues that section 14-7.4 does not permit the consideration of exhibit S-1 to establish a prior conviction. We disagree.

Section 14-7.4 of our General Statutes states:

> In all cases where a person is charged . . . with being an habitual felon, the record or records of prior convictions of felony

> offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. *A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction.* The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

N.C. Gen. Stat. § 14-7.4 (1999) (emphasis added). At issue in this appeal is the above emphasized provision of section 14-7.4, specifying that "[a] prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." N.C.G.S. § 14-7.4.

Our appellate courts have never examined whether a faxed certified copy of a criminal record is admissible under section 14-7.4 to prove defendant's status as an habitual felon. However, our Court found in *State v. Jordan*, 120 N.C. App. 364, 462 S.E.2d 234, *dismissed and disc. review denied*, 342 N.C. 416, 465 S.E.2d 546 (1995), that a faxed certified copy of a police record check was admissible under circumstances similar to those presented by the instant case. The *Jordan* case provides us with guidance concerning the issue presented *sub judice*.

In *Jordan*, the defendant contended on appeal that the trial court committed reversible error in admitting "a faxed copy of a Connecticut police record check into evidence for sentencing purposes," in violation of North Carolina General Statutes section 15A-1340.4(e). 120 N.C. App. at 370, 462 S.E.2d at 238; N.C. Gen. Stat. § 15A-1340.4(e) (1988) (repealed 1993). The *Jordan* court noted that section 15A-1340.4(e) provided: " 'A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction.' " *Id.* at 370, 462 S.E.2d at 238-39 (quoting N.C.G.S. § 15A-1340.4(e)). The court found that the statutory provision was permissive. *Id.* at 370, 462 S.E.2d at 239. The court further found that "the reliability of the method of proof is the important inquiry to be made in determining admissibility." *Id.*

The *Jordan* court noted that defendant's only contention concerning the document's admission was that the fax did not strictly comply with the formalities of section 15A-1340.4(e). However, "defendant did not deny that the [] police record was complete and

accurate." *Id.* The court concluded that the "faxed, certified copy" of the police record "appear[ed] to be a reliable source of the defendant's prior convictions" and therefore, overruled defendant's assignment of error. *Id.*

The statute at issue in the instant case, section 14-7.4, clearly indicates that the provision is permissive, not mandatory, in that it provides a prior conviction "may" be proven by stipulation or a certified copy of a record. *See Campbell v. Church*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979) ("the use of 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act"). Thus, although section 14-7.4 contemplates the most appropriate means to prove prior convictions for the purpose of establishing habitual felon status, it does not exclude other methods of proof. *Cf. State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983) (stating the same in relation to similar language under section 15A-1340.4(e)).

In the present case, the State, similar to the State in *Jordan*, presented a facsimile, certified copy of a 1989 court record referencing defendant's felony larceny conviction for the purpose of establishing defendant's status as an habitual felon. Prior to its admission, the trial judge carefully examined the facsimile, noting that it was stamped with a seal "showing this is a true copy of the original which was signed by a clerk of Superior Court[,] April 9, 1999." The trial court found that "although not the original, the facsimile is a reasonable copy of the seal from Alamance County." The court concluded that exhibit S-1 "suffices [sic] the statute to be introduced into evidence." Defendant, similar to the *Jordan* defendant, does not contend that exhibit S-1 was inaccurate or incomplete, but only that its admission was not in compliance with the plain language of section 14-7.4.

Based on the above noted observations by the trial court and our own examination of exhibit S-1, we conclude that the faxed, certified copy "appears to be a reliable source of [defendant's] prior conviction[]" for felony larceny. *Jordan*, 120 N.C. App. at 370, 462 S.E.2d at 239. The exhibit's reliability was further bolstered below by defendant's own admission under oath that he indeed was convicted of the crimes listed therein. As such, we conclude that the trial court properly admitted exhibit S-1 into evidence as proof of defendant's prior felonious larceny conviction for the purpose of establishing his status as an habitual felon. Defendant's assignment of error is consequently overruled.

For the foregoing reasoning, we find that defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge FULLER concur.

WILLIAM SPEAGLE, AND WIFE DERENE SPEAGLE, PLAINTIFFS V. CHRISTY LYNETTE HOLLAND SEITZ, DEFENDANT

No. COA99-1526

(Filed 29 December 2000)

Child Custody and Support— custody—protected status of parent—error to utilize best interests standard in favor of third-party

The trial court erred by utilizing the best interests of the child standard to grant custody to plaintiffs, the child's grandparents, instead of to defendant mother, because: (1) the interest of the parent prevails against the interest of third parties and precludes the application of a best interests standard in resolving custody disputes unless the parent has engaged in some conduct inconsistent with his or her protected status; and (2) even if defendant mother's conduct from the date of the child's birth to the date of defendant's arrest for murder was inconsistent with her protected status, defendant was acquitted of the murder and there are no findings of fact or any evidence in the record that this conduct had any negative impact on the child or had a substantial risk of causing some harm to her, or that the conduct was still present at the time of the termination hearing.

Appeal by plaintiffs and defendant from order and judgment filed 5 April 1999 by Judge William A. Creech in Catawba County District Court. Heard in the Court of Appeals 17 October 2000.

Sigmon, Clark, Mackie, Hutton & Hanvey, P.A., by Forrest A. Ferrell and Stephen L. Palmer, for plaintiff-appellants/appellees.

Rudolf Maher Widenhouse & Fialko, by Thomas K. Maher and M. Gordon Widenhouse, for defendant-appellant/appellee.

GREENE, Judge.

Christy Lynette Holland Seitz (Defendant) appeals a 5 April 1999 Order and Judgment (the Order) awarding William Speagle and Derene Speagle (collectively, Plaintiffs) custody of Defendant's daughter, Amber Ashton Holland (Amber), with liberal visitation to Defendant. Plaintiffs cross-appeal the Order's denial of Plaintiffs' claim Defendant be ordered to pay child support for Amber.

In summary form, the undisputed evidence shows Amber was born out of wedlock on 3 September 1993. Defendant is the mother of the child and William Stacy Speagle (the father), now deceased, was the biological father of the child. Plaintiffs are the biological parents of the father and, thus, the paternal grandparents of Amber. Defendant had sole custody of Amber from birth until 24 October 1995, when a court order was entered granting joint custody to Defendant and the father. During the time the father had custody of Amber, the father and child resided in Plaintiffs' home. On 29 January 1996, the father was killed by Bryce Colby Delon, a recent companion of Defendant. On 30 January 1996, Defendant was arrested and charged with first-degree murder and conspiracy to commit first-degree murder of the father. On that same day, Plaintiffs filed an action seeking custody of Amber, and an Emergency Order was immediately entered granting Amber's custody to Plaintiffs. Defendant remained in jail until 26 March 1996, after which she was released on bond, moved to Dallas, Texas, and became employed as an office receptionist. On 29 March 1996, Defendant filed an answer to Plaintiffs' complaint and counterclaimed for Amber's custody. On 29 June 1997, Defendant was acquitted of all criminal charges arising from the father's death. On 19 August 1997, the trial court entered a temporary order maintaining Amber's custody with Plaintiffs and granting Defendant certain visitation privileges. With few exceptions, Defendant exercised her visitation privileges consistent with the 19 August 1997 order. Defendant was married to Robert Eric Seitz of Texas on 4 October 1997 and gave birth to his son on 15 June 1998. Defendant and her husband presently live in Texas.

The evidence further shows Plaintiffs are of good character and reputation and have a stable home in Hickory, North Carolina. Amber is well adjusted and is currently enrolled in the Catawba County schools. There is a strong bond between Amber and Plaintiffs. Defendant, between Amber's birth and her arrest in 1996, was regularly employed as a topless dancer at various clubs and, on occasion, had sexual relations with different men. There is no evidence

Defendant ever engaged in topless dancing or sexual relations in the presence of Amber.

The trial court entered findings of fact consistent with this undisputed evidence and further found in part:

> 58. . . . Defendant's lifestyle and romantic involvement[]s resulted in her neglect and separation from the minor child.
>
> 59. . . . [T]hat any actions in the past but not recent past by . . . Defendant that may have been construed as inconsistent with the presumption that the biological parent will act always in the best interests of the child do not render . . . Defendant unfit to have a relationship with, but not custody of, her daughter.

The trial court then concluded, in part: "that at this time the best interests of the child would be served [by] granting custody to . . . Plaintiffs" and "Defendant is unfit to have custody of, but is a fit and proper person to be granted visitation with, the minor child."

The dispositive issue is whether the findings of fact and conclusions of law in this case justify the trial court's application of the best interests standard to adjudicate the custody dispute between a natural parent and the grandparents.

In any child custody dispute between the parents and third parties, including grandparents, the parents have a constitutionally protected interest in the companionship, custody, care, and control of their children. *Price v. Howard*, 346 N.C. 68, 73, 484 S.E.2d 528, 530 (1997). The interest of the parents, therefore, prevails against the interest of third parties and precludes the application of a best interests standard, in resolving child custody disputes, unless the parents have engaged in some "conduct inconsistent with [their] protected status." *Id.* at 79, 484 S.E.2d at 534. This conduct includes, but is not limited to: neglect of the children; abandonment of the children; and, in some circumstances, the voluntary surrender of custody of the children. *Id.* Whether the conduct constitutes "conduct inconsistent" with the parents' protected status presents a question of law and, thus, is reviewable *de novo*, *Raynor v. Odom*, 124 N.C. App. 724, 731, 478 S.E.2d 655, 659 (1996); *see In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (any determination requiring the "exercise of judgment" is most properly classified a conclusion of law), and "need not rise" to that conduct necessary to terminate parental rights, *Price*, 346 N.C. at 79, 484 S.E.2d at 534. The parental conduct must,

however, in order to give rise to a best interests inquiry, have some negative impact on the child or constitute a substantial risk of such impact. *See Wisconsin v. Yoder*, 406 U.S. 205, 233-34, 32 L. Ed. 2d 15, 35 (1972) (parents' constitutional right to rear their children can be suspended only when "it appears that parental decisions will jeopardize the health or safety of the child"); *cf. Browning v. Helff*, 136 N.C. App. 420, 424, 524 S.E.2d 95, 98 (2000) (modification of child custody order permissible only upon showing of a change in circumstances "affecting the welfare of the child"); *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (neglect of child, within meaning of Juvenile Code, occurs only upon showing of lack of proper care accompanied with a showing that the lack of care resulted in "some physical, mental, or emotional impairment of the juvenile"); *In re McCraw Children*, 3 N.C. App. 390, 395, 165 S.E.2d 1, 5 (1969) (adulterous conduct of parent does not per se render that parent unfit to have custody).

In this case, the trial court clearly utilized a best interests inquiry. It concluded it was in the "best interests of the child" to grant custody to Plaintiffs, the child's grandparents. This was error. Even assuming Defendant's conduct between 3 September 1993 (Amber's birth) and 30 January 1996 (Defendant's arrest) is "inconsistent" with her protected status,[1] there are no findings of fact or any evidence in the record this conduct had any negative impact on Amber or had a substantial risk of causing some harm to her. Accordingly, it was improper for the trial court to utilize the best interests standard to resolve this custody dispute, as Defendant has not lost her constitutionally protected right to retain custody of her child. The Order of the trial court must, therefore, be reversed. It, consequently, is unnec-

1. Although the "conduct inconsistent" with the parents' protected constitutional right is not to be judged solely by the termination statutes, *Price*, 346 N.C. at 79, 484 S.E.2d at 534, the law with regard to termination of parental rights can, nonetheless, be instructive. That law holds that termination of parental rights cannot be based on past circumstances, which no longer exist, but must be based on grounds present at the time of the termination hearing. *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). In this case, even assuming Defendant's topless dancing or sexual relations constitute "conduct inconsistent" with her protected parental status, within the meaning of *Price*, there is no evidence this conduct extended beyond 26 March 1996. Thus, there is no evidence Defendant was engaging in any "conduct inconsistent" with her protected status in August 1998, the date of the custody trial, or at any time soon before that trial. Furthermore, although Defendant was forced to leave her child when she was arrested and placed in custody, there is no evidence Defendant intended for this separation to be permanent and indeed Defendant sought to regain custody upon her release from jail. *See Price*, 346 N.C. at 83, 484 S.E.2d at 537 (parents' grant of temporary custody to another does not necessarily result in loss of protected status).

essary for us to address Plaintiffs' appeal or any other assignments of error.

Reversed.

Judges MARTIN and EDMUNDS concur.

STATE OF NORTH CAROLINA v. ANTHONY MORAITIS, DEFENDANT; SURETY: MOUNTAINEER BAIL BONDS

No. COA99-1563

(Filed 29 December 2000)

Bail and Pretrial Release— bond forfeiture—request for remittance—unverified petition for relief—jurisdiction

The trial court's order remitting a bail bond forfeiture based upon a surety's unverified petition for relief is invalid because: (1) N.C.G.S. § 15A-544 requires the petition to be verified, and the surety has not moved to amend its motion to include a verification; and (2) the trial court had no jurisdiction over the motion since the requirement that a complaint filed pursuant to that statute be verified is a jurisdictional requirement.

Appeal by Watauga County Board of Education from order entered 22 September 1999 by Judge William A. Leavell in Watauga County District Court. Heard in the Court of Appeals 9 November 2000.

Miller & Johnson, PLLC, by Paul E. Miller, Jr., and Linda L. Johnson, for plaintiff-appellant Watauga County Board of Education.

Steven M. Carlson for defendant-appellee.

EDMUNDS, Judge.

Judgment creditor Watauga County Board of Education (Watauga) appeals from an order remitting a bond forfeiture. We vacate and remand.

On 24 August 1998, defendant Anthony Moraitis (Moraitis) was arrested for felony possession of marijuana in violation of N.C. Gen.

Stat. § 90-95(a)(3) (1999). On that same date, he executed, as principal, an appearance bond in the amount of $5,000, which was secured by Mountaineer Bail Bonds (Mountaineer) as surety. Moraitis was released from custody pending hearing on the charge.

When Moraitis failed to appear in court on 18 December 1998, his scheduled court date, an order for his arrest was issued and an order of forfeiture was entered on the bond. On 21 December 1999, Moraitis and Mountaineer were notified of a 24 March 1999 hearing at which either would be allowed to present evidence to show why Moraitis' appearance at the 18 December 1998 hearing was impossible or without fault. Judgment of forfeiture was entered on 23 June 1999 in the amount of the bond.

On 17 September 1999, Mountaineer filed a "Motion to Remit Bond," alleging as grounds for relief that:

> 2. Immediately, after receiving notice of the Order of Forfeiture, the Surety began diligent efforts to locate the Defendant for the purpose of arresting him and surrendering him to the Sheriff.
>
> . . . .
>
> 4. The Surety was in no way a contributing factor or cause in the Defendant's failure to appear, and it promptly pursued action designed to locate the Defendant and to promote the purposes of the appearance bond.
>
> 5. Subsequently, the Surety sought the assistance of the District Attorney's Office in Watauga County however, he was informed that there was no interest in apprehending or prosecuting the Defendant.
>
> 6. The Surety is entitled to reasonable assistance from the District Attorney and other State agencies and lack of such assistance has made it impossible for the Surety to surrender the Defendant. Therefore, the Surety is entitled to be released from all obligations for payment of this bond.

After a hearing on 22 September 1999, the court granted the motion, allowing remission in the amount of $5,000. Two orders were entered on 22 September 1999, one on form AOC-CR-213. A second more specific order was filed on 27 September 1999.

Watauga filed notice of appeal on 19 October 1999, raising several assignments of error. We need address only the first.

Watauga argues that the court's order remitting the bond forfeiture is invalid because it is based upon an unverified petition for relief in violation of N.C. Gen. Stat. § 15A-544 (1999). This argument requires examination of the statutory language contained in section 15A-544, which provides in pertinent part:

> At any time within 90 days after entry of the judgment against a principal or surety, the principal or surety, by *verified written petition*, may request that the judgment be remitted in whole or in part, upon such conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment.

N.C. Gen. Stat. § 15A-544(e) (emphasis added). In the case at bar, although Mountaineer requested that the judgment be remitted within ninety (90) days after entry of judgment of forfeiture, its request was not verified, nor has Mountaineer moved to amend its motion to include a verification. Accordingly, Watauga is correct in its assertion that the trial court erred in remitting the judgment.

Mountaineer, citing *Taylor v. Nationsbank Corp.*, 125 N.C. App. 515, 481 S.E.2d 358, *disc. review allowed*, 346 N.C. 288, 487 S.E.2d 570, *disc. review improvidently allowed*, 347 N.C. 388, 493 S.E.2d 57 (1997) and *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990), contends that Watauga failed to object to the lack of verification at the 22 September 1999 hearing and is therefore precluded from raising such argument on appeal. However, these cases are distinguishable from the case at bar. In *Taylor*, we held that because the plaintiffs failed to raise any objection at trial regarding the absence of verification of the defendants' *answer*, the issue was not properly preserved for appellate review. However, unlike a request for remittance of judgment made pursuant to N.C. Gen. Stat. § 15A-544(e), the defendants' answer was not required to be verified by statute.

Alford is more closely analogous to the case at bar and requires analysis. In *Alford*, the plaintiff failed properly to verify its complaint in a shareholder derivative suit, as required by N.C. Gen. Stat. § 1A-1, Rule 23 (1983). Our Supreme Court held, however, that "because N.C.G.S. § 1A-1, Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholder's derivative suit, plaintiffs' failure to comply with the verification requirement at the time the complaint was filed is not a jurisdictional defect." *Alford*, 327 N.C. at 531, 398 S.E.2d at 447. Accordingly, the Court held that

"[b]ecause the rule containing the verification requirement is not jurisdictional in nature, where the purposes behind the rule have been fulfilled by the time the objection to a defective or absent verification is lodged, dismissal or summary judgment in favor of defendants is not appropriate." *Id.* at 532, 398 S.E.2d at 448 (internal citations omitted).

The question presented to this Court in the present case is whether the verification requirement in N.C. Gen. Stat. § 15A-544 is jurisdictional. The issue of lack of subject matter jurisdiction can be raised at any time, even on appeal. *See Wildcatt v. Smith*, 69 N.C. App. 1, 316 S.E.2d 870, *disc. review allowed*, 312 N.C. 90, 321 S.E.2d 909 (1984). This particular issue is one of first impression in this State, and we begin with a review of general principles of statutory construction. A statute that is clear on its face must be enforced as written. *See Bowers v. City of High Point*, 339 N.C. 413, 451 S.E.2d 284 (1994). We presume that the use of a word in a statute is not superfluous and must be accorded meaning, if possible. *See N.C. Bd. of Exam for Speech Path. v. N.C. State Bd. of Educ.*, 122 N.C. App. 15, 468 S.E.2d 826, *disc. review allowed*, 343 N.C. 513, 472 S.E.2d 16 (1996), *aff'd in part and disc. review improvidently allowed in part*, 345 N.C. 493, 480 S.E.2d 50 (1997). Where a term used in a statute has obtained long-standing legal significance, we presume that the legislature intended that significance to attach to the use of the term, absent an indication to the contrary. *See Black v. Littlejohn*, 312 N.C. 626, 325 S.E.2d 469 (1985).

We now consider whether the use of the term "verified" in the statute governing Mountaineer's motion imposed a jurisdictional requirement on the party filing the motion. As established in *Alford*, the resolution of the issue turns on whether the statute requiring verification addresses only the procedure to be followed in the forfeiture proceeding, as opposed to addressing the substantive elements of the proceeding. We are mindful that we have previously held in *In Re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (1993) that "[t]he shareholder derivative suit appears to be the only situation where a specific requirement that the pleadings be verified is not considered jurisdictional in nature." *Id.* at 288, 426 S.E.2d at 437.

Our review of N.C. Gen. Stat. § 15A-544 in its entirety reveals that the statute addresses both substantive and procedural elements. Accordingly, consistent with *Alford* and the principles of statutory interpretation reviewed above, we hold that the requirement that a

complaint filed pursuant to that statute be verified is a jurisdictional requirement. Because Mountaineer failed to comply with this requirement, the trial court had no jurisdiction over the motion. Accordingly, the order of the court is vacated and the matter is remanded to the trial court for action consistent with this opinion.

Vacated and remanded.

Judges MARTIN and TIMMONS-GOODSON concur.

THE CIT GROUP/SALES FINANCING, INC., PLAINTIFF v. WADE LEON BRAY, DEFENDANT/THIRD PARTY PLAINTIFF v. PALM HARBOR HOMES, INC., D/B/A PALM HARBOR VILLAGE; AND TIMBERLAND HOMES, INC., D/B/A MAGIC LIVING HOMES, THIRD-PARTY DEFENDANTS

No. COA99-1184

(Filed 29 December 2000)

1. **Appeal and Error— appealability—denial of motion to compel arbitration—interlocutory order—substantial right**

Although the trial court's order denying motions by plaintiff and the third-party defendant to compel arbitration is an interlocutory order, it is immediately appealable because it affects a substantial right.

2. **Arbitration and Mediation— order denying—no determination of valid agreement—insufficient findings**

The trial court erred by prohibiting arbitration in a foreclosure action without first addressing whether the "General Arbitration Provision" was part of the consumer credit agreement, because: (1) when the party contesting arbitration challenges the validity of such an agreement, the trial court must summarily determine whether, as a matter of law, a valid arbitration agreement exists; and (2) the findings set out in the order were insufficient to enable the Court of Appeals to conduct a meaningful review of the trial court's conclusions that plaintiff waived its right to arbitrate and that the provision was violative of public policy.

Appeal by plaintiff and third-party defendants from order entered 19 March 1999 by Judge William C. Gore, Jr. in Superior Court, Columbus County. Heard in the Court of Appeals 9 October 2000.

Law Office of William D. Harazin, by William D. Harazin, for plaintiff-appellant, and Harris, Shields, Creech and Ward, P.A., by Bonnie J. Refinski-Knight, for third-party defendants-appellants.

Nunalee & Nunalee, L.L.P., by Mary Margaret McEachern Nunalee, and Morgan & Maynard, PLLC, by Mallam J. Maynard, for defendant/third-party plaintiff-appellee.

TIMMONS-GOODSON, Judge.

This appeal involves the validity of a "General Arbitration Provision" purporting to have been executed contemporaneously with a "Consumer Credit Contract" between the purchaser and seller of a mobile home. On 7 November 1996, Wade Leon Bray (hereinafter, "Bray") entered into a contract with Timberland Homes, Inc., d/b/a Magic Living Homes (hereinafter, "Timberland"), whereby Timberland agreed to finance the purchase of a mobile home manufactured by Palm Harbor Homes, Inc., d/b/a Palm Harbor Village (hereinafter, "Palm Harbor"). The transaction was secured by the mobile home, and Timberland assigned the contract to The CIT Group/Sales Financing (hereinafter, "CIT").

On 24 February 1998, CIT filed a complaint alleging that Bray had defaulted under the terms of the agreement by failing to make monthly payments on the loan. Consequently, CIT prayed for damages and possession of the mobile home. On 9 April 1998, the Clerk of Superior Court, Columbus County, entered an Order of Seizure in Claim and Delivery against Bray and in favor of CIT. Bray thereafter filed an answer and counterclaim in response to CIT's action and brought a third-party complaint against Palm Harbor. The third-party complaint raised, among others, claims for breach of contract, breach of express and implied warranties, and unfair and deceptive trade practices arising out of the sale and service of the mobile home. Palm Harbor answered the third-party complaint and moved to compel arbitration pursuant to section 1-567.1, *et seq.*, of the North Carolina General Statutes. CIT filed a cross-claim against Palm Harbor and an answer to Bray's counterclaim, which answer included a motion to compel arbitration.

The trial court conducted a hearing on the motions, and by order entered 19 March 1999, denied arbitration. CIT and Palm Harbor filed timely notices of appeal.

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[1] As a preliminary matter, this Court has said that an order denying a motion to compel arbitration affects "a substantial right which might be lost if appeal is delayed." *Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991). Accordingly, the order from which the present appeal was taken, although interlocutory, merits immediate review. *See Sims v. Ritter Construction, Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983) (allowing immediate appeal from order withdrawing matter from arbitration and placing it on trial calender).

[2] The motions of CIT and Palm Harbor for compulsory arbitration were made pursuant to North Carolina General Statutes section 1-567.1, *et seq.* In relevant part, section 1-567.3 provides:

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

N.C. Gen. Stat. § 1-567.3(a) (1999). Therefore, when the party contesting arbitration challenges the legitimacy of such an agreement, the trial court must "summarily determine whether, as a matter of law, a valid arbitration agreement exists." *Routh v. Snap-On Tools Corp.*, 101 N.C. App. 703, 706, 400 S.E.2d 755, 757 (1991). Failure of the court to resolve this issue, when properly raised, is reversible error. *Burke v. Wilkins*, 131 N.C. App. 687, 689, 507 S.E.2d 913, 914 (1998).

In the case *sub judice*, Bray submitted a brief in opposition to the motions of CIT and Palm Harbor to compel arbitration. Bray alleged in the brief that the document entitled "General Arbitration Provision" "was not executed . . . in connection with the transaction which is the subject of this litigation, but rather was executed by [Bray and his wife, Teresa,] with regard to an attempted sale, approximately one (1) month earlier (10/7/96)." Bray further maintained that Teresa refused to contract with Palm Harbor because she disap-

proved of their business practices. As a result, "[the earlier] sale was never consummated." According to Bray, "[n]o arbitration document was signed or agreed upon in the November 7, 1996 transaction," and the previously-executed arbitration provision was altered to misrepresent the date of execution as 7 November 1996. The claims asserted in the brief were corroborated by the attached exhibits and affidavits of Bray and his wife, Teresa.

Although the order denying arbitration states that the trial court considered Bray's opposing brief, not one of the court's findings of fact or conclusions of law addresses whether the "General Arbitration Provision" was indeed a part of the consumer credit agreement at issue in this litigation. The court, instead, prohibited arbitration based on its determinations that CIT waived its right to arbitrate and that the arbitration provision was void and unenforceable as against public policy. In failing to first ascertain whether the parties intended that the arbitration provision apply to the 7 November 1996 transaction, the court put the proverbial cart before the horse. If, in fact, the parties did not mutually assent to incorporate the agreement to arbitrate in the 7 November 1996 Consumer Credit Contract, any issue as to waiver or enforceability of the agreement is moot.

In short, Bray having "denie[d] the existence of the agreement to arbitrate [with respect to the transaction in dispute], the court [was compelled to] proceed summarily to the determination of the issue so raised." *See* N.C.G.S. § 1-567.3(a). Failure to do so was error. *See Paramore v. Inter-Regional Financial*, 68 N.C. App. 659, 316 S.E.2d 90 (1984) (remanding case for trial court to determine validity of agreement to arbitrate where party opposing arbitration made showing of forgery, fraud, and undue influence regarding execution of underlying contract). We further conclude that the findings of fact set out in the order were insufficient to enable this Court to conduct a meaningful review of the trial court's conclusions that CIT waived its right to arbitrate and that the provision was violative of public policy. *See In re Foreclosure of Newcomb*, 112 N.C. App. 67, 75, 434 S.E.2d 648, 653 (1993) (quoting *Appalachian Poster Advertising Co., Inc. v. Harrington*, 89 N.C. App. 476, 480, 366 S.E.2d 705, 707 (1988) (reversing and remanding order where findings of fact inadequate to permit meaningful appellate review and to " 'test the correctness of [the lower court's] judgment.' ") Accordingly, we reverse the order and remand this matter to the Superior Court with instructions to determine summarily whether a valid arbitration agreement exists with

respect to the 7 November 1996 Consumer Credit Contract between Bray and Timberland.

Reversed and remanded.

Chief Judge EAGLES and Judge FULLER concur.

FREDERIC W. RIPLEY, III, PAMELA BERBUE, AND DIANE R. OLSON, PLAINTIFFS V. SUZANNE E. DAY AND WACHOVIA BANK, N.A., (F/K/A WACHOVIA BANK AND TRUST COMPANY, N.A.), EXECUTOR OF THE ESTATE OF ELLISON G. DAY AND TRUSTEE OF THE TRUST, UNDER AGREEMENT WITH ELLISON G. DAY DATED FEBRUARY 1, 1990, DEFENDANTS

No. COA99-866-2

(Filed 29 December 2000)

1. **Declaratory Judgments— right to dissent from will—subject matter jurisdiction**

In an opinion superceding the previous opinion of the Court of Appeals, the trial court was held to have correctly granted summary judgment in favor of defendant Day in a declaratory judgment action contesting Day's right to dissent from her husband's will. Although plaintiffs contend that they have standing to contest Day's right to dissent in a declaratory judgment action through reading N.C.G.S. § 30-1 in pari materia with certain provisions of the Declaratory Judgment Act, including N.C.G.S. § 1-254, an action contesting a surviving spouse's right of dissent entails something entirely different from the construction of a will and the two statutes must be construed separately. Because plaintiff's complaint contested the right to dissent based upon valuations, which has nothing to do with the will instrument, the provisions of N.C.G.S. § 1-254 do not confer subject matter jurisdiction.

2. **Wills— right to dissent—declaratory judgment—subject matter jurisdiction**

The trial court did not err by granting summary judgment for defendant Day in a declaratory judgment action contesting her right to dissent from her husband's will. Although plaintiffs contend that Day's attorney had agreed in conversations and correspondence that plaintiffs had standing to bring a declaratory

judgment action, the issue involved subject matter jurisdiction rather than standing, and it was not defendant's position to advise plaintiffs on their options for contesting her right to dissent.

Appeal by plaintiffs from order entered 19 April 1999 by Judge Wiley F. Bowen in Chatham County Superior Court. Originally heard in the Court of Appeals 19 April 2000.

Bryant, Patterson, Covington & Idol, P.A., by David O. Lewis, for the plaintiff-appellants.

Newsom, Graham, Hedrick & Kennon, P.A., by Josiah S. Murray III and J. Alan Campbell, for the defendant-appellee.

LEWIS, Judge.

In an opinion filed 15 August 2000, this Court concluded the trial court lacked subject matter jurisdiction over the plaintiffs' declaratory judgment action contesting defendant Suzanne E. Day's right to dissent from her deceased husband's will. We affirmed the trial court's 19 April 1999 order granting summary judgment in favor of defendant Day. Plaintiffs filed a petition for rehearing pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure 19 September 2000, which we granted, 26 September 2000.

Plaintiffs instituted a declaratory judgment action to determine whether defendant Suzanne E. Day is entitled to dissent from her deceased husband's will. Plaintiffs are the nieces and nephew of the decedent. The trial court granted summary judgment in favor of defendants Day and Wachovia; however, plaintiffs filed notice of appeal only with respect to defendant Day. As such, we address the issues on appeal only as they relate to defendant Day.

[1] Plaintiffs first argue they have standing to contest Day's right of dissent in this action, and as such, the trial court should not have granted summary judgment in favor of defendant Day. Plaintiffs contend that when N.C. Gen. Stat. § 30-1 is read *in pari materia* with certain provisions of the Declaratory Judgment Act, including N.C. Gen. Stat. § 1-254, they have standing to contest Day's right of dissent by means of a declaratory judgment action. Although we disagree, the problem relates not to a lack of standing, but to a lack of subject matter jurisdiction.

G.S. 30-1 sets forth the requirements for establishing a surviving spouse's right of dissent. The valuations relevant to determining

whether a right of dissent exists, including the estate of the deceased spouse and the property passing outside of the will to the surviving spouse, may be established by agreement of the executor and surviving spouse and upon approval of the clerk of superior court. N.C. Gen. Stat. § 30-1(c) (1999). G.S. 1-254, which governs the courts' authority to construe instruments, provides that "[a]ny person interested under a . . . will . . . may have determined any question of construction or validity *arising under the instrument* . . . and obtain a declaration of rights, status or any other legal relations thereunder." (Emphasis added).

It is well-settled that "[s]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Bd. of Adjmt. of the Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993). We conclude the two statutes cited by plaintiffs do not deal with the same subject matter. It is clear that G.S. 30-1(c) specifically governs the determination of a surviving spouse's right of dissent, including both valuation and the ultimate determination of whether a right of dissent is established as a result of the relevant valuations. G.S. 1-254, however, allows questions as to the construction of a *will* to be brought in a declaratory judgment action. *Rogel v. Johnson*, 114 N.C. App. 239, 242, 441 S.E.2d 558, 560 (1994). "The Declaratory Judgment Act . . . is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder." *Farthing v. Farthing*, 235 N.C. 634, 635, 70 S.E.2d 664, 665 (1952).

An action contesting a surviving spouse's right of dissent entails something entirely different from the construction of a will. In fact, as its name connotes, dissent does not even involve application of the will—it involves a spouse's outright refusal to collect under the will. Although both actions in part involve estate valuations (the dissent action involving valuation of the *entire* estate and the declaratory judgment action involving valuation of the *testamentary* estate), the actions are still fundamentally different in nature. As such, we conclude that G.S. 30-1(c) and G.S. 1-254 govern mutually exclusive subject matter, so that each must be construed separately.

Because G.S. 1-254 does not encompass actions to contest a surviving spouse's right of dissent, we conclude the superior court did not have subject matter jurisdiction over the issues involved in this

case. In its declaratory judgment action, plaintiffs sought something entirely different from the court than construction of a will. In their complaint, plaintiffs contest defendant Day's right of dissent from the will based on valuations. Resolution of this issue has nothing to do with construction of the will instrument; the provisions of G.S. 1-254 do not confer subject matter jurisdiction for plaintiffs' action.

It is important to note that plaintiffs' action contests only the valuations relevant to defendant Day's right of dissent. A different analysis may have resulted if plaintiffs had alleged that the agreement in this case was reached through collusion or fraud. While our courts have indicated that "[a]bsent a showing that the parties have failed to act in an arm's length manner . . . the clerk ought to abide by this agreement," *Taylor v. Taylor*, 301 N.C. 357, 363, 271 S.E.2d 506, 510-11 (1980), they have not addressed what action is appropriate when persons other than the parties to the agreement make such a challenge. As plaintiffs have made no contention regarding collusion or fraud, the issue is not before us and we have not addressed it.

[2] Plaintiffs also contend that because defendant Day and her attorney, through conversations and correspondence, previously agreed that plaintiffs have standing to bring a declaratory judgment action, defendant Day waived her right to assert standing as a defense in this case. We have already concluded that the issue in this case was not one of standing, but of subject matter jurisdiction. Hence, even if defendant Day agreed or even urged plaintiffs to institute a declaratory judgment action, jurisdiction of the court over the subject matter of the action is the most critical aspect of the court's authority to act and cannot be waived. W. Brian Howell, *Shuford North Carolina Civil Practice and Procedure* § 12-4 (5th ed. 1998). Furthermore, it was certainly not Day's position to advise plaintiffs on their options for contesting her right of dissent.

In sum, the trial court's 19 April 1999 order granting summary judgment is vacated for lack of subject matter jurisdiction over plaintiffs' appeal. The matter is remanded for dismissal for the reasons set forth herein.

Given our disposition as to the first issue, we need not consider plaintiff's contentions regarding valuation of the testate and intestate shares.

This opinion supercedes in all respects the previous opinion of the Court.

Vacated and remanded.

Judges MARTIN and WALKER concur.

IN RE: ENJOLI DANELLE BROWN

No. COA00-446

(Filed 29 December 2000)

Guardians— GAL—respondent or party—no statutory authorization

The trial court correctly denied a motion by a guardian ad litem (GAL) to dismiss an appeal because the GAL was not served with notice. The Rules of Civil Procedure provide that written notice shall be served on each of the parties; while a GAL may in some instances be a petitioner, there is no statutory authority for that GAL to be a respondent or party.

Appeal by guardian *ad litem* from order dated 14 January 2000 by Judge Kimberly S. Taylor in Iredell County District Court. Heard in the Court of Appeals 19 December 2000.

Thomas R. Young for petitioner-appellee Iredell County Department of Social Services.

Andrea D. Edwards attorney advocate for guardian ad litem-appellant.

Homesley, Jones, Gaines, Homesley & Dudley, by L. Ragan Dudley and J. Franklin Mock, II, for respondent-appellee.

GREENE, Judge.

The guardian *ad litem* (the GAL) for the minor child appeals a 14 January 2000 order in favor of the Respondent-father (Respondent) denying the motion to dismiss Respondent's appeal.

The Iredell County Department of Social Services (DSS) filed a petition on 17 March 1999, to terminate the parental rights of Respondent to his minor daughter, and the GAL was appointed for

the minor child on 19 March 1999. DSS alleged Respondent neglected and willfully abandoned the child. Respondent filed a response to the petition on 7 May 1999, denying the allegations set out in the petition. On 2 September 1999, the Iredell County District Court entered an order terminating Respondent's parental rights to his daughter. On 13 August 1999, Respondent filed notice of appeal from the order terminating his parental rights and served the notice of appeal on DSS. Respondent, however, did not serve the notice of appeal on the GAL. On 2 December 1999, DSS and the GAL filed a joint motion to dismiss Respondent's appeal because Respondent failed to serve the GAL with the notice of appeal. On 14 January 2000, the trial court filed an order denying the motion to dismiss the appeal, stating "it is unclear that the [GAL] is a party to the foregoing Termination of Parental Rights proceeding."

The issue is whether a guardian *ad litem*, appointed for the child in a termination of parental rights case, must be served with a copy of the notice of appeal from an order terminating a parent's parental rights in the child.

In a termination of parental rights proceeding, the taking of an appeal is governed by N.C. Gen. Stat. § 7A-289.34 (1995).[1] N.C.R. App. P. 3(b)(1). North Carolina General Statute § 7A-289.34 is silent on any requirement for the service of a written notice of appeal and, thus, the Rules of Civil Procedure govern. N.C.G.S. § 1A-1, Rule 1 (1999); *In re Bullabough*, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988) (because a termination of parental rights proceeding is civil in nature, it is governed by the Rules of Civil Procedure unless otherwise provided). The Rules of Civil Procedure provide "every written notice . . . shall be served upon each of the parties." N.C.G.S. § 1A-1, Rule 5(a) (1999). A party is by definition "those by or against whom a legal suit is brought." *Black's Law Dictionary* 1122 (6th ed. 1990). Those persons or agencies authorized to file a petition for termination of parental rights are limited by statute and are known as petitioners. N.C.G.S. § 7A-289.24 (1995).[2] The department of social services to whom the trial court has given custody of a child is a proper

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1. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1113 (1999).

2. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1103 (1999).

petitioner.[3] N.C.G.S. § 7A-289.24(3) (1995).[4] The person or persons against whom the petition is filed are known as respondents. N.C.G.S. § 7A-289.27(a) (1995).[5] A respondent includes the parents of the child, any person "judicially appointed as guardian of the person of the child" and the child if the child is "12 years of age or older at the time the petition is filed." *Id.* A guardian *ad litem* is not a respondent in a termination of parental rights proceeding and, thus, not a party to the proceeding.

In summary, a guardian *ad litem* for a child in a termination of parental rights proceeding may, in some instances, be a petitioner, but there is no statutory authority for that guardian *ad litem* to be a respondent or party.

In this case, the GAL did not file or join in the filing of the petition and, thus, was not a party to the termination of parental rights proceeding and not entitled to notice of Respondent's notice of appeal of the order terminating his parental rights. The order of the trial court denying the GAL's motion to dismiss the appeal must therefore be affirmed.[6]

Affirmed.

Judges WALKER and FULLER concur.

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3. A guardian *ad litem* of the child "who has served in this capacity for at least one continuous year" may act as a petitioner in a termination of parental rights proceeding. N.C.G.S. § 7A-289.24(6) (1995) (repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1103(6) (1999)).

4. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1103(3) (1999).

5. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1106 (1999).

6. We acknowledge the guardian *ad litem* is entitled to a copy of the termination of parental rights order, N.C. Gen. Stat. § 7A-289.31(c2) (1995), (repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1110(d)), and it would seem the guardian *ad litem*, in order to act in the best interests of the child, should be entitled to a copy of any notice of appeal from that order. We further note, however, our Legislature has not vested the guardian *ad litem* with the right to appeal from the entry of an order terminating or failing to terminate parental rights. N.C.G.S. § 7A-289.34. Again, it would appear the guardian *ad litem* should be granted this right and, indeed, we note the guardian *ad litem* has the right to appeal from the removal or failure to remove a child from the custody of a parent who has been found to have abused or neglected a child. N.C.G.S. § 7A-667 (1995) (repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now N.C.G.S. § 7B-1002 (1999)).

STATE OF NORTH CAROLINA v. LARRY CHAVIS

No. COA99-1250

(Filed 29 December 2000)

1. **Discovery— medical and psychiatric history of witness— State not required to provide when not in State's possession**

The State was under no obligation to provide a defendant with medical and psychiatric history of a witness in a prosecution for statutory sexual offense and attempted statutory rape, because defendant presented no evidence the State actually had the witness's medical and psychiatric history in its possession, or that such history would have been favorable to defendant.

2. **Criminal Law— motion for continuance—not entitled to counsel of choice**

A defendant in a prosecution for statutory sexual offense and attempted statutory rape was not entitled to a continuance for purposes of obtaining counsel of his choice, because: (1) defendant's motion was made on the morning the trial was set to begin on the basis that defendant wanted to employ private counsel; (2) the private counsel that defendant indicated he wanted to employ was not in the courtroom at the time the motion was made, and there was no evidence defendant had made financial arrangements with this attorney; (3) all the State's witnesses were in the courtroom and defendant did not point to any conflict he had with his appointed counsel; and (4) this case had been rescheduled twice due to various conflicts.

3. **Evidence— incidents occurring two years apart—not habit**

The trial court did not abuse its discretion in a prosecution for statutory sexual offense and attempted statutory rape by finding that two incidents occurring approximately two years apart did not constitute a habit under N.C.G.S. § 8C-1, Rule 406, even though defendant sought to show the victim claimed an assault only for the purpose of obtaining a pregnancy test as she had done in the past.

4. **Evidence— prior crime or act—prior assault—common plan, scheme, system, or design**

The trial court did not err in a prosecution for statutory sexual offense and attempted statutory rape by allowing evidence of

defendant's 1990 assault of another victim under N.C.G.S. § 8C-1, Rule 404(b), because: (1) the evidence was properly admitted for the purpose of proving a plan, scheme, system, or design since the evidence on both instances were similar in nature in that the victims were of similar age, both visited various residences or places in which they were unfamiliar along with defendant, both victims were taken by automobile to isolated areas at night, and in both instances defendant told the victims something was wrong with the automobile, asked the victims to get out of the automobile, and then proceeded to sexually assault them; (2) the two charges are not too remote in time; (3) even though the evidence was improperly admitted for statutory sexual offense, the improper admission did not prejudice defendant when it was properly admitted to show a common scheme; and (4) the probative value of the prior bad act evidence was not substantially outweighed by its prejudicial impact.

5. Witness— expert—clinical psychology—education and extensive experience

The trial court did not abuse its discretion in a prosecution for statutory sexual offense and attempted statutory rape by allowing a witness to be received as an expert in clinical psychology, because the witness's education and extensive experience made her well-qualified to testify as an expert.

6. Evidence— expert testimony—victim suffered from post-traumatic stress disorder—corroboration—no prejudicial error although improper to allege defendant's assault was triggering event

The trial court did not err in a prosecution for statutory sexual offense and attempted statutory rape by allowing a clinical psychologist to testify that the victim suffered from post-traumatic stress disorder (PTSD) as a result of the 26 July 1997 incident, because: (1) the evidence was admissible for corroborative purposes to assist the jury in understanding the behavioral patterns of sexual assault victims; and (2) even though the psychologist was improperly permitted to testify that the 26 July 1997 assault by defendant was the "triggering event" of the PTSD, there was no prejudicial error since there was not a reasonable possibility that a different result would have been reached in the trial without this testimony.

7. Jury— alleged juror misconduct—speaking to prosecuting attorney concerning juror's familiarity with defense witness

The trial court did not abuse its discretion in a prosecution for statutory sexual offense and attempted statutory rape by concluding that a juror was not required to be removed even after the juror sought to speak with the prosecuting attorney concerning the juror's possible familiarity with one of defendant's witnesses, because: (1) the trial court conducted a voir dire examination of the juror to determine if there had been any prejudice to defendant; and (2) defendant has not shown how he was prejudiced or that the juror's ability to remain impartial was impacted.

8. Evidence— defendant's statement to detective—not hearsay—no prejudicial error

Although the trial court erred in a prosecution for statutory sexual offense and attempted statutory rape by concluding that defendant should not be allowed to cross-examine a detective concerning defendant's statements to the detective on the grounds that the statement was inadmissible hearsay, defendant was not prejudiced when there is no reasonable possibility a different result would have been reached at trial if the detective had been permitted to read defendant's statement to the jury.

9. Sentencing— presumptive range—no error

The trial court did not abuse its discretion in a prosecution for statutory sexual offense and attempted statutory rape by sentencing defendant within the presumptive range, because: (1) the trial court is required to take into account factors in aggravation and mitigation only when deviating from the presumptive range in sentencing; and (2) the trial court is not required to take into account any evidence offered in mitigation when it imposes the presumptive sentence.

Appeal by defendant from judgment dated 30 April 1999 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 19 September 2000.

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

Bowen & Berry, PLLC, by Sue A. Berry, for defendant-appellant.

GREENE, Judge.

Larry Chavis (Defendant) appeals from a judgment entered after a jury rendered a verdict finding him guilty of a statutory sexual offense and of attempted statutory rape in violation of N.C. Gen. Stat. §§ 14-27.7A(a) and 14-27.7(a).

Pre-trial

On 24 March 1999, Defendant sought discovery from the State of the "[m]edical and psychiatric history of [the prosecuting witness (M.F.P.)] admissible under Rule of Evidence 611(b) to impeach the witness'[] ability to perceive, retain, or narrate." The trial court ruled that the State was under "no duty to go out and find impeaching information with regard[] to its witnesses." The trial court, however, did indicate it would allow Defendant to inquire into those matters on cross-examination.

On 27 April 1999, Defendant's case was called for trial. At that time, Defendant sought a continuance to permit him to obtain alternate counsel.[1] The case was first set for trial in July 1998, "at which time the State was unable to proceed to trial because [Detective Ron Simmons (Simmons)] was on vacation." The case was then set for the early part of 1999, but "it was a short week and the court had other obligations." The lawyer whom Defendant sought to retain was not present in the courtroom and Defendant had not made any financial arrangements to hire the new lawyer. The prosecuting attorney indicated to the trial court that all the State's witnesses were present in court. The trial court, after questioning Defendant, denied Defendant's motion to continue because "there appear[ed] to be no conflict with regard to counsel. That issue is just now being brought to the [trial] court's attention immediately before the matter is to be tried. . . . The motion is being made unduly late . . . ."

State's evidence

M.F.P. testified that during the summer of 1997, she visited with Defendant and his wife, Betty Chavis (Chavis), while her parents were on vacation. On 26 July 1997, Defendant, M.F.P., and M.F.P.'s sister "went [in an automobile] to visit people [Defendant] said were his sisters, . . . to a gas station[,] and some club that [Defendant] wanted to go to."

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1. Defendant had appointed counsel in this matter.

After Defendant stopped and purchased beer, he said: "Well, I guess we'll go on home." Defendant, however, went down "some road where there were no [automobiles] . . . out in the sticks." While driving down this road, Defendant "was shaking the wheel really bad[ly] and he told [M.F.P.] something was wrong with the [automobile]." Defendant told M.F.P. he needed to pull over the automobile because he was scared to drive it home and needed to check it. Defendant got out of the automobile and began "l[]ying on the ground [and] looking at the tires." Defendant told M.F.P. to get out of the automobile and to shine the light for him.

As M.F.P. was standing outside the automobile, Defendant stood up in front of her and told her "Don't tell [Chavis]." Defendant then pushed M.F.P. against the automobile and started touching M.F.P. "all over [her] body." Defendant's hands "went under [M.F.P.'s] underwear and [she] felt his fingers or his finger go inside [her]." Defendant eventually stopped touching M.F.P. because an automobile "started coming down the road." When M.F.P. got into the automobile, "[Defendant] told [M.F.P.] that he was just playing, he just wanted to see what [M.F.P.] would do if something like that happened[,] if someone tried to hurt [her]." M.F.P. stated she was scratched and bruised by Defendant during the alleged assault.

After Defendant reached his residence, M.F.P. got out of the automobile and ran to the house of Eliza Jane Wilkins Painter (Painter), M.F.P.'s aunt. Painter called the Sheriff's Department and was told to bring M.F.P. to the station to speak with someone. M.F.P. spoke with Simmons, who took her statement.

On cross-examination, M.F.P. denied being involved in a physical fight with her brother. M.F.P. stated that after the incident, she "was supposed to have gotten checked out but . . . wouldn't let them"; instead, photographs of her were taken. Although M.F.P. denied requesting a pregnancy test at the hospital on 27 July 1997, Defendant produced medical records showing M.F.P. had requested a pregnancy test. Defendant attempted to question M.F.P. concerning an incident which occurred approximately two years prior to the July 1997 incident, but the State objected. On *voir dire*, Chavis testified that two years before the July 1997 incident, M.F.P. told Chavis "a man approached [M.F.P.] with a knife and pulled her in[to] the woods and raped her." Chavis stated M.F.P. made no request to get a medical exam, but did ask Chavis to go with her to get a pregnancy test. Because M.F.P. requested a pregnancy test at the hospital after the July 1997 event, Defendant sought to introduce the evidence of the

alleged prior sexual assault to show M.F.P.'s habit as to "when she's concerned about whether she's pregnant or not, to report a sexual assault, decline medical care and seek a pregnancy test." The trial court declined to permit Defendant to introduce evidence of the earlier incident, finding "the two incidents . . . [occurring] two years apart [do not constitute] a habit within the purview of [Rule] 406."

The State tendered Dr. Margaret Barnes (Dr. Barnes), a licensed clinical psychologist, as an expert "in the field of clinical psychology with a focus on behavior and treatment of post traumatic stress disorder [PTSD] and sexual assault victims." Dr. Barnes received her Masters in Psychology and her Ph.D. at the University of North Carolina at Greensboro with her primary "specialty or practice . . . in . . . anxiety disorders, including [PTSD]." Dr. Barnes interned for one year at High Point Mental Health with Family and Children Services and also interned for one year at Forsyth County Mental Health in Adult Services. Over Defendant's objection, the trial court received Dr. Barnes "as an expert in the field of clinical psychology."

During Dr. Barnes' testimony, the trial court gave the following limiting instruction:

> Members of the jury, you're about to hear evidence regarding [PTSD]. This evidence is to be considered by you only for the purpose of corroboration of other evidence if you find it does so. It is not to be considered by you as substantive evidence. That is, it may not be considered by you as proof of any fact in issue.

M.F.P. first came to see Dr. Barnes on 28 August 1997. Over the noted objection of Defendant, Dr. Barnes testified she diagnosed M.F.P. with PTSD. M.F.P.'s symptoms included "having a lot of flashbacks[,] . . . going into the shower and scrubbing herself raw[,] . . . [and] difficulty sleeping." Dr. Barnes was asked by the State if M.F.P. had described to her any recent event that might have constituted a "triggering event" for the PTSD. Dr. Barnes responded in pertinent part: "[M.F.P.] indicated that on July 26 of [1997], she was with the alleged perpetrator. . . . [M.F.P.'s] sister was in the [automobile] . . . and saw [the] whole thing happen."

M.F.P.'s brother testified he and M.F.P. had a disagreement on 26 July 1997, prior to Defendant and M.F.P. leaving to visit Chavis. M.F.P.'s brother denied the disagreement escalated to a physical altercation.

The State also introduced evidence by D.H., who relayed an event that occurred between her and Defendant on 23 December 1990. This event resulted in Defendant being convicted in January 1991 of assault and sentenced to a fifteen-year active sentence, of which he served approximately six years. This evidence was offered pursuant to Rule 404(b) to show Defendant's intent and common scheme. Over Defendant's objection, the trial court accepted the evidence under Rule 404(b) and allowed D.H. to testify about the 23 December 1990 assault, finding the following similarities between the 1990 assault and the 1997 alleged assault: the ages of the alleged victims were similar; the facts were similar; it appeared Defendant had been drinking; the victims visited various residences or places in which they were not familiar; the incidents occurred at night; the victims were taken by automobile to isolated areas; the sexual assaults occurred in isolated areas; Defendant told the victims something was wrong with the automobile; and once Defendant had the victims outside of the automobile, he proceeded to sexually assault them. The trial court then ruled, pursuant to Rule 403, that "the probative value outweighs any prejudicial effect of the conviction" and gave the following limiting instruction with respect to D.H.'s testimony:

> This evidence is being received for the purpose of showing that . . . Defendant had intent, which is a necessary element of the crime charged in this case, and that there existed in the mind of . . . Defendant a plan, scheme or system or design involving the crime charged in this case. If you believe this evidence which is being offered, you may consider it but only for the limited purposes for which it is being received.

During the course of the trial, it was brought to the trial court's attention that Juror No. 5 [the Juror] attempted to have contact with the prosecuting attorney in this case, despite the trial court's admonishments the jury "have no contact with the participants." The Juror sought to speak with the prosecuting attorney concerning a witness present in the courtroom he "thought [he] knew." The prosecuting attorney refused to speak with the Juror and he was told "[y]ou're a juror. [The prosecuting attorney] can't speak with you." After being told this, the Juror left and raised his concerns with the bailiff. The trial court conducted a *voir dire* examination and refused to remove the Juror, finding "[t]here appears to be nothing that would in any way affect [the Juror's] ability to proceed as originally announced during the jury selection process and be a fair and impartial juror."

The State also called Simmons, who testified concerning his investigation of the July 1997 incident and M.F.P.'s version of what happened. On cross-examination, Defendant attempted to have Simmons read, to the jury, Defendant's statement given to Simmons shortly after the incident, and the State objected. The trial court sustained the State's objection on the ground it was inadmissible hearsay. On re-direct, Simmons was permitted to testify, over Defendant's objection, he obtained the arrest warrants after speaking with Defendant. On re-cross, Defendant again attempted to have Simmons read Defendant's statement because, Defendant argued, the State's inquiry as to when Simmons obtained the warrants made it "appear to the jury that [Simmons] got them in response to something [Defendant] said." The trial court again ruled Defendant's statement was inadmissible. Defendant then asked Simmons if the warrants in this case were obtained "despite what [Defendant] had told [Simmons]." The trial court sustained the State's objection to this question.

Defendant's evidence

Chavis testified that during M.F.P.'s visit, M.F.P. asked for directions so her boyfriend could visit. Defendant refused to let M.F.P.'s boyfriend visit and M.F.P. responded, " 'If it's the last thing I do, I'll fix you, you S.O.B.' " During M.F.P.'s visit, Chavis saw M.F.P. with marijuana and asked her not to use the substance while in her home.

Katrina Campbell (Campbell), Chavis's sister, testified that on 26 July 1997, she observed M.F.P. and M.F.P.'s brother "[f]ist fighting and cussing." Campbell testified M.F.P.'s brother "had been scratching [M.F.P.] up, [and] [M.F.P.] had scratched him back and was hitting him." After the altercation, M.F.P. "had scratches on her face, her arms, and her legs . . . and bruises." Martin Campbell, Campbell's husband, also stated M.F.P. had scratches on her after a fight with her brother. Painter testified M.F.P. was doing drugs and she observed the fight between M.F.P. and her brother. Painter, who also was present during M.F.P.'s visit to the hospital, heard M.F.P. state "she wanted to get a pregnancy test." On cross-examination, Painter verified M.F.P.'s version of the events at trial was the same as the version given by M.F.P. to Painter on 27 July 1997.

Sentencing

During the sentencing phase of Defendant's trial, Defendant argued mitigating factors were shown at trial and included:

Defendant supports his family; Defendant has a support system in the community; and Defendant is gainfully employed. The trial court declined to make any written findings and sentenced Defendant within the "presumptive range."

The issues are whether: (I) the State is under an obligation to provide Defendant with medical and psychiatric history of a witness, when that history is not in its possession; (II) Defendant was entitled to a continuance for purposes of obtaining counsel of his choice; (III) two incidents occurring approximately two years apart constitute habit, within the meaning of Rule 406; (IV) evidence of Defendant's 1990 assault of D.H. was properly admitted under Rule 404(b) to prove intent and/or common scheme; (V) Dr. Barnes was properly received as an expert in clinical psychology; (VI) it was proper to allow Dr. Barnes to testify that M.F.P. was suffering from PTSD as a result of the 26 July 1997 incident, and if not, whether the erroneous admission of the testimony resulted in prejudicial error; (VII) a juror must be removed for failing to abide by the trial court's instructions; (VIII) Defendant should have been allowed to cross-examine Simmons concerning Defendant's statement to Simmons; and (IX) the trial court erred in sentencing Defendant within the presumptive range.

I

[1] A defendant is constitutionally entitled to all exculpatory evidence, including impeachment evidence, in the possession of the State. *State v. Soyars*, 332 N.C. 47, 63, 418 S.E.2d 480, 490 (1992). The State, however, is under a duty to disclose only those matters in its possession and "is not required to conduct an independent investigation" to locate evidence favorable to a defendant. *State v. Smith*, 337 N.C. 658, 664, 447 S.E.2d 376, 379 (1994).

In this case, Defendant presented no evidence the State actually had M.F.P.'s medical and psychiatric history in its possession or that such history would have been favorable to Defendant. Accordingly, the State was under no obligation to obtain and disclose this information to Defendant.

II

[2] A motion to continue based on a defendant's request to obtain private counsel raises a constitutional question and is thus fully reviewable by the appellate court. *State v. Searles*, 304 N.C. 149, 153, 282

S.E.2d 430, 433 (1981); *State v. Little*, 56 N.C. App. 765, 768, 290 S.E.2d 393, 395, *appeal dismissed*, 306 N.C. 390, 294 S.E.2d 217 (1982). The right to retain private counsel is not absolute and is balanced against "the need for speedy disposition of the criminal charges and the orderly administration of the judicial process." *State v. Foster*, 105 N.C. App. 581, 584, 414 S.E.2d 91, 92 (1992).

In this case, Defendant's motion was made on the morning the trial was set to begin on the basis Defendant wanted to employ private counsel. The private counsel Defendant indicated he wanted to employ was not in the courtroom at the time the motion was made and there was no evidence Defendant had made financial arrangements with this or any other private attorney. The record shows all the State's witnesses were in the courtroom and Defendant did not point to any conflict he had with his appointed attorney. Finally, this case had been rescheduled twice due to various conflicts.

On this record, the trial court did not err in denying Defendant's motion to continue.

III

[3] Evidence of a person's habit, "whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit." N.C.G.S. § 8C-1, Rule 406 (1999). In deciding whether specific instances constitute habit, the trial court should consider: the number of instances, whether the instances are similar, and the regularity of the instances. *Crawford v. Fayez*, 112 N.C. App. 328, 335, 435 S.E.2d 545, 550 (1993), *disc. review denied*, 335 N.C. 553, 441 S.E.2d 113 (1994). Whether instances constitute habit "is a question to be decided on a case-by-case basis, and the trial court's rulings thereon will not be disturbed absent an abuse of discretion." *Id.* (citing N.C.G.S. § 8C-1, Rule 104 (1992)).

In this case, Defendant sought to examine M.F.P. about a 1995 alleged assault which Defendant contends M.F.P. reported for the sole purpose of obtaining a pregnancy test. It is Defendant's contention in this case that he did not assault M.F.P. and she claimed an assault only for the purpose of obtaining a pregnancy test. The trial court denied admissibility of this evidence because it believed the "two incidents" occurring "two years apart" were not sufficient to constitute a habit within the meaning of Rule 406. We cannot hold this constitutes an abuse of discretion.

IV

A

Relevancy

[4] "Evidence of other 'crimes, wrongs or acts' [is] not admissible to 'show that the defendant has the propensity or disposition to commit an offense [of] the nature of the crime charged.' " *State v. Elliott*, 137 N.C. App. 282, 285, 528 S.E.2d 32, 35 (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)), *reversed on other grounds*, — N.C. —, 535 S.E.2d 32 (2000); N.C.G.S. § 8C-1, Rule 404(b) (1999). This evidence, however, may be admissible if it is relevant for some other purpose. N.C.G.S. § 8C-1, Rule 404(b); *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). "The evidence is relevant for some other purpose if it 'tends to prove a material fact in issue in the crime charged.' " *Elliott*, 137 N.C. App. at 285, 528 S.E.2d at 35 (quoting *State v. Johnson*, 317 N.C. 417, 425, 347 S.E.2d 7, 12 (1986)). In making this evaluation, the trial court must reject the relevancy of the evidence if it "does not clearly perceive the connection between the extraneous criminal transaction and the crime charged." *Id.* at 286, 528 S.E.2d at 35 (citations omitted).

Common scheme

The trial court admitted evidence of the 1990 assault for the purpose of proving plan, scheme, system or design. Evidence of other crimes is material and, therefore, relevant if it "tends to establish a . . . scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *State v. Bean*, 55 N.C. App. 247, 249, 284 S.E.2d 760, 761 (1981), *disc. review denied*, 305 N.C. 303, 290 S.E.2d 704 (1982). The crimes are related if they are sufficiently similar and not too remote in time. *See State v. McKinney*, 110 N.C. App. 365, 372, 430 S.E.2d 300, 304, *appeal dismissed, disc. review denied, and cert. denied*, 334 N.C. 437, 433 S.E.2d 182 (1993).

In this case, the 1990 assault and the current charges are similar in nature. In both instances the victims, similar in age, visited various residences or places in which they were unfamiliar and then were taken by automobile to isolated areas at night. During both instances, Defendant told the victims something was wrong with the automobile, asked the victims to get out of the automobile, and then proceeded to sexually assault them.

Likewise, the 1990 assault and the current charges are not too remote in time. Although approximately seven years elapsed between the 1990 assault and the current charges, some six of those years Defendant was in prison and those six years are not to be considered in evaluating remoteness. *See State v. Davis*, 101 N.C. App. 12, 20-21, 398 S.E.2d 645, 650 (1990), *appeal dismissed and disc. review denied*, 328 N.C. 574, 403 S.E.2d 516 (1991). Accordingly, the 1990 assault was relevant evidence and was properly admitted under Rule 404(b) to show common scheme.

Intent

The trial court also admitted evidence of Defendant's previous assault on D.H. to show Defendant's intent to commit a statutory sexual offense and an attempted statutory rape. Intent is not an element of statutory sexual offense and statutory rape. *State v. Murry*, 277 N.C. 197, 203, 176 S.E.2d 738, 742 (1970). Intent is an element of an attempt to commit a crime. *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000). Assuming the existence of a crime of attempted statutory rape, *see id.* at 451, 527 S.E.2d at 48 (logically impossible "for a person to specifically intend to commit a form of murder which does not have, as an element, specific intent to kill"), an issue not argued by Defendant in this case, the evidence of the 1990 assault was relevant and thus admissible to prove intent under Rule 404(b). It was not relevant and thus not admissible to prove intent to commit statutory sexual offense. The improper admission of this evidence, however, did not prejudice Defendant because it was properly admitted to show common scheme. *See State v. Haskins*, 104 N.C. App. 675, 683, 411 S.E.2d 376, 382 (1991) ("no prejudicial error where at least one of the two purposes for which the prior act evidence was admitted was correct"), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992).

B

Unfair prejudice

Although we have determined the 1990 assault is relevant for some purpose(s) under 404(b), it may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Wallace*, 104 N.C. App. 498, 503, 410 S.E.2d 226, 229 (1991) (citing N.C.G.S. § 8C-1, Rule 403 (1988)), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). The question of whether evidence is unfairly prejudicial "is a matter left to the sound discretion of the trial court." *Haskins*, 104 N.C. App. at 680, 411 S.E.2d at 381.

In this case, the trial court admitted the evidence of Defendant's 1990 assault of D.H. for the limited purposes of proving a common scheme and Defendant's intent. In admitting the evidence, the trial court found the probative value of the testimony outweighed any prejudicial effect of the conviction. We cannot hold this constitutes an abuse of discretion. *See State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996) ("[i]n light of the limiting instruction, the probative value of [the prior bad act evidence] was not substantially outweighed by its prejudicial impact"), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997).

V

[5] A witness may be "qualified as an expert by knowledge, skill, experience, training, or education," and may testify in the form of an opinion "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702(a) (1999). To qualify as an expert, the witness need only be "better qualified than the jury as to the subject at hand." *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992) (citations omitted), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). Whether a witness qualifies as an expert is "exclusively within the trial judge's discretion," and should " 'not be reversed on appeal absent a complete lack of evidence to support his ruling.' " *Id.* (quoting *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598, 603 (1985), *appeal dismissed and disc. review denied*, 316 N.C. 198, 341 S.E.2d 581 (1986)).

The evidence shows Dr. Barnes has her masters in psychology, has a Ph.D., and is a licensed clinical psychologist who specializes in anxiety disorders, including PTSD. Given Dr. Barnes' education and extensive experience, she was well qualified to testify as an expert, and her testimony was properly admitted as expert testimony. Accordingly, the trial court did not abuse its discretion in qualifying Dr. Barnes as an expert and the record supports this ruling.

VI

[6] Evidence from an expert that a prosecuting witness is suffering from PTSD is admissible, for corroborative purposes, *State v. Hall*, 330 N.C. 808, 821, 412 S.E.2d 883, 890 (1992), to assist the jury in understanding the behavioral patterns of sexual assault victims, *id.* at 822, 412 S.E.2d at 891; *State v. Huang*, 99 N.C. App. 658, 664, 394 S.E.2d 279, 283, *disc. review denied*, 327 N.C. 639, 399 S.E.2d 127

(1990). The expert witness may not, however, explicitly or implicitly indicate the PTSD was caused or contributed to by the actions of the defendant that are the subject of the trial. *State v. Hensley*, 120 N.C. App. 313, 319, 462 S.E.2d 550, 553-54 (1995). On this factual question, whether a defendant actually committed the act with which he is charged, the expert is "in no better position to have an opinion than the jury." *State v. Wilkerson*, 295 N.C. 559, 570, 247 S.E.2d 905, 911 (1978).

In this case, the trial court allowed Dr. Barnes to testify as to M.F.P.'s PTSD. As the trial court instructed the jury to consider this evidence only for corroborative purposes, the evidence was properly admitted to assist the jury in evaluating the credibility of M.F.P.'s testimony. It was error, however, for the trial court to permit Dr. Barnes to testify that the 26 July 1997 assault by Defendant was the "triggering event" of the PTSD. This testimony directly implicated Defendant as the person who sexually assaulted M.F.P. and was thus not admissible, either as substantive or corroborative evidence.

Prejudicial error

Defendant argues admission of Dr. Barnes' testimony concerning the triggering event was prejudicial error because of conflicting evidence at trial. 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, M.F.P. testified about the alleged sexual assault in detail and Defendant's alleged assault of M.F.P. is very similar to Defendant's assault of D.H. M.F.P. gave the same account at trial she had previously given to Painter and Simmons. In addition, there was physical evidence of scratches and bruises on M.F.P, consistent with M.F.P.'s testimony. Although there is some evidence these scratches and bruises came from an altercation with M.F.P.'s brother, the brother denies any altercation. This limited conflict in the evidence is not sufficient to support a reasonable possibility a different result would have been reached at trial if Dr. Barnes had not been allowed

to testify about the triggering event of M.F.P.'s PTSD. The admission of this testimony, therefore, was not prejudicial error.

VII

[7] The trial court, in its discretion, determines whether juror misconduct has occurred and if so, whether the defendant was prejudiced as a result of such conduct. *See State v. Williams*, 330 N.C. 579, 583, 411 S.E.2d 814, 817 (1992). Absent a clear abuse of discretion, the trial court's ruling on juror misconduct will not be disturbed on appeal. *See State v. Sneeden*, 274 N.C. 498, 504, 164 S.E.2d 190, 194-95 (1968).

In this case, the Juror sought to speak with the prosecuting attorney concerning the Juror's possible familiarity with one of Defendant's witnesses. The trial court conducted a *voir dire* examination of the Juror to determine if there had been any prejudice to Defendant. Defendant has not shown how he was prejudiced by the Juror's conduct or that the Juror's ability to remain impartial was impacted.[2]

Accordingly, the trial court did not abuse its discretion in denying Defendant's motion to remove the Juror.

VIII

[8] Defendant contends the trial court committed reversible error in not permitting Simmons to disclose to the jury the contents of the statement Defendant made to Simmons. Simmons testified he obtained the warrant against Defendant immediately after talking with Defendant and Defendant wanted the jury to know that there was nothing in Defendant's statement that would support the warrant.

The trial court rejected Defendant's request on the ground the statement was inadmissible hearsay. We disagree. A statement made by a defendant to another person is not hearsay and is admissible when the statement explains the subsequent conduct of the person to whom the statement was made. *Coffey*, 326 N.C. at 282, 389 S.E.2d at 56; N.C.G.S. § 8C-1, Rule 801(c) (1999).

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2. Defendant argues the Juror's misconduct, along with responses during jury selection, demonstrate the Juror is not fair and impartial. Defendant, however, does not point to anything in the record to reflect Defendant sought to have the Juror removed during jury selection and did not assign error to the trial court permitting the Juror to initially be impaneled. Accordingly, we do not address this argument. *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 this case, Defendant sought to disclose his statement to Simmons in an effort to place some context on or explain why Simmons subsequently sought a warrant for Defendant's arrest. Thus, Defendant's written statement to Simmons was not hearsay and the trial court erred in denying Defendant's request. Not every error, however, mandates a new trial, *Locklear*, 349 N.C. at 149, 505 S.E.2d at 295, and in this case there is no reasonable possibility, for the reasons previously given (in our discussion of prejudicial error in the context of Dr. Barnes' testimony), a different result would have been reached at trial if Simmons had been permitted to read Defendant's statement to the jury.

IX

[9] Defendant finally contends the trial court abused its discretion in failing to impose a sentence less than the presumptive range, on the grounds of undisputed evidence in mitigation. We disagree. This Court has held the trial court is required to take "into account factors in aggravation and mitigation *only* when deviating from the presumptive range in sentencing." *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997) (emphasis in original). As the trial court imposed the presumptive sentence in this case, it was not required to take into account any evidence offered in mitigation.

No error.[3]

Judges MARTIN and EDMUNDS concur.

3 We do not address Defendant's assignment of error concerning an instruction given to the jury during jury instructions. Defendant has failed to cite any authority in his brief in support of this argument, and, therefore, this argument is deemed abandoned. *See* N.C.R. App. P. 28(b)(5).

COCA-COLA BOTTLING CO. CONSOLIDATED AND REIDSVILLE TRANSACTION CORPORATION, INC., PLAINTIFFS V. DURHAM COCA-COLA BOTTLING CO., DEFENDANT

DURHAM COCA-COLA BOTTLING CO., PLAINTIFF V. COCA-COLA BOTTLING CO. CONSOLIDATED, REIDSVILLE TRANSACTION CORPORATION, INC., REIDSVILLE COCA-COLA BOTTLING CO., R.S. FISH, TRUSTEE, U/W D.D. BUSICK, FRED D. BUSICK, JOHN O. BUSICK, II, WILLIAM E. BUSICK, BRONA B. FISH, AND KATHRYN B. MCMICHAEL, DEFENDANTS

No. COA99-1369, No. COA99-1372

(Filed 29 December 2000)

1. **Declaratory Judgments— plaintiff not a party to contract—cognizable interest**

In a dispute over the purchase of a soft drink bottling company, a third-party was not precluded from maintaining a declaratory judgment action simply because it sought to determine the validity of a contract to which it was not a party. Plaintiff has a cognizable interest under the alleged contract as a result of having purportedly purchased one of the parties to the contract.

2. **Declaratory Judgments— discretion to dismiss action**

A declaratory judgment action arising from the sale of a soft drink bottling company should have been dismissed where plaintiff, Consolidated, attempted to purchase the Reidsville Coca-Cola Bottling Company and Durham contended that Reidsville had already accepted its offer to purchase. A declaratory judgment suit should not be used as a device for procedural fencing; a defendant in a pending lawsuit should not be permitted to bring a declaratory judgment suit involving overlapping issues in a different jurisdiction as a strategic means of obtaining a more preferable forum. Moreover, priority should not necessarily be given to a declaratory suit simply because it was filed earlier in situations where two suits involving overlapping issues are pending in separate jurisdictions.

3. **Declaratory Judgments— not by natural plaintiff—forum shopping—dismissed**

A declaratory judgment action by Consolidated arising from efforts to purchase a soft drink bottling company by Consolidated and a competing company (Durham) should have been dismissed where the issues were whether letters exchanged

between Reidsville (the company being bought) and Durham constituted a binding contract of sale; whether Reidsville breached its contract with Durham; and whether Consolidated tortiously interfered with a contractual relationship between Reidsville and Durham. The natural plaintiff is Durham since Durham alleges damages from its unsuccessful efforts to purchase Reidsville and Durham's suit addresses all of the issues and includes all of the parties, while Consolidated's does not. Consolidated cannot contend that the natural plaintiff was unwilling to litigate, and cannot contend that a declaration of its rights will be useful in helping Consolidated to determine whether to purchase Reidsville because it purports to have already done so.

4. Appeal and Error— preliminary injunction—interlocutory order—no immediate appeal

A trial court order granting a preliminary injunction prohibiting the sale of assets in the disputed sale of a soft drink bottling company was an interlocutory order not properly before the Court of Appeals. No substantial right is affected by the order, which merely prevents Consolidated from disposing of the assets of Reidsville which it had purportedly purchased and the business operations in which Consolidated engaged prior to the purchase are not impacted. Reidsville's right to rent or sell a few remaining items of real property does not constitute a substantial right within the context of the multi-million dollar sale of the vast majority of its assets. Furthermore, even assuming that these are substantial rights, they have at most been delayed, not lost, and the court provided for protection of those rights by requiring bonds.

5. Venue— sale of company—intangible assets

The trial court did not err by denying a motion to dismiss or transfer pursuant to N.C.G.S. § 1-76(4) an action arising from the sale of a soft drink bottling company where the company being sold contended that it was an action to recover personal property, but the specific performance claim which arguably sought personal property was not the sole or primary relief requested, as required by the statute. Furthermore, the assets sought in the specific performance claim largely include intangible assets such as stock, good will, contract rights, consumer lists, and exclusive sales territory. Intangible personal property is not subject to the venue requirements of N.C.G.S. § 1-76(4).

Appeal by Defendant in COA99-1369 (Mecklenburg County No. 99 CVS 6062) from order entered 18 August 1999 by Judge Dennis J. Winner in Mecklenburg County Superior Court. Appeal by Defendants in COA99-1372 (Durham County No. 99 CVS 2459) from orders entered 7 July 1999 and 28 July 1999 by Judge Orlando F. Hudson, Jr., and 19 July 1999 by Judge A. Leon Stanback, Jr. in Durham County Superior Court. Heard in the Court of Appeals 18 September 2000.

Pursuant to N.C.R. App. P. 40 and motion to consolidate by defendant-appellant in COA99-1369, which we granted 28 December 1999, COA99-1369 and COA99-1372 were consolidated for hearing.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by Kiran H. Mehta and Anne M. Package for plaintiffs-appellees in COA99-1369 and defendants-appellants in COA99-1372.

Moore & Van Allen, P.L.L.C., by Lewis A. Cheek and Pamela A. Wachter for defendant-appellant in COA99-1369 and plaintiff-appellee in COA99-1372.

Wishart, Norris, Henninger & Pittman, P.A., by Robert J. Wishart and Pamela S. Duffy for defendants-appellants in COA99-1372.

FULLER, Judge.

Defendant in COA99-1369, Durham Coca-Cola Bottling Company (Durham), appeals from an order denying its motion to dismiss the declaratory judgment claims brought by plaintiff in that lawsuit, Coca-Cola Bottling Company Consolidated (Consolidated). We reverse and remand with instructions to the trial court to grant Durham's motion to dismiss. Defendants in COA99-1372, Reidsville Coca-Cola Bottling Company (Reidsville) and Consolidated, appeal from various orders of the trial court. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The facts underlying these two proceedings are as follows. Durham, seeking to purchase Reidsville, submitted a letter to Reidsville dated 26 February 1999 entitled "Offer to Purchase." This letter outlined the terms and provisions for Durham's proposed purchase of Reidsville. On 3 March 1999, Fred Busick, the president of Reidsville, responded by signing this letter under the language "Accepted and Agreed" and returning it to Durham. In addition, all of the shareholders and directors of Reidsville signed an attached docu-

ment entitled "Acceptance," indicating their approval of Durham's proposal to purchase Reidsville. This document was also returned to Durham. On 31 March 1999, having discovered that Consolidated was actively engaged in efforts to purchase Reidsville, Durham sent a letter to Consolidated asserting that Consolidated would be interfering with the contractual relationship between Durham and Reidsville if it pursued efforts to purchase Reidsville. On 13 April 1999, Durham filed a lawsuit against Reidsville in Durham County (the first Durham suit). In this suit, Durham sought specific performance of the allegedly binding contract between Durham and Reidsville, claimed breach of the alleged contract by Reidsville, and sought injunctive relief to prevent Reidsville from selling or disposing of its assets.

On 19 April 1999, Consolidated filed a lawsuit in Mecklenburg County (the Mecklenburg suit) naming Durham and Reidsville as defendants, and seeking a declaratory judgment and specific performance by Reidsville. The complaint in the Mecklenburg suit alleges that Consolidated and Reidsville are parties to two separate written agreements predating Durham's 26 February 1999 offer to purchase Reidsville. The first of these, a "Sub-Bottler's Contract," dated 30 June 1949, purports to prohibit Reidsville from selling its bottling rights without the written consent of Greensboro Coca-Cola Bottling Company, allegedly a predecessor of Consolidated. The second of these agreements, a "Right of First Refusal" contract, dated 1 April 1988, purports to grant to Consolidated a right of first refusal upon the sale of Reidsville's stock and bottling rights. The complaint in the Mecklenburg suit also alleges that Consolidated made an offer to purchase Reidsville, and that Reidsville accepted the offer, on 24 February 1999, two days prior to Durham's 26 February 1999 offer.

Consolidated set forth two claims for relief in its original complaint in the Mecklenburg suit. In its first claim for relief Consolidated requested a declaratory judgment, stating that "[t]here exists an actual, justiciable controversy as to the rights of Consolidated and Durham in connection with Reidsville, as well as the rights of Consolidated to pursue its acquisition of Reidsville free of threats of litigation from Durham." In its second claim for relief, Consolidated sought specific performance by Reidsville pursuant to the alleged agreements between them.

Consolidated purportedly purchased Reidsville on 16 May 1999. On 21 May 1999, the court in the first Durham suit granted Durham's request for a Temporary Restraining Order (TRO) against Reidsville.

On 24 May 1999, Consolidated took a voluntary dismissal without prejudice of all claims against Reidsville in the Mecklenburg suit. This served to dismiss Consolidated's second claim for relief, namely specific performance by Reidsville, leaving only the declaratory judgment claim. On 25 May 1999, Consolidated amended its complaint, requesting declaratory judgment as to three issues: (1) whether Consolidated has tortiously interfered with any contractual rights between Durham and Reidsville; (2) whether Durham has an enforceable contract to purchase Reidsville; and (3) whether Consolidated was justified in acquiring, and is justified in continuing to operate, Reidsville.

After learning of the purported purchase of Reidsville by Consolidated, Durham dismissed the first Durham suit without prejudice on 28 May 1999 and filed a second suit against Reidsville and Consolidated in Durham County on the same day (the second Durham suit, or the Durham suit). In its complaint in the second Durham suit, Durham alleges that: (1) it is entitled to specific performance by Reidsville of the alleged contract between Durham and Reidsville, and is also entitled to specific performance by Consolidated to the extent Consolidated now owns assets formerly held by Reidsville; (2) Consolidated has tortiously interfered with Durham's alleged contract with Reidsville; (3) Reidsville has breached the alleged contract with Durham; and (4) Durham is entitled to injunctive relief against both Reidsville and Consolidated to prohibit the sale of Reidsville assets. Durham was granted a TRO against Consolidated and Reidsville on 28 May 1999.

On 2 June 1999, Reidsville moved for removal of the Durham suit pursuant to N.C.G.S. § 1-76(4) (1999), contending that the suit seeks recovery of personal property and must be brought in the county in which the property is maintained. On 4 June 1999, Consolidated moved to dismiss or stay the Durham suit pursuant to N.C.R. Civ. P. 13(a), alleging that Durham's claims in the suit were compulsory counterclaims in the pending Mecklenburg suit. The trial court in the Durham suit subsequently denied these motions, and granted a preliminary injunction against Consolidated and Reidsville. Consolidated and Reidsville appeal from these orders.

On 28 June 1999, Durham moved to dismiss the Mecklenburg suit pursuant to N.C.R. Civ. P. 12(b)(1) and 12(b)(6), contending that the issues are not appropriate for a declaratory judgment proceeding. On 18 August 1999, the trial court granted Durham's motion to dismiss as to the portion of the complaint seeking a declaratory judgment that

Consolidated has not tortiously interfered with any contractual relationship between Durham and Reidsville. However, the trial court denied Durham's motion to dismiss as to the portion of the complaint seeking a declaratory judgment that the letters exchanged between Durham and Reidsville did not form a binding contract. Durham appeals from the order of the trial court to the extent it denied Durham's motion to dismiss. We have consolidated the two proceedings in order to address all of the issues.

II. THE MECKLENBURG SUIT

A. Motion to Dismiss Durham's Appeal

Initially, we address whether Durham's appeal in the Mecklenburg suit is properly before us. Consolidated has filed a motion to dismiss the appeal on the grounds that it is interlocutory. Durham contends that although the appeal is interlocutory, it is properly before this Court because it affects a "substantial right" pursuant to N.C.G.S. §§ 1-277(a) and 7A-27(d)(1) (1999). While we agree that the appeal is interlocutory, we need not determine whether the trial court's order affects a substantial right because we have elected in our discretion to treat the purported appeal as a petition for writ of certiorari and to address the merits of the appeal. *See* N.C.R. App. P. 21(a)(1); N.C.G.S. § 7A-32(c) (1999). Accordingly, Consolidated's motion to dismiss Durham's appeal is denied.

B. Issues Remaining Pursuant to Consolidated's Claim for Declaratory Judgment

In its amended complaint, Consolidated purports to seek declaratory judgment as to three separate issues: (1) whether Consolidated has tortiously interfered with any contractual rights between Durham and Reidsville; (2) whether Durham has an enforceable contract to purchase Reidsville; and (3) whether Consolidated was justified in acquiring Reidsville. In fact, only issues (1) and (2) need be considered since judgments as to these two issues would logically resolve issue (3). This conclusion is based on the following reasoning: if, on the one hand, the alleged contract between Durham and Reidsville is not enforceable, it follows that Consolidated would have been justified in acquiring Reidsville; if, on the other hand, the alleged contract is enforceable, then a judgment as to whether Consolidated's actions constituted tortious interference would determine whether Consolidated was justified in acquiring Reidsville. Furthermore, issue (1) is not before us because the trial court granted Durham's motion

to dismiss as to this issue, and Consolidated has not appealed from that portion of the trial court's order. Thus, there is only one viable issue remaining pursuant to Consolidated's declaratory judgment claim, namely whether Durham has an enforceable contract to purchase Reidsville. We note that this conclusion is consistent with the trial court's description of the remaining issues in its 18 August 1999 order.

C. Consolidated's Standing to Seek a Declaratory Judgment

[1] Durham contends that Consolidated cannot maintain a declaratory judgment suit to determine the validity of a contract to which it is not expressly a party. Consolidated, on the other hand, contends that there is no such general prohibition, and that a declaratory judgment suit is appropriate under the present circumstances. At the outset, we agree with Consolidated that there is no general rule prohibiting an entity from bringing a declaratory judgment suit to determine the validity of a contract to which it is not expressly a party.

To begin with, § 1-254 of our Declaratory Judgment Act itself provides that "[a]ny person interested under a . . . written contract . . . or whose rights, status or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254 (1999). Furthermore, it is well-established that the purpose of the Declaratory Judgment Act is "to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations," *Walker v. Phelps*, 202 N.C. 344, 349, 162 S.E. 727, 729 (1932), and that the Act "is to be liberally construed and administered." *Id.* Addressing the requirements for jurisdiction in a declaratory judgment suit, our Supreme Court has stated:

> It is required only that the plaintiff shall allege in his complaint and show at the trial, that a real controversy, arising out of [the parties'] opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing . . . exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure.

Light Co. v. Iseley, 203 N.C. 811, 820, 167 S.E. 56, 61 (1933). A plaintiff need only show the existence of some claim which "disturbs the

title, peace, or freedom of the plaintiff," or which, "by casting doubt, insecurity, and uncertainty upon the plaintiff's rights or status, damage[s] his pecuniary or material interests." Edwin M. Borchard, *Declaratory Judgments*, at 39 (2d ed. 1941). Therefore, the fact that Consolidated is not expressly a party to the contract at issue does not necessarily preclude it from bringing a declaratory judgment suit. A party who seeks a declaratory judgment as to the validity of a contract need only have some cognizable interest under the contract. *See Terrell v. Lawyers Mut. Liab. Ins. Co.*, 131 N.C. App. 655, 660, 507 S.E.2d 923, 926 (1998) (holding that a party seeking to have a written contract construed by way of a declaratory judgment must have an interest thereunder).

Consolidated purports to have purchased Reidsville, and for this reason purports to own most of Reidsville's assets. If the alleged contract between Durham and Reidsville is, in fact, enforceable, Consolidated may find that it has also purchased some liability to Durham along with its purported purchase of Reidsville. If Reidsville is at some point found to have breached a contract with Durham, Durham may have a claim to some of the assets which now purportedly belong to Consolidated. Simply put, it appears to us that Consolidated does have a cognizable interest under the alleged contract between Durham and Reidsville as a result of having purportedly purchased Reidsville. Thus, we do not agree with Durham's contention that Consolidated is precluded from maintaining this declaratory judgment suit simply because Consolidated seeks to determine the validity of a contract to which it is not expressly a party.

D. Discretion to Render a Declaratory Judgment

1. Background for Analysis

[2] Section 1-257 of our Declaratory Judgment Act, entitled "Discretion of court," provides that a court "may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." N.C.G.S. § 1-257 (1999). This provision of our General Statutes has been cited in only a small handful of cases, and has, to date, not been the subject of any significant consideration by this Court or our Supreme Court. As a result, there is sparse precedent in our case law to provide guidance regarding G.S. § 1-257.

However, an examination of its history reveals that G.S. § 1-257 is based upon § 6 of the 1922 Uniform Declaratory Judgment Act. While the federal equivalent of our State's Declaratory Judgment Act, the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (1999), does not expressly incorporate § 6 of the Uniform Act as our State's Act does, the federal courts have long relied upon § 6 of the Uniform Act when addressing a federal court's discretion to issue declaratory judgments. *See, e.g., Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321, 324 (4th Cir. 1937). The federal courts have consistently applied the Federal Act with the presumption that a trial court is not obligated to render a declaratory judgment, but may, in its discretion, decide to render a declaratory judgment when it appears that doing so would further the objectives of the Act. *See, e.g., Wilton v. Seven Falls Co.*, 515 U.S. 277, 286, 132 L. Ed. 2d 214, 223 (1995) ("Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.").

The issue typically arises where: (1) a party brings a declaratory suit in federal court pursuant to the Federal Act seeking to address issues that are part of a larger underlying controversy; and (2) the natural plaintiff in the underlying controversy has already filed a suit in state court, or is planning to do so, to address all of the various issues in the underlying controversy. The party bringing the declaratory suit in federal court would naturally be the defendant in the underlying controversy, but adopts the role of the plaintiff in the declaratory suit. Because this situation arises fairly frequently, the federal courts have often been called upon to address in depth the circumstances in which it is appropriate for a trial court to refuse to entertain a declaratory suit. Although this Court is not bound by these federal cases, *see Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986), we find the approach taken by the federal courts on this issue to be logical and persuasive. Therefore, as we have in the past, we deem it appropriate to examine federal court decisions addressing this declaratory judgment issue. *See id.*

2. Standard of Review

Until 1995, the federal circuit courts were divided on the applicable standard in reviewing a trial court's decision to grant, or refuse to grant, declaratory relief. However, this issue was resolved by the United States Supreme Court in *Wilton*, in which case the Court held that a trial court's decision to grant, or refuse to grant, declaratory

relief is reviewed for abuse of discretion. The Court explained that the Declaratory Judgment Act is best effectuated if trial courts are vested "with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." *Wilton*, 515 U.S. at 289, 132 L. Ed. 2d at 225. Thus, in the instant case, we review the trial court's order denying Durham's motion to dismiss pursuant to an abuse of discretion standard.

3. Guiding Principles

Federal courts have long agreed that declaratory judgment suits should be entertained by a trial court where the declaratory relief sought by the plaintiff (1) "will serve a useful purpose in clarifying and settling the legal relations in issue," and (2) "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Borchard, *Declaratory Judgments*, at 299, *cited with approval in Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996); *Grand Trunk R. Co. v. Consol. R. Corp.*, 746 F.2d 323, 326 (6th Cir. 1984); *Quarles*, 92 F.2d at 325. These two fundamental principles require, first of all, consideration of whether the declaratory proceeding will settle the entire underlying controversy. The declaratory remedy should not be invoked "to try a controversy by piecemeal, or to try particular issues without settling the entire controversy." *Quarles*, 92 F.2d at 325. This is especially so where a separate suit has been filed, or is likely to be filed, that will more fully encompass the scope of the entire controversy. *See Poston*, 88 F.3d at 258 (affirming decision of trial court to dismiss declaratory judgment suit because it would settle only part of controversy while pending state litigation could resolve entire matter). The interests of judicial economy and efficiency weigh in favor of suits that will settle all of the issues in the underlying controversy. *See Mitcheson v. Harris*, 955 F.2d 235, 239 (4th Cir. 1992) ("[I]t makes no sense as a matter of judicial economy for a federal court to entertain a declaratory action when the result would be to 'try a controversy by piecemeal, or to try particular issues without settling the entire controversy.' " (quoting *Quarles*, 92 F.2d at 325)).

These principles also call for consideration of the usefulness of a declaratory suit in light of the surrounding circumstances. A declaratory proceeding can serve a useful purpose where the plaintiff seeks to clarify its legal rights in order to prevent the accrual of damages, or seeks to litigate a controversy where the real plaintiff in the controversy has either failed to file suit, or has delayed in filing.

However, a declaratory suit should not be used as a device for "procedural fencing." *See Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 377 (4th Cir. 1994). A defendant in a pending lawsuit should not be permitted to bring a declaratory suit involving overlapping issues in a different jurisdiction as a strategic means of obtaining a more preferable forum. *See BASF Corp. v. Symington*, 50 F.3d 555, 559 (8th Cir. 1995). Otherwise, the natural plaintiff in the underlying controversy would be deprived of its right to choose the forum and time of suit. *See id.* Furthermore, it is inappropriate for a potential tortfeasor to bring a declaratory suit against an injured party for the sole purpose of compelling the injured party "to litigate [its] claims at a time and in a forum chosen by the alleged tortfeasor." *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165, 1167 (7th Cir.), *cert. denied*, 395 U.S. 959, 23 L. Ed. 2d 745 (1969).

We also note that in situations in which two suits involving overlapping issues are pending in separate jurisdictions, priority should not necessarily be given to a declaratory suit simply because it was filed earlier. Rather, if the plaintiff in the declaratory suit was on notice at the time of filing that the defendant was planning to file suit, a court should look beyond the filing dates to determine whether the declaratory suit is merely a strategic maneuver to achieve a preferable forum. *See Poston*, 88 F.3d at 258 ("[A]lthough the federal action was filed first, we decline to place undue significance on the race to the courthouse door, particularly in this instance where [the plaintiff] had constructive notice of [the defendant's] intent to sue."); *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 (5th Cir. 1983) (holding that plaintiff should not be permitted to gain precedence in time and forum by filing a declaratory action which is merely anticipatory of a parallel state action).

E. Consolidated's Declaratory Judgment Suit

[3] The underlying controversy in the instant case involves three parties: Durham, Reidsville, and Consolidated. The three legal issues in this controversy are: (1) whether the letters exchanged between Durham and Reidsville, and the surrounding circumstances, constitute a binding contract for the sale of Reidsville to Durham; (2) whether Reidsville has breached a contract with Durham; and (3) whether Consolidated has tortiously interfered with a contractual relationship between Durham and Reidsville. The natural plaintiff in this controversy is Durham, since Durham has been unsuccessful in its efforts to purchase Reidsville and alleges damages as a result. The natural defendants are Reidsville and Consolidated, whose actions

may have caused the alleged damages. Neither Consolidated nor Reidsville has any claim against Durham, since neither claims to have been injured by Durham.

A declaration in the Mecklenburg suit would only settle one small piece of the larger underlying controversy. For example, a declaration that the alleged contract between Durham and Reidsville is binding would not determine whether Reidsville breached the contract, and would not determine whether Consolidated tortiously interfered with this contract. In addition, as the declaratory proceeding now stands, Reidsville is not a party, and, thus, any declaration as to Reidsville's legal rights and status would be ineffectual. The Durham suit, however, addresses all of the issues and includes all of the parties involved in the underlying controversy. A declaratory remedy should not be invoked "to try a controversy by piecemeal, or to try particular issues without settling the entire controversy." *Quarles*, 92 F.2d at 325. We believe that allowing the Mecklenburg suit to proceed would conflict with the interests of judicial economy and efficiency.

Furthermore, Consolidated cannot argue that the declaratory suit is useful on the grounds that the natural plaintiff in the controversy, Durham, failed to initiate litigation or delayed in initiating litigation. When Consolidated filed the declaratory suit on 19 April 1999, it was well aware that Durham would likely sue Consolidated for tortious interference with a contractual relationship if Consolidated interfered with Durham's agreement to purchase Reidsville. Consolidated had not yet purchased Reidsville, and, as a result, Durham had no reason, at that time, to bring a tortious interference suit against Consolidated.

Consolidated also knew that Durham had already filed suit in Durham County against Reidsville seeking specific performance of the alleged contract between Durham and Reidsville. Thus, Consolidated cannot contend that the natural plaintiff, Durham, was unwilling to litigate the controversy. Although it could have, Consolidated chose not to intervene in the first Durham suit. Instead, it filed a separate suit involving overlapping issues, including whether a contract was formed between Durham and Reidsville as a result of the letters exchanged between them.

In addition, Consolidated cannot argue that a declaration of its rights will be useful in helping Consolidated to determine whether to purchase Reidsville, since Consolidated purports to have already purchased Reidsville. The only way in which the Mecklenburg suit

may be useful to Consolidated is by allowing Consolidated to avoid litigating the controversy in Durham County. We cannot condone using the Declaratory Judgment Act to obtain a more preferable venue in which to litigate a controversy. Such "procedural fencing" deprives the natural plaintiff of the right to choose the time and forum for suit. Furthermore, the fact that Consolidated's declaratory suit was filed prior to the second Durham suit is not dispositive. To hold otherwise would be to encourage a race to the courthouse in situations in which a potential defendant anticipates litigation by the natural plaintiff in a controversy.

After careful consideration, we conclude that Consolidated's Declaratory Judgment suit should be dismissed pursuant to G.S. § 1-257. We reverse the trial court's order of 18 August 1999 and remand for entry of an order granting Durham's motion to dismiss.

III. THE DURHAM SUIT

On appeal in the Durham suit, Consolidated assigns error to the trial court's 7 July 1999 order denying defendants' motion to dismiss or stay pursuant to N.C.R. Civ. P. 13(a) on the grounds that Durham's claims are compulsory counterclaims in the prior pending Mecklenburg lawsuit. Because we have determined that the Mecklenburg suit should be dismissed pursuant to G.S. § 1-257, that suit is no longer pending and Consolidated's motion to dismiss or stay in the Durham suit is moot. This assignment of error is overruled.

[4] Next, Consolidated and Reidsville contend the trial court erred in granting Durham's motion for preliminary injunction in its order of 7 July 1999. Consolidated and Reidsville correctly concede that the grant of a preliminary injunction is interlocutory in nature, but argue that the issue is properly before us on appeal because the injunction affects a substantial right pursuant to G.S. §§ 1-277(a) and 7A-27(d)(1). It is well-established that an interlocutory order is appealable under the "substantial right" exception where (1) the right itself is substantial, and (2) the order deprives the appellant of a substantial right which will be lost if the order is not reviewed before final judgment. *See J & B Slurry Seal Co. v. Mid-South Aviation*, Inc., 88 N.C. App. 1, 5-6, 362 S.E.2d, 812, 815 (1987). Reidsville argues that certain real property not purchased by Consolidated, including an office, a warehouse, and two residential rental properties, are subject to the preliminary injunction, and that the injunction affects a substantial right because it prevents Reidsville from renting or selling

this real property. Consolidated argues that the preliminary injunction affects its substantial right to operate its "entire business, including the portion purchased from Reidsville."

As to Consolidated's argument, the preliminary injunction merely prevents Consolidated from selling or otherwise disposing of the Reidsville assets it has purportedly purchased. Any and all business operations in which Consolidated engaged prior to the alleged purchase of Reidsville are not impacted by the injunction, and we fail to see how such an injunction can accurately be said to affect a substantial right by preventing Consolidated from operating its "entire business." Nor are we persuaded by Reidsville's argument that the right to rent or sell a few remaining items of real property constitutes a substantial right within the context of a multi-million dollar sale of the vast majority of its assets.

However, even assuming that the rights claimed by Reidsville and Consolidated are substantial rights, there has been no showing that these rights will be lost if the order granting a preliminary injunction is not reviewed before final judgment. These rights still exist and, at most, have been temporarily delayed in order to maintain the status quo during the litigation. Furthermore, the trial court has provided protection for defendants' rights by requiring Durham to post security bonds in the amount of $50,000.00 for Consolidated and $25,000.00 for Reidsville. We also note that, to the extent that the preliminary injunction does inconvenience Reidsville and Consolidated while in effect, the interests of these parties would best be served by a prompt remand of the Durham suit for further proceedings and a resolution on the merits. We hold the trial court's interlocutory order granting a preliminary injunction is not properly before us.

[5] Finally, Reidsville assigns error to the trial court's order denying its motion to dismiss or transfer pursuant to G.S. § 1-76(4). This statute requires that lawsuits for recovery of personal property must be brought in the county in which the subject of the suit, or some part thereof, is situated when recovery of the property itself is the sole or primary relief demanded. G.S. § 1-76(4). Although this is an interlocutory order, appeal from this order is not premature because Reidsville appeals from the denial of a motion for a change of venue as a matter of right pursuant to G.S. § 1-76(4). *See Klass v. Hayes*, 29 N.C. App. 658, 660, 225 S.E.2d 612, 614 (1976).

Reidsville argues that the Durham suit is a proceeding to recover personal property and must be brought in Guilford County because

the operating assets of Reidsville were moved to Guilford County upon the purchase by Consolidated. We disagree. The specific performance claim, pursuant to which Durham arguably seeks to recover personal property, is neither the sole nor the primary relief requested in the Durham suit, as required by G.S. § 1-76(4). Furthermore, the assets Durham seeks to recover pursuant to the specific performance claim largely include intangible assets such as Reidsville's stock, good will, contract rights, consumer lists, and exclusive sales territory. Intangible personal property is not subject to the venue requirements of G.S. § 1-76(4). *See Flythe v. Wilson*, 227 N.C. 230, 233, 41 S.E.2d 751, 752 (1947). We find no error in the trial court's denial of the motion to dismiss or transfer pursuant to G.S. § 1-76(4). This assignment of error is overruled.

As to the judgment in 99CVS6062, reversed.

As to the judgment in 99CVS2459, affirmed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

MARY ELLEN CONNELLY, ROBERT CONNELLY, BRIAN CONNELLY, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, NANCY McBRIDE, AND NELLIE LOCKETT, PLAINTIFFS V. FAMILY INNS OF AMERICA, INC., FAMILY INNS OF AMERICA FRANCHISING, INC., FAMILY INNS OF ROWLAND, INNCO MANAGEMENT CORPORATION, ROWLAND ASSOCIATES, LTD., A LIMITED PARTNERSHIP, BILL THOMAS, KENNETH SEATON, WAYNE DAVIS, AND GERALD WILLIAMSON, DEFENDANTS

No. COA99-1241

(Filed 29 December 2000)

1. Negligence— failure to provide adequate security—summary judgment improper—foreseeability based on numerous criminal acts—proprietor on actual or constructive notice

The trial court erred by granting summary judgment in favor of defendants on a negligence claim based upon defendants' alleged failure to provide adequate security at their motel even though there is no duty on the part of a proprietor to insure the

safety of his patrons unless it is reasonably foreseeable that the conditions on the motel premises were such that its guests might be exposed to injury by the criminal acts of third persons, because: (1) the criminal act of armed robbery in this case was foreseeable in light of the one hundred instances of criminal activity occurring at the nearby I-95, U.S. 301 intersection in the preceding five years; and (2) it is reasonable to infer that if criminal incidents occurred so close to defendants' motel, defendants were or should have been aware of those facts which should have prompted them to take adequate safety measures.

2. Appeal and Error— preservation of issues—failure to specifically name claims or mention requisite elements— failure to relate listed cases to any argument

Although plaintiffs appeal the trial court's grant of summary judgment in favor of defendants on claims of negligent misrepresentation, negligent infliction of emotional distress, bad faith violation of special relationship, loss of consortium, intentional infliction of emotional distress, fraud, and unfair trade practices, plaintiffs failed to adequately preserve these claims for review because: (1) plaintiffs neither specifically named their negligence-based claims nor mentioned the requisite elements of the claims in their argument as required by N.C.G.S. § 1A-1, Rule 56(c), and have therefore abandoned them under N.C. R. App. P. 28(b)(5); (2) any argument by plaintiffs as to the existence of an issue of fact on foreseeability of crime at defendant's motel does not, in and of itself, address reversal of summary judgment on plaintiffs' remaining negligence-based claims and the claim for bad faith violation of a special relationship; and (3) plaintiffs listed cases for the remaining claims without relating those cases to any argument.

3. Damages and Remedies— punitives—willful or wanton negligence not shown—summary judgment proper

The trial court did not err by granting summary judgment for defendants as to the punitive damages claim based on willful or wanton negligence allegedly demonstrated by defendants' failure to make needed security changes at their motel in response to numerous criminal incidents at the nearby I-95, U.S. 301 intersection, because: (1) the alleged aggravating circumstances encompassing defendants' failure to provide reasonable and economically feasible measures standing alone is insufficient evidence; and (2) the motel manager's refusal to refund the modest room

charge after plaintiffs were robbed on the premises is not a basis for submitting the issue of punitive damages to the jury.

Judge WALKER concurring.

Appeal by plaintiffs from order entered 17 March 1999 and order entered 28 May 1999 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 28 August 2000.

Parker, Poe, Adams & Bernstein, L.L.P., by Jack L. Cozort and Stephen D. Coggins, for the plaintiff-appellants.

Young, Moore & Henderson, P.A., by John A. Michaels and Kathryn H. Hill, for the defendant-appellees.

LEWIS, Judge.

This case arose from an armed robbery that took place at the Family Inn Motel in Rowland, North Carolina ("Family Inn"). On 19 July 1994, plaintiffs Mary Ellen Connelly, her son, Brian Connelly, and his grandmother, Nellie Lockett, were traveling south on Interstate Highway 95 en route to Florida for a family vacation from their home in Pennsylvania. They obtained lodging for the night at the Family Inn, located at the intersection of Interstate 95 and U.S. Highway 301 ("I-95, U.S. 301 intersection"). The North Carolina-South Carolina border runs through this intersection. The commercial area known as "South of the Border" is across I-95, U.S. 301 intersection but is part of the same intersection, although it is located in South Carolina.

At approximately 2 a.m., while plaintiffs were asleep, two men entered through the door of plaintiffs' motel room, which contained only a push lock on the doorknob; there was no evidence of a chain or deadbolt. One of the men brandished a small handgun, announced, "This is a wake-up call!" and threatened to shoot plaintiffs if they could not find any money. They ordered plaintiffs to lie on the floor and cover themselves with sheets; they then ripped the phone wires out of the wall. One of the thieves walked outside to the parking lot to search Mary Ellen Connelly's car, which was parked directly outside the motel room. During this time, a local police officer drove through the parking lot, waving to the intruder as he drove by. The robbers left with Nellie Lockett's ATM card and pin number, seventy-five dollars in cash, two gold rings and two gold watches. The plaintiffs suffered no physical injuries.

After the intruders left, Mary Ellen Connelly went to the front office of the Family Inn, where the desk clerk called the police. The motel refused to refund plaintiffs' money for the room, but offered them another room in which to stay. After giving the police a description of the intruders, however, plaintiffs checked out of the Family Inn in the early morning hours and drove to Florida.

On 16 December 1996, plaintiffs brought suit against numerous defendants variously associated with the Family Inn. Plaintiffs first claimed that their injuries and damage were proximately caused by, among other things, defendants' negligent failure to provide adequate security for the protection of its patrons against intentional criminal acts of third parties and failure to maintain adequate control over keys to the rooms. In addition, plaintiffs alleged claims for (2) negligent misrepresentation, (3) negligent infliction of emotional distress, (4) intentional infliction of emotional distress, (5) fraud, (6) bad faith violation of special relationship, (7) unfair trade practices and (8) loss of consortium.

On 17 March 1999, the trial court granted summary judgment for defendants on all claims. The trial court thereafter denied plaintiffs' motions under Rule 59 to alter or amend the order of summary judgment and Rule 60 to vacate the summary judgment in its entirety. Plaintiffs appeal.

NEGLIGENCE

[1] The first issue is whether plaintiffs presented a sufficient forecast of evidence in support of their negligence claim based upon defendants' alleged failure to provide adequate security at the Family Inn to withstand defendants' motion for summary judgment. On appeal, the parties dispute whether plaintiffs presented sufficient proof on the issue of whether criminal acts at the Family Inn were foreseeable, which would create a duty in defendants to provide adequate protection for its guests.

Plaintiffs have dedicated a large part of their argument to several alternate theories of determining whether defendants had a duty to safeguard their patrons from criminal acts of third parties. In one, plaintiffs contend defendants' duty is established by N.C. Gen. Stat. § 72-1(a), which provides that "[e]very innkeeper shall at all times provide suitable lodging accommodations for persons accepted as guests in his inn or hotel." Plaintiffs assert the statute's mandate of "suitable lodging accommodations" sets forth an affirmative require-

ment which effectively makes innkeepers insurers of the safety of their guests, citing *Patrick v. Springs*, 154 N.C. 270, 70 S.E. 395 (1911).

In analyzing G.S. 72-1(a), this Court has made clear that the provision "does no more than state the common law duty of an innkeeper to provide suitable lodging to guests, and carries with it *no warranty of personal safety.*" *Urbano v. Days Inn*, 58 N.C. App. 795, 799, 295 S.E.2d 240, 242 (1982) (emphasis added). Furthermore, *Patrick v. Springs* involved neither application of G.S. 72-1 nor criminal acts of third parties. Rather, *Patrick* concerned a hotel guest who was asphyxiated by a leaking gas pipe in his hotel room, and did not address the issue of criminal acts by third parties. *Patrick*, 154 N.C. at 271-72, 70 S.E.2d at 395.

In addition, plaintiffs cite an array of cases in support of a rule that prima facie liability of negligence is established where a motel's doorlock system fails to prevent minimal effort intrusions. We reject this argument. From this jurisdiction, plaintiffs have cited only *Madden v. Carolina Door Controls*, 117 N.C. App. 56, 449 S.E.2d 769 (1994). In *Madden*, the plaintiff was injured by an automatic door in a supermarket. *Id.* at 57, 449 S.E.2d at 770. The Court's analysis focused on the doctrine of *res ipsa loquitor*. *Id.* at 59, 449 S.E.2d at 771. The *Madden* Court did not even suggest a rule regarding negligence in the instance of an intrusion by a third party, as is at issue here. We find *Madden* and the numerous cases from other jurisdictions set forth by plaintiffs in this regard inapplicable.

We turn now to the necessary issue of foreseeability. It is well settled in North Carolina that there is no duty on the part of a proprietor to insure the safety of his patrons. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981). Rather, such a person owes only the general duty of ordinary care to maintain the premises in such a condition that it may be used safely by guests in the manner for which it was intended. *Rappaport v. Days Inn*, 296 N.C. 382, 383-84, 250 S.E.2d 245, 247 (1979). Generally, intentional, criminal acts of third persons cannot be reasonably foreseen by the proprietor, and therefore constitute an independent, intervening cause absolving the owner of liability. *Foster*, 303 N.C. at 638, 281 S.E.2d at 38.

The test in determining whether a proprietor has a duty to safeguard his patrons from injuries caused by the criminal acts of third persons is one of foreseeability. *Murrow v. Daniel*, 321 N.C. 494, 501,

364 S.E.2d 392, 397 (1988). The most probative evidence on the question of whether a criminal act was foreseeable is evidence of prior criminal activity committed. *Sawyer v. Carter*, 71 N.C. App. 556, 558, 322 S.E.2d 813, 815, *disc. review denied*, 313 N.C. 509, 329 S.E.2d 93 (1985). However, certain considerations restrict us as to which evidence of prior criminal activity is properly considered. General considerations are the location where the prior crimes occurred, *see, e.g.*, *Murrow*, 321 N.C. at 501, 364 S.E.2d at 397 (considering location of prior crimes as guiding foreseeability analysis), the type of prior crimes committed, *see, e.g.*, *Shepard v. Drucker & Falk*, 63 N.C. App. 667, 670, 306 S.E.2d 199, 202 (1983) (considering type of prior crime), and the amount of prior criminal activity, *see, e.g.*, *Urbano*, 58 N.C. App. at 798, 295 S.E.2d at 242 (considering number of prior crimes).

Here, plaintiffs have submitted hundreds of incident reports as bearing on the question of whether criminal acts at the Family Inn were foreseeable. These reports relate incidents occurring in a variety of places, including the premises of the Family Inn, sites in Rowland and Lumberton, North Carolina, and the South of the Border area in South Carolina. We will limit our consideration of these reports to the location in which they occurred.

Clearly, evidence of prior criminal activity occurring *on* the subject premises is sufficiently probative on the issue of foreseeability. *Urbano*, 58 N.C. App. at 797, 295 S.E.2d at 241. We first conclude that the incidents of criminal activity occurring in Lumberton, North Carolina, which is approximately twenty miles north of Rowland, is too remote to guide our determination of whether criminal acts were foreseeable in this case. *See, e.g.*, *Murrow*, 321 N.C. at 503, 364 S.E.2d at 398 (indicating evidence of criminal activity at another highway intersection located just *two miles away* from the I-95 and Highway 70 intersection should be excluded as physically too remote from defendants' motel to be of probative value).

In regard to which of the remaining off-premises incidents are properly considered, we turn to *Murrow*, 321 N.C. 494, 364 S.E.2d 392 (1988), which involved facts largely analogous to this case. The plaintiff in *Murrow* was sexually assaulted and robbed in her room at defendants' motel, located at the intersection of Interstate Highway 95 and N.C. Highway 70. *Id.* at 502, 364 S.E.2d at 397-98. The *Murrow* court held admissible evidence of prior crimes both *on* the premises of defendants' motel and from places of business at the surrounding I-95, Highway 70 interchange. *Id.* at 502, 364 S.E.2d at 398.

Accordingly, we consider evidence of criminal activity occurring at the surrounding I-95, U.S. 301 intersection, including that occurring on the premises of the Family Inn. This includes criminal activity from the surrounding South of the Border area, which, although in South Carolina, is part of the I-95, U.S. 301 intersection.

We next consider the types of criminal activity reflected in these incident reports. Plaintiffs have presented evidence of approximately one hundred sixty incidents of criminal activity occurring at the I-95, U.S. 301 intersection area in the preceding five years. These reported incidents include an assortment of criminal activity ranging from minor to serious. We do not agree that instances of public drunkenness, shoplifting, vandalism and disorderly conduct indicated by this evidence establish the foreseeability necessary to create a duty in this case. *See, e.g., Liller v. Quick Stop Food Mart, Inc.*, 131 N.C. App. 619, 624, 507 S.E.2d 602, 606 (1998) (refusing to consider shoplifting and "gas driveoffs" where the subject criminal activity was armed robbery). However, we do consider the following criminal activity occurring at the I-95, U.S. 301 intersection as bearing on the issue of foreseeability: two armed robberies, eleven assaults (three with intent to kill), five instances of breaking and entering, thirty-six instances of breaking and entering and larceny, forty-three larcenies, one attempted larceny, and two instances of pointing a firearm. *See, e.g., Murrow*, 321 N.C. at 502, 364 S.E.2d at 398 (considering incidents of armed robbery, kidnapping, assault, vehicle theft and breaking and entering and larceny as bearing on the issue of foreseeability).

We next consider the number of relevant reported crimes occurring in the I-95, U.S. 301 intersection. The evidence in this case, when viewed in the light most favorable to the plaintiffs, indicates that in the five years preceding the armed robbery in this case, one hundred instances of criminal activity bearing on the issue of foreseeability occurred at the I-95, U.S. 301 intersection. This number of crimes was sufficient to raise a triable issue of fact as to the foreseeability of the attack upon plaintiffs. *See also Murrow*, 321 N.C. at 502-03, 364 S.E.2d at 398 (evidence of one hundred incidents of criminal activity taking place at intersection where defendants' motel was located in the preceding four years raised a triable issue as to reasonable foreseeability); *Urbano*, 58 N.C. App. at 798-99, 295 S.E.2d at 242 (evidence of forty-two episodes of criminal activity taking place on motel premises during three-year period prior to plaintiff's injury raised a triable issue of reasonable foreseeability). *But cf. Liller*, 131 N.C. App. at 623, 507 S.E.2d at 606 (evidence of six undisputed incidents of crimi-

nal activity in the preceding three years insufficient evidence of foreseeability to survive defendant's summary judgment motion); *Sawyer*, 71 N.C. App. at 562, 322 S.E.2d at 817 (evidence of single robbery of convenience store five years earlier, coupled with evidence of occasional robberies of other convenience stores and businesses at unspecified locations over extended period of time insufficient evidence of foreseeability to survive defendant's summary judgment motion); *Brown v. N.C. Wesleyan College*, 65 N.C. App. 579, 583, 309 S.E.2d 701, 703 (1983) (holding that "scattered incidents of crime through a period beginning in 1959 were not sufficient to raise a triable issue as to whether the abduction and subsequent murder of plaintiff's intestate was reasonably foreseeable" by defendant college).

However, this does not end our inquiry on the question of foreseeability. Establishing a duty on the claim of negligence here is contingent upon notice to the proprietor of that criminal activity, which notice may be either actual or constructive. The Restatement (Second) of Torts, § 344 (1965) has been adopted by this Court in determining whether a duty exists to protect patrons from the criminal acts of third parties. In regard to notice, Restatement (Second) § 344, Comment f states:

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he *knows or has reason to know* that the acts of the third person are occurring, or are about to occur. He may, however, *know or have reason to know*, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he *should reasonably anticipate* careless or criminal conduct on the part of the third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

(Emphasis added) (cited in *Foster*, 303 N.C. at 639-40, 281 S.E.2d at 38-39).

Plaintiffs' evidence here fulfills the requirement of notice set forth in the Restatement (Second) of Torts. In addition to the incident reports indicating significant criminal activity in the area under con-

sideration, the evidence includes an affidavit from the Rowland Chief of Police stating that during the course of his career with the Rowland Police Department (since 1981), he was aware of a significant crime problem at the Family Inn. Even though a number of these incidents occurred at South of the Border and thus, were investigated by the Dillon County Sheriff's Department in South Carolina, it is reasonable to infer that if criminal incidents occurred so close to defendants' motel, the defendants were or should have been aware of those facts which should have prompted them to take adequate safety measures. *See also Murrow*, 321 N.C. at 502, 364 S.E.2d at 398.

We therefore conclude the evidence before the trial court in this case raised a triable issue as to whether defendants should have reasonably foreseen that the conditions on its motel premises were such that its guests might be exposed to injury by the criminal acts of third persons. Such issues were and still are for the jury and were not to be determined as a matter of law by the trial court. Accordingly, we reverse summary judgment as to plaintiffs' claim for negligence.

PLAINTIFFS' REMAINING CLAIMS

[2] In addition to the claim of negligence, plaintiffs appeal the trial court's grant of summary judgment as to their "negligence-based" claims of (1) negligent misrepresentation, (2) negligent infliction of emotional distress, (3) bad faith violation of special relationship, and (4) loss of consortium, as well as their remaining claims for (5) intentional infliction of emotional distress, (6) fraud and (7) unfair trade practices. Plaintiffs have failed to adequately preserve these remaining claims for our review.

We turn first to plaintiffs' "negligence-based" claims. Plaintiffs have neither specifically named these "negligence-based" claims nor mentioned the requisite elements of the claims in their argument. Although they have submitted to this Court volumes of evidence in the form of depositions, affidavits and various exhibits in response to defendants' motion for summary judgment, they have not pointed in their brief to any forecast of evidence establishing a prima facie case, or even an element of any of these claims, as they are required to do in a summary judgment case. N.C.R. Civ. P. 56(c); *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998).

We note that the foregoing foreseeability discussion examined the narrow issue of whether the evidence as to a proprietor's duty to

safeguard his guests from the criminal acts of third persons was sufficient to withstand summary judgment on plaintiffs' claim for negligence. Any argument by plaintiffs as to the existence of an issue of fact on foreseeability of crime at the Family Inn does not, in and of itself, address reversal of summary judgment on plaintiffs' remaining "negligence-based" claims. The remaining "negligence-based" claims include elements which are distinct to each of those claims and not part of plaintiffs' claim for negligence. *See, e.g., Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (citing elements of negligent infliction of emotional distress), *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990); *Johnson v. Johnson*, 317 N.C. 437, 447, 346 S.E.2d 430, 436 (1986) (citing requirements for loss of consortium); *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 669, 255 S.E.2d 580, 585 (citing elements of negligent misrepresentation), *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979). The same is true for plaintiffs' claim for bad faith violation of special relationship, which elements they have alleged to include: (1) defendants agreed to provide safe lodging for the plaintiffs (2) defendants breached that agreement and (3) it was reasonably foreseeable that the breach of that agreement would result in damages to plaintiffs. The discussion in plaintiffs' brief addresses whether criminal conduct could have been foreseeable at the Family Inn, which does not compose an entire element of any one of these "negligence-based" claims.

Having failed to establish by "reason or argument . . . or authority cited" that these remaining "negligence-based" claims should have been submitted to the jury in this case, we deem them abandoned under Appellate Rule 28(b)(5). Accordingly, we leave undisturbed the trial court's grant of summary judgment as to plaintiffs' "negligence-based" claims.

Similarly, we find plaintiffs have not properly preserved their remaining claims of (5) intentional infliction of emotional distress, (6) fraud and (7) unfair trade practices for our review. In support of their contention that summary judgment as to these claims should be reversed, plaintiffs have but listed cases; they have not related those cases to any argument in support of the trial court's denial of summary judgment on those claims. For instance, in reference to the claim of fraud, plaintiffs assert that the "Family Inn's misleading conduct fulfills the elements required for (a) the fraud causes of action . . . [For elements of fraud, see *Rowan Co. Bd. of Educ. v. United States Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 658-59

(1992)]." In order to properly preserve these claims for our review, plaintiffs must have done more than merely referencing "misleading conduct" from another portion of their brief and citing to case law without any accompanying argument as to the elements of the alleged claim. N.C.R. App. P. 28(b)(5); *Smith v. Carlina Coach Co.*, 120 N.C. App. 106, 114-15, 461 S.E.2d 362, 367 (1995) (holding plaintiff's mere contention in brief that evidence was sufficient to establish a prima facie case of defamation in the form of libel without supporting reason or argument insufficient to preserve issue for appellate review); *see also Brown v. Boney*, 41 N.C. App. 636, 647, 255 S.E.2d 784, 790-91 (holding plaintiff's listing of several cases in its brief with no attempt to relate those cases to its assignment of error violated Appellate Rule 28), *cert. denied*, 298 N.C. 294, 259 S.E.2d 910 (1979).

PUNITIVE DAMAGES

[3] Plaintiffs also contend the trial court erred in granting summary judgment for defendants as to the punitive damages claim based on willful or wanton negligence. Because we have reversed summary judgment only as to plaintiffs' negligence claim, we address the propriety of punitive damages with respect to that claim only. *See, e.g., Paris v. Kreitz*, 75 N.C. App. 365, 374, 331 S.E.2d 234, 241 (stating that party's entitlement to punitive damages does "not constitute a separate cause of action;" rather, it "can only arise in connection with the tortious act"), *disc. review denied*, 315 N.C. 185, 337 S.E.2d 858 (1985). We note that since Chapter 1D of the North Carolina General Statutes pertaining to punitive damages was not effective until after the incident in this case occurred, it does not apply. N.C. Gen. Stat. § 1D-1, Editor's Note (1999).

As a general rule, punitive damages may be recovered where tortious conduct is accompanied by an element of aggravation, as when the wrong is done willfully or under circumstances of rudeness, oppression, or express malice, or in a manner evincing a wanton and reckless disregard of the plaintiffs' rights. *Robinson v. Duszynski*, 36 N.C. App. 103, 106, 243 S.E.2d 148, 150 (1978). "An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others." *Siders v. Gibbs*, 39 N.C. App. 183, 187, 249 S.E.2d 858, 861 (1978). "An act is willful when there exists 'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another,' a duty assumed by contract or imposed by law." *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 383-84, 291 S.E.2d 897, 903 (quoting *Brewer v. Harris*,

279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971)), *aff'd* 307 N.C. 267, 297 S.E.2d 397 (1982).

The plaintiffs' forecast of evidence on the issue of willful and wanton conduct tended to show that the Family Inn failed to make needed security changes in response to numerous criminal incidents in the I-95, U.S. 301 intersection. The Family Inn displayed a video surveillance camera in the front reception area which did not actually work. It also failed to institute private security patrols, instead relying on local police, and did not post warning signs on the premises to ward off trespassers. In addition, plaintiffs contend the fact of the Family Inn's refusal to refund plaintiffs the cost of their room warranted submission of the issue of punitive damages to the jury.

The facts of this case are similar to those in *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E.2d 855, *disc. review denied*, 301 N.C. 239, 283 S.E.2d 136 (1980). In *Wesley*, plaintiff brought an action against the bus company for failing to protect her from an assault that occurred in the restroom of the defendant's bus station. *Id.* at 684, 268 S.E.2d at 859. The plaintiff established that defendant's bus station was located in a high crime area in which drug arrests were common and that pimps, prostitutes and vagrants loitered about the premises. *Id.* at 685, 268 S.E.2d at 859. The assailant, a loiterer, had bothered passengers in the station on other occasions and had been asked to leave on multiple occasions. *Id.* The entrance to the women's restroom was not observable by employees at defendant's station, although technological means were available to make it so. *Id.* at 700, 268 S.E.2d at 867. Though a police officer had spoken to defendant's agents about the need for and availability of security guards, the defendant had not provided any. *Id.* The *Wesley* Court concluded the evidence was insufficient to submit the issue of punitive damages based on willful or wanton negligence to the jury, even though the defendant had a special duty as a carrier to protect its passengers from assault. *Id.* at 701, 268 S.E.2d at 868; *see also Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 51, 524 S.E.2d 53, 60 (1999) (evidence that no security measures such as locks or guards were in place to protect customers at restaurant located in high crime area where one plaintiff was shot and killed and another injured was insufficient aggravation to submit punitive damages issue to the jury).

Applying the standard from *Wesley* to the evidence presented in this case, we conclude the evidence was insufficient to create a triable issue as to punitive damages. The alleged aggravating circum-

stances here encompass defendants' failure to provide reasonable and economically feasible measures. This, standing alone, was insufficient in *Wesley*, as it is in this case. In addition, however niggardly defendant's manager's refusal to refund the modest room charge after being robbed on the premises, this is not a basis for submitting the issue of punitive damages to the jury. Thus, the trial court did not err in granting summary judgment for defendants as to the punitive damages claim.

In sum, we reverse summary judgment only as to plaintiffs' claim for negligence. We affirm summary judgment as to the remaining claims, including negligent misrepresentation, negligent infliction of emotional distress, intentional infliction of emotional distress, fraud, bad faith violation of special relationship, unfair trade practices, loss of consortium and punitive damages.

Affirmed in part, reversed in part, and remanded.

Judge HUNTER concurs.

Judge WALKER concurs with separate opinion.

WALKER, Judge, concurring.

I write separately to emphasize the plaintiffs' entitlement to prove damages upon establishing their claim of negligence at trial.

The record reviewed by the trial court on defendants' motion for summary judgment included the plaintiffs' depositions. In their depositions, plaintiffs described the traumatic events of gunmen breaking into their room in the middle of the night, screaming, threatening, and robbing them of their valuables. This evidence from their depositions is set out in plaintiffs' brief. We have determined that, at this stage, the elements of negligence are satisfied such that plaintiffs' claim should survive summary judgment. If plaintiffs prove their claim of negligence at trial, they would be entitled to all damages which proximately flow from this negligence including all physical and mental injuries and pain and suffering.

As to the element of damages for pain and suffering:

> Pain and suffering damages are intended to redress a wide array of injuries ranging from physical pain to anxiety, de-

pression, and the resulting adverse impact upon the injured party's lifestyle.

David A. Logan and Wayne A. Logan, North Carolina Torts § 8.20 (d) at 178 (1996 edition).

STATE OF NORTH CAROLINA v. KENNETH A. BALDWIN

No. COA99-1283

(Filed 29 December 2000)

1. Appeal and Error— no objection at trial—insufficient assignment of error

The Court of Appeals was not able to consider whether the trial court impermissibly expressed an opinion during a rape and kidnapping trial where defendant did not object at trial and failed to preserve the issue in any manner in the record. When a trial court acts contrary to a statutory mandate to the prejudice of a defendant, the right to appeal is preserved notwithstanding defendant's failure to object, but defendant's assignments of error must be sufficient to direct the attention of the appellate court to the particular error, with clear and specific record or transcript references.

2. Kidnapping— second-degree—purpose of terrorizing victim—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a charge of second-degree kidnapping for the purpose of terrorizing the victim where defendant, the victim's estranged husband, brandished a gun and confined the victim in her apartment against her will for almost twenty hours; the victim did not have an opportunity to leave the apartment without going past defendant, who held a loaded weapon; despite the victim's repeated requests, defendant did not permit her to leave the apartment at any time; defendant repeatedly threatened to kill himself, pointing the gun at his head and saying that he wanted to kill himself in front of the victim; and the victim testified that she was petrified.

3. Kidnapping— second-degree—instruction on false imprisonment not required

The trial court did not err in a second-degree kidnapping prosecution by denying defendant's request for a jury instruction on the lesser-included offense of false imprisonment where there was no evidence from which a rational jury could have reasonably found that defendant confined, restrained, or removed the victim for some purpose other than terrorizing her. The evidence pointed to one purpose behind the kidnapping: terrorizing the victim (defendant's estranged wife) by forcing her to watch him either kill himself or, at the least, threaten to kill himself while pointing a gun to his head. Although defendant contends that his purpose was to commit suicide, neither the victim's presence nor his presence in her home was required.

4. Jury— deadlocked—refusal to grant mistrial

Based upon the totality of the circumstances, the trial court did not abuse its discretion by refusing to grant a mistrial after the jury indicated its inability to reach a unanimous verdict where the jury began deliberations at 2:00 p.m. on a Friday afternoon; resumed deliberations at 3:55 after a break; sent a note to the court at 4:05 indicating an impasse; the court returned the jury to the jury room at 4:06 for further deliberations; a dinner break was taken and the jury resumed deliberations at 6:35; the jury returned to the courtroom at 8:40 to indicate that they could not reach an unanimous decision; the judge gave the jury a fifteen-minute recess and an additional instruction; the jury resumed deliberations and returned at 9:55 to indicate an impasse; after a discussion, the judge concluded that the jury was making progress, the foreperson agreed, and the jury retired at 10:00; and the jury returned at 11:04 p.m. with unanimous verdicts. The fact that the jury was required to deliberate late on a Friday night was not dispositive; the court never expressed irritation or intimated that the jury would be held for an unreasonable period.

Appeal by defendant from judgment entered 25 June 1999 by Judge Thomas D. Haigwood in Superior Court, New Hanover County. Heard in the Court of Appeals 20 September 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel D. Addison for the State.

Neil D. Weber, for the defendant-appellant.

WYNN, Judge.

This appeal stems from the defendant's conviction for second-degree kidnaping as a result of events that occurred on 29 and 30 December 1997, but relevant evidence was presented regarding events that occurred within several years prior and several months subsequent to that time. In September 1997, the defendant and Cheryl Lang had been married for approximately seventeen and a half years, during which time the defendant had allegedly abused her both physically and verbally on numerous occasions, beginning shortly after their marriage. The defendant and Ms. Lang had two children during their marriage, a son and a daughter. The alleged incidents of abuse by the defendant became more frequent around 1991 or 1992, and often involved the defendant pulling Ms. Lang's hair, and pushing, pulling, hitting or kicking her. The defendant allegedly would throw items across the room in fits of anger, and was alleged to have physically abused the children on occasion.

On 14 September 1997, the defendant and Ms. Lang, together with their children, were living in Brooklyn, New York, having recently moved there from Germany. The defendant, who was a master sergeant in the Army at the time, was assigned to John F. Kennedy Airport. The defendant and Ms. Lang had taken their children to Manhattan for the day to sightsee. That evening, after the kids had gone to bed, the defendant and Ms. Lang were watching television when they began to argue. The defendant, who had been drinking, allegedly pushed Ms. Lang and then dragged her into the kitchen to force her to make a phone call to her mother. When she refused, the defendant went to bed, leaving Ms. Lang in the kitchen and telling her not to move. Ms. Lang gathered some of her belongings, collected the children, and decided to leave. As they were preparing to leave, the defendant woke up and became angry. The defendant grabbed Ms. Lang's throat and threatened her and the children that if they left they could never come back. Ms. Lang left nonetheless, taking the children with her. After staying overnight in Wilmington, Delaware with Ms. Lang's aunt, they continued the following day to Wilmington, North Carolina to stay with Ms. Lang's parents. Although the defendant and Ms. Lang corresponded occasionally by telephone and letters, according to Ms. Lang's testimony they did not see one another again until December 1997.

At that time, Ms. Lang and the children were living in an apartment in Wilmington, North Carolina and Ms. Lang was working at Chloride Power and Electronics. On 24 December 1997 the defendant,

who was from Wilmington and had family in the area, arrived in Wilmington for the Christmas holidays. The defendant was staying with his sister and her husband while in Wilmington. The defendant called Ms. Lang at her apartment at 10:00 p.m. on Christmas Eve and asked to see her. She responded that it was too late. On Christmas Day, Ms. Lang and the children spent several hours with the defendant and his family at the defendant's sister's house. Ms. Lang testified that during this gathering, upon prompting by the defendant, she told the defendant that the chances of their getting back together were not good. Over the next several days, the defendant visited Ms. Lang's apartment off and on to visit her and the children.

On 29 December 1997, Ms. Lang returned home from working all day. The defendant was at her apartment and had cooked dinner with the children, and they all sat down for dinner. After dinner, the children went to watch television and the defendant and Ms. Lang cleaned up, after which they went to her bedroom to talk in private. At that point Ms. Lang told the defendant that there was no chance of their reconciling and that the relationship was over. The defendant then made her walk out and tell the children that she was leaving the defendant and that they were getting a divorce, after which the defendant left the apartment, only to return a short time later.

When he returned to Ms. Lang's apartment approximately thirty minutes later, the defendant told Ms. Lang that there was something he needed to tell her before he left, and he again directed her back to the bedroom away from the children. After closing the bedroom door, the defendant pulled out a gun that he had retrieved from his sister's house while he was gone. The defendant pointed the gun in the air and waved it around, then chambered a round and pointed the gun at his own head, threatening to kill himself and stating that he had nothing to live for. Ms. Lang screamed and begged him not to kill himself and the defendant told her to keep quiet. He threw several hundred dollars at Ms. Lang and took off his wedding ring, giving it to Ms. Lang and telling her to give it to their daughter. The defendant told Ms. Lang that his insurance papers were in his foot locker and told her its combination.

Over the next several hours, Ms. Lang begged the defendant not to kill himself and to put the gun down. He would alternately hold the gun to his head, and then lower it. At breaks in the conversation, the defendant would remove the clip from the gun, but then reinsert it. Ms. Lang testified that she was petrified and was worried that the gun may fire accidentally. Ms. Lang asked the defendant why he was going

to kill himself in her apartment, and he responded that he wanted to do it in front of her. Ms. Lang asked if she could take the children elsewhere, but the defendant refused to allow her or the children to leave. He later told Ms. Lang that the children could leave, but Ms. Lang did not want the children to wander the busy street outside alone, so they stayed.

Ms. Lang continued begging the defendant not to kill himself, and he repeatedly asked her questions about what had gone wrong with their marriage and why she did not love him anymore. At one point, the defendant, who is diabetic, left the apartment to retrieve his glucometer from his car, taking the phone receiver with him. He instructed Ms. Lang not to move, and returned approximately a minute later with his glucometer. After testing his blood-sugar level with the glucometer and taking a shot, the defendant again threatened to kill himself, telling Ms. Lang to call an ambulance, which she refused to do.

This pattern continued into the morning of 30 December 1997, with the defendant threatening to kill himself and asking Ms. Lang what had gone wrong and Ms. Lang begging him not to kill himself and to allow her to leave. At one point during this period, Ms. Lang fell asleep for a short time, and awoke on the bed next to the defendant, who was awake with the gun next to him. The defendant did not allow her to leave the bedroom that night. At another point during the evening, the defendant and Ms. Lang had sexual intercourse, which Ms. Lang alleged to be non-consensual. In the morning of 30 December, the defendant again checked his blood-sugar level and took an insulin shot. Ms. Lang then accompanied the defendant to the kitchen where he got a soda, after which they returned to the bedroom. The defendant, threatening to shoot himself imminently, allowed Ms. Lang to leave the room to be with the children to comfort them when they heard the shot. Not wanting to wake the children, Ms. Lang instead sat in the hallway outside the bedroom with her hands over her ears. Shortly thereafter the defendant came and took her back into the bedroom, threatened again to kill himself, and again refused to allow Ms. Lang or the children to leave the apartment. The defendant briefly allowed Ms. Lang to leave the bedroom to go check on her son, whose bedroom door had opened, but he came and retrieved her again shortly thereafter.

After some convincing, the defendant allowed Ms. Lang to call her employer so she would not lose her job, but stood close by during the call and told her to be careful what she said. Ms. Lang simply

told her superiors that she was sick and hung up. Later that morning, a cable repairman stopped by in response to a repair call Ms. Lang had placed several days earlier. Ms. Lang left the bedroom to tell the repairman what was wrong, and the defendant stayed immediately behind her the entire time the repairman was in the apartment. After the repairman had left, Ms. Lang convinced the defendant to eat something to keep his blood sugar up and made a sandwich for him.

Eventually the defendant said something about needing help, and Ms. Lang agreed. Around 4:00 p.m. on 30 December 1997, Ms. Lang drove the defendant to the base hospital at Camp Lejeune. Before leaving for the hospital, the defendant gave to Ms. Lang the clip of bullets from the gun, which she hid in the apartment. She showered quickly, while the defendant talked to the children and told them what he was doing. After checking the defendant into the psychiatric ward at Camp Lejeune, Ms. Lang returned to Wilmington to her parents' house, where she broke down and told her parents of the overnight ordeal.

In February 1998, after talking with an attorney, Randall Rusch, Ms. Lang took out a restraining order against the defendant. She also filed a civil suit including claims for divorce, alimony, equitable distribution and child custody. Also in February 1998, Ms. Lang spoke to a domestic violence investigator with the Wilmington Police Department, Detective Malcolm Phelps. On 29 May 1998, at the urging of Mr. Rusch, Ms. Lang again spoke to Detective Phelps in detail regarding the events of 29 and 30 December 1997, and explained that she had been unable to serve the defendant with the restraining order. After giving a detailed statement to Detective Phelps and expressing her desire to press charges, warrants were issued charging the defendant with first-degree rape and first-degree kidnaping.

On 5 October 1998, the defendant was indicted for first-degree rape and first-degree kidnaping. Following a jury trial, the defendant was convicted of second-degree kidnaping and acquitted of the rape charge, and judgment was entered accordingly on 25 June 1999. The defendant appeals.

[1] On appeal, the defendant asserts four assignments of error. First, the defendant contends that the trial court committed plain error by impermissibly expressing an opinion during the trial. The defendant argues that, during the trial, the courtroom bailiff had been sitting or standing in front of the clerk's desk to the left of the judge. After the

defendant took the witness stand but before he began testifying, the court allegedly instructed the bailiff to sit between the jury and the witness stand to the right of the judge. The defendant argues that this conduct constituted an impermissible expression of opinion by the trial court which prejudiced the defendant and warrants a new trial. We disagree.

N.C. Gen. Stat. § 15A-1222 provides that "[t]he 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. Gen. Stat. § 15A-1222 (1988). Trial judges therefore have a duty of absolute impartiality, *State v. Fleming*, 350 N.C. 109, 125-26, 512 S.E.2d 720, 732, *cert. denied*, — U.S. —, 145 L. Ed. 2d 274 (1999), and must avoid even the "slightest intimation of an opinion," as "every defendant in a criminal case is entitled to a trial before an impartial judge and an unbiased jury." *State v. Sidbury*, 64 N.C. App. 177, 178-79, 306 S.E.2d 844, 845 (1983) (citation omitted).

Nonetheless, not every expression of opinion by the trial court constitutes prejudicial error. *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). "Whether the judge's comments, questions or actions constitute reversible error is a question to be considered *in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant.*" *Id.* (emphasis added) (citations omitted). In a criminal case, reversible error results where the jury may rationally infer from the trial judge's action an expression of opinion as to the defendant's guilt or the credibility of a witness. *Id.*

Generally, however, a "defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985); *see* N.C.R. App. P. 10(a) (2000). The defendant correctly points out that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *Ashe*, 314 N.C. at 39, 331 S.E.2d at 659. Nonetheless, for a defendant's assignments of error on appeal to be sufficient they must "direct 'the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.' " *State v. Nobles*, 350 N.C. 483, 505, 515 S.E.2d 885, 899 (1999) (quoting N.C.R. App. P. 10(c)(1) (2000)). As the defendant failed to object to the trial judge's conduct at trial, and failed to preserve the issue in any manner whatsoever in the record, the defend-

ant has failed to properly preserve the question and we are unable to properly consider this issue on appeal. *See Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248.

[2] In his second assignment of error, the defendant contends that the trial court erred in denying his motion to dismiss all charges at the close of the State's evidence on grounds of insufficient evidence to sustain a conviction. The defendant argues that the State failed to prove the specific intent necessary to support a conviction for second-degree kidnaping, specifically that the defendant unlawfully confined, restrained or removed Ms. Lang for the purpose of terrorizing her. We disagree.

"Since kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in the statute." *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986); *see* N.C. Gen. Stat. § 14-39 (Supp. 1996). Furthermore, the indictment in such cases must clearly state "the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment." *Moore*, 315 N.C. at 743, 340 S.E.2d at 404.

N.C. Gen. Stat. § 14-39 provides in relevant part that:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of: . . .
>
> > (3) [T]errorizing the person so confined, restrained or removed . . . ;
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39. The indictment on the charge of first-degree kidnaping in the present case stated the following:

> The jurors for the State upon their oath present that on or about the [29th day of December, 1997] and in [New Hanover County] [Kenneth A. Baldwin] unlawfully, willfully and feloniously did kidnap Cheryl [Lang], a person who had attained the age of 16 years by unlawfully confining, restraining, and removing her from one place to another without her consent and *for the purpose of terrorizing her.* Cheryl [Lang] was sexually assaulted.

(Emphasis added). Therefore, the State was limited at trial to proving that the defendant acted with the intent to terrorize Ms. Lang, and the jury was permitted to convict the defendant solely on that theory. *See Moore*, 315 N.C. at 743, 340 S.E.2d at 404; *see also State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983).

In reviewing the trial court's denial of the defendant's motion to dismiss for insufficiency of the evidence to sustain a conviction, we are required to review the evidence introduced at trial "in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime." *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). Substantial evidence is that which a reasonable juror would consider sufficient to support the conclusion that each essential element of the crime exists. *Id.* As explained by our Supreme Court, we must determine "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981).

In determining whether sufficient evidence was introduced to support the jury's determination that the defendant acted with the purpose of terrorizing Ms. Lang, "the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize her." *Moore*, 315 N.C. at 745, 340 S.E.2d at 405. Nonetheless, the victim's subjective feelings of fear, while not determinative of the defendant's intent to terrorize, are relevant. *See, e.g., id.*, 315 N.C. at 745, 340 S.E.2d at 406 (where victim testified that she was "very scared" and "horrified"); *State v. Williams*, 127 N.C. App. 464, 468, 490 S.E.2d 583, 586 (1997) (witnesses testified that the victim was crying and hysterical throughout the ordeal). Terrorizing requires not only the intent to place the victim in a state of fear, but requires "putting [the victim] in some high degree of fear, a state of intense fright or apprehension." *Moore*, 315 N.C. at 745, 340 S.E.2d at 405 (citing *State v. Jones*, 36 N.C. App. 447,

244 S.E.2d 709 (1978)). The presence or absence of the defendant's intent or purpose to terrorize Ms. Lang may be inferred by the fact-finder from the circumstances surrounding the events constituting the alleged crime. *State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 271 (1982).

The evidence introduced at trial, when viewed in the light most favorable to the State, showed that the defendant, while brandishing a gun, confined Ms. Lang in her apartment against her will for close to twenty hours. At no time during the ordeal in the apartment did Ms. Lang have an opportunity to leave the apartment without having to get past the defendant, who held a loaded weapon. At no time did the defendant permit her to leave the apartment, despite her repeated requests. The defendant repeatedly threatened to kill himself, pointing the gun at his own head, and stated that he wanted to kill himself in front of Ms. Lang. Ms. Lang testified that she was "petrified." We conclude that the State introduced sufficient evidence from which a rational trier of fact could have concluded beyond a reasonable doubt that the defendant acted with the purpose of terrorizing Ms. Lang.

[3] Next, we consider the defendant's contention that the trial court erred in denying the defendant's request for a jury instruction on the lesser-included offense of false imprisonment. As there was no evidence presented from which a rational jury could have reasonably found that the defendant confined, restrained or removed Ms. Lang for some purpose other than terrorizing her, we conclude that the trial court committed no error in denying the defendant's request.

Our courts have long held that false imprisonment is a lesser-included offense of the crime of kidnaping. *See State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514 (1986). When there is any evidence introduced at trial that would permit the jury to find the defendant guilty of a lesser-included offense, the failure of the trial court to instruct the jury regarding that lesser-included offense constitutes reversible error. *Id.* at 520, 342 S.E.2d at 518. " '[W]hether a defendant who confines, restrains, or removes another is guilty of kidnapping or false imprisonment depends upon whether the act was committed to accomplish one of the purposes enumerated in' " the kidnaping statute, N.C. Gen. Stat. § 14-39. *Id.* (quoting *State v. Lang*, 58 N.C. App. 117, 118-19, 293 S.E.2d 255, 256, *disc. review denied*, 306 N.C. 747, 295 S.E.2d 761 (1982)); *see* N.C. Gen. Stat. § 14-39. As previously noted, in a kidnaping case, the indictment must state with particular-

ity the purpose with which the defendant acted, and the State can only convict the defendant of confining, restraining or removing the victim for that specified purpose. *See Moore*, 315 N.C. at 743, 340 S.E.2d at 404. We must therefore determine whether "there was evidence from which the jury could have concluded that the defendant, although restraining, confining and removing the victim, [did so] for some purpose other than" to terrorize the victim. *Lang*, 58 N.C. App. at 119, 293 S.E.2d at 257.

The evidence reflects that the defendant forced Ms. Lang into her bedroom and confined her there throughout most of the night. While in the bedroom with Ms. Lang, he repeatedly held a gun to his head and threatened to kill himself. He assured her that he did not intend to harm her, but instead only intended to harm himself. To show her that he was serious about his suicidal threats, the defendant removed his wedding ring and told Ms. Lang to give it to their daughter. He also told Ms. Lang the combination to his foot locker, where all his insurance papers could be found. When asked why he wanted to kill himself in her apartment, the defendant responded that he wanted to kill himself right in front of her.

We believe that this evidence points to one singular purpose behind the defendant's kidnaping of Ms. Lang. Specifically, by forcing her to either watch him kill himself or, at the very least, watch him point a gun at his head and repeatedly threaten to do so, the defendant intended to terrorize Ms. Lang. *See generally State v. Surrett*, 109 N.C. App. 344, 351, 427 S.E.2d 124, 128 (1993) (holding that no false imprisonment instruction was required where the evidence of defendant forcing the victim into his vehicle and instructing her to lie down and remain quiet manifested the singular purpose of terrorizing the victim; *State v. Nicholson*, 99 N.C. App. 143, 147, 392 S.E.2d 748, 751 (1990) (holding that no false imprisonment instruction was required where the evidence of defendant grabbing victim, threatening her at gunpoint, and forcing her to walk to another room in her house pointed to the singular purpose of terrorizing the victim).

The defendant, however, maintains that the evidence reasonably suggests that his purpose in kidnaping Ms. Lang was to commit suicide. We do not find this to be the case. Simply stated, in order for him to commit suicide, neither Ms. Lang's presence nor her assistance was required. Indeed, he need not have been in her home. Thus, by bringing Ms. Lang into the picture (i.e. by forcing her to remain locked with him in her bedroom while he pointed a gun at his head), the defendant was necessarily acting with some purpose apart from wanting to

commit suicide. All the evidence suggests this purpose was to terrorize Ms. Lang. The defendant's contention that the trial court erred in denying his request for an instruction on the lesser-included offense of false imprisonment is therefore overruled.

[4] Lastly, we consider the defendant's contention that the trial court erred in failing to declare a mistrial after the jury indicated its inability to reach a unanimous verdict after deliberating for six hours. After sending the jury back for further deliberations, the jury ultimately returned its verdict after approximately eight total hours of deliberations. The defendant argues that the trial court improperly coerced the jury into reaching a verdict. We disagree.

N.C. Gen. Stat. § 15A-1235 concerns jury deliberations and the matter of deadlocked juries, and provides trial judges with clear standards for instructions urging jury verdicts. N.C. Gen. Stat. § 15A-1235 (1988); *see State v. Alston*, 294 N.C. 577, 597, 243 S.E.2d 354, 367 (1978). Subsection (c) provides that "[t]he judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." N.C. Gen. Stat. § 15A-1235(c). Subsection (d), which allows for declaration of a mistrial on the same grounds as N.C. Gen. Stat. § 15A-1063, provides that "the judge *may* declare a mistrial and discharge the jury" if there appears to be "no reasonable possibility of [unanimous] agreement" among the jurors. N.C. Gen. Stat. § 15A-1235(d) (emphasis added); *see* N.C. Gen. Stat. § 15A-1063 (1988); *State v. O'Neal*, 67 N.C. App. 65, 73 n. 2, 312 S.E.2d 493, 498 n. 2, *modified*, 311 N.C. 747, 321 S.E.2d 154 (1984). "The purpose behind the enactment of N.C.G.S. § 15A-1235 was to avoid coerced verdicts from jurors having a difficult time reaching a unanimous decision." *State v. Evans*, 346 N.C. 221, 227, 485 S.E.2d 271, 274 (1997), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998) (citation omitted).

It is well-settled that the decision to grant or deny a motion for mistrial lies within the sound discretion of the trial judge. *See State v. Wall*, 304 N.C. 609, 621, 286 S.E.2d 68, 76 (1982) (citations omitted); *State v. Chavis*, 134 N.C. App. 546, 552, 518 S.E.2d 241, 246 (1999), *cert. denied*, — N.C. —, — S.E.2d — (2000) (citation omitted). The trial judge's ruling on a motion for mistrial will not be disturbed on appeal "unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996) (citation omitted); *see State v. Nobles*, 350 N.C. 483, 511,

515 S.E.2d 885, 902 (1999); *State v. Darden*, 48 N.C. App. 128, 133, 268 S.E.2d 225, 228 (1980) ("the action of the judge in declaring or failing to declare a mistrial is reviewable only in case of gross abuse of discretion").

In reviewing whether the trial court coerced the jury into its verdict, we must consider the totality of the circumstances. *See Porter*, 340 N.C. 320, 335, 457 S.E.2d 716, 723 (1995). In reviewing the totality of the circumstances, some factors to consider are whether the trial court "conveyed an impression to the jurors that it was irritated with them for not reaching a verdict and whether the trial court intimated to the jurors that it would hold them until they reached a verdict." *Id.* (citing *State v. Beaver*, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988)). Our courts, however, have not adopted a bright-line rule setting an outside time-limit on jury deliberations, or a rule that deliberations for a certain length of time, in relation to the length of time spent by the State presenting its evidence, is too long.

Our Supreme Court has held that "[a] jury's failure to reach a verdict due to deadlock is 'manifest necessity' justifying declaration of a mistrial." *State v. Pakulski*, 319 N.C. 562, 570, 356 S.E.2d 319, 324 (1987) (citation omitted), *rev'd on other grounds*, 326 N.C. 434, 390 S.E.2d 129 (1990). Nonetheless, the Court has upheld decisions by trial courts to continue deliberations despite jury indications that it was "at a standstill," *Porter*, 340 N.C. at 337, 457 S.E.2d at 724, or "hopelessly deadlocked." *State v. Patterson*, 332 N.C. 409, 414, 420 S.E.2d 98, 100 (1992).

In the instant case, the jury retired to the jury room at 12:29 p.m. on Friday afternoon to select its foreperson. At 1:00 p.m., the jury returned to the courtroom, indicated it had selected its foreperson, and was given a lunch recess until 2:00 p.m. The trial court resumed session at 2:00 p.m., and the jury returned to the jury room for deliberations at 2:10 p.m. The jury returned to the courtroom at 3:40 p.m. and was given a 15-minute recess. The jury returned and resumed deliberations at 3:55 p.m.

At 4:05 p.m., the court received a note from the jury foreperson reading, "Your Honor, we are at an impass[e]. What are our options?" The trial judge noted that deliberations had been ongoing for approximately two and a half hours, and returned the jury to the jury room at 4:06 p.m. for further deliberations. At 5:30 p.m., the jury returned to the courtroom, following which a dinner recess was taken until 6:35 p.m., at which time the jury returned to deliberations. The jury

returned to the courtroom at 8:40 p.m., after indicating in a note that "We cannot come to a unanimous decision on either charge." The judge gave the jury a fifteen minute recess, and upon their return issued an additional instruction, stating:

> The Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and attempt to reconcile your differences, if you can, without the surrender of conscientious convictions, but you should not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

The jury returned to deliberations at 8:58 p.m., and at 9:55 p.m. returned to the courtroom after indicating in a note to the court that "We have been at a 10-2 impass[e] for several hours. There is no way the 2 feel that they can ever change their mind." Without inquiring how the jurors were voting, the judge learned that the jury had taken "three or four" votes, and that the first and last ballots on the rape charge remained unchanged at 10-2. However, the foreperson indicated that on the kidnaping charge, the first vote was 9-3 and the last vote was 11-1. The judge concluded that the jury was making progress, and the foreperson indicated agreement. The judge asked the jury to continue deliberations, and it retired to the jury room at 10:00 p.m. The jury returned to the courtroom at 11:04 p.m. with unanimous verdicts on both charges.

The fact that the jury was required to deliberate late on a Friday night was not dispositive on the issue of coercion. *See Beaver*, 322 N.C. 464, 368 S.E.2d 608. The trial court never expressed irritation at the jury for failing to reach a unanimous verdict, or intimated that the jury would be held for an unreasonable period of time to reach such a verdict. We find the circumstances here no more indicative of coercion than those present in other cases wherein the trial court's denial of a motion for mistrial has been upheld. *See Porter*; *Patterson*. Based upon the totality of the circumstances, we conclude that the trial court's refusal to grant the defendant's motion for a mistrial was not erroneous.

No Error.

Judges LEWIS and HUNTER concur.

STATE OF NORTH CAROLINA v. JOHN KERMIT ALLEN, JR.

No. COA99-1522

(Filed 29 December 2000)

1. **Criminal Law— mistrial denied—old arrest photograph—improperly admitted**

The trial court did not err by denying a murder defendant's motion for a mistrial after the State introduced an arrest photograph of defendant taken at least ten years before the incident in this case where the State represented to the jury that the photograph was taken immediately after the victim's death to show that defendant had no scratches or bruises indicating a struggle. There is no evidence suggesting that the improper admission was intentional or that the State admitted the photograph to improperly suggest that defendant had been previously arrested, and the trial judge withdrew the evidence and provided a curative instruction.

2. **Constitutional Law— privilege against self-incrimination—refutation of old arrest photograph—testimony for another purpose**

A murder defendant was not compelled to testify by the improper admission of a ten-year-old arrest photograph in violation of his Fifth Amendment privilege against self-incrimination where defendant took the stand to put on evidence of self-defense, not to answer the State's evidence regarding prior arrests.

3. **Evidence— prior bad acts—chain of circumstances of crime**

The trial court did not err in a murder prosecution by admitting evidence that, one week before the killing, defendant had fired a gun over his mother's head, pointed a gun at his brother, and threatened to kill him. The challenged evidence was part of the chain of circumstances leading up to the victim's murder and was admissible to show defendant's state of mind in the days prior to the murder. These prior acts reveal defendant's intensifying state of violent behavior toward his family and the possibility that he was angry with the victim for confronting him about the treatment of his family.

4. Criminal Law— limiting instruction—not requested

The trial court did not err in a murder prosecution by not giving an immediate limiting instruction following admission of defendant's prior misconduct to show a chain of events establishing defendant's state of mind where defendant did not request such an instruction.

5. Appeal and Error— plain error review—no supporting argument

A murder defendant waived plain error review of whether the court erred by admitting evidence that the victim was peaceful by failing to provide argument in support of plain error.

6. Criminal Law— outburst by victim's sister—mistrial denied

The trial court did not abuse its discretion by not granting a mistrial in a murder prosecution after an emotional outburst by the victim's sister. The judge demonstrated the inappropriateness of the outburst by a statement to the prosecutor that those unable to control their emotions would not be allowed in the courtroom. Although defendant contends that a curative instruction should have been given, the defense attorney did not request such an instruction and it is possible that a curative instruction could have emphasized the outburst.

7. Homicide— self-defense—duty to retreat—instruction not required

A murder defendant was not entitled to an instruction that he had no duty to retreat where his testimony revealed a series of escalating events leading to the victim's death but did not reveal that it was actually or reasonably necessary under the circumstances to kill the victim. Therefore, defendant was required to retreat if a way of escape was open to him, and his testimony indicates that he left the altercation to go to the bathroom, a diagram of the apartment indicated that defendant was required to pass the front door, and defendant's testimony did not indicate that the front door was obstructed in any way.

Appeal by defendant from judgment entered 23 April 1999 by Judge L. Todd Burke in Wilkes County Superior Court. Heard in the Court of Appeals 8 November 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas O. Lawton, III, for the State.

McElwee Firm, PLLC, by Kimberly C. Stevens and Elizabeth K. Mahan, for the defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 19 April 1999 session of Wilkes County Superior Court on one count of first-degree murder. On 23 April 1999, the jury returned a verdict of guilty of second-degree murder. Defendant was sentenced to a minimum of one hundred seventy-six and a maximum of two hundred twenty-one months' imprisonment. The trial court's judgment recommended a Substance Abuse Treatment Unit pursuant to N.C. Gen. Stat. § 15A-1351(h).

The State's evidence tended to show the following. On 21 December 1997, defendant shot and killed his first cousin, Mitch Grimes. In the weeks preceding Mitch's death, defendant had exhibited increasing animosity toward several members of his family, and consequently, committed several acts of violence toward his mother, brother and first cousin. Approximately one week before Mitch's death, defendant shot a gun over his mother's head and pointed a gun at his brother, threatening to kill him. Mitch reprimanded defendant for his actions several times, urging him to stop "disrespecting" his family. (1 Tr. at 279). On another occasion, Mitch came upon defendant walking past his aunt's house carrying a gun and threatening to kill his brother because he stole his money and his drugs. The victim urged defendant to put the gun away and not to kill his brother, which advice defendant heeded. In the week preceding his death, after defendant had pointed a gun at his mother and threatened his brother, the victim cut his own arm with a knife in front of the defendant, reminding him that "blood's thicker than water." (1 Tr. at 279). Apparently angered by the victim's continuing remonstrations addressing defendant's behavior toward his family, defendant called the victim on several occasions threatening to kill him.

On the day of the shooting, defendant arrived at the apartment of Robert Davenport, a friend of both defendant and Mitch. Mitch was already at Davenport's apartment. Davenport allowed defendant to enter, warning him that he wanted no trouble, to which defendant agreed. Defendant entered the apartment and after a short time, as Mitch and Davenport stood talking to one another, defendant walked

over to them, unprovoked and unsolicited, and shot Mitch in the face, killing him instantly. Davenport testified that Mitch took no action to cause any altercation—he did not punch, slap or push the defendant. Defendant admitted to killing the victim, asserting he acted in self-defense.

[1] Defendant first argues the trial court erred in denying his motion for mistrial after erroneously admitting evidence which was not disclosed during discovery, despite a proper discovery request by defendant pursuant to N.C. Gen. Stat. § 15A-903(d). The evidence was an arrest photograph of defendant taken at least ten years before the incident in this case. The State, however, represented before the jury that the photograph was taken immediately after the victim's death in order to show that defendant had no scratches or bruises tending to indicate a struggle. The State was ultimately attempting to refute defendant's claim of self-defense.

Although the trial court denied defendant's immediate motion for mistrial as a result of admitting the arrest photograph, the court withdrew the evidence and provided a curative instruction to the jury as follows:

> [T]his photograph here is not the photograph of the Defendant that was taken at the time that he was arrested. This photograph here, you should not consider it. I'm striking it from the record. It has no bearing on this case, whatsoever. The photograph was incorrectly utilized by the State for which they apologize for, but this is, it was just in the file by error or by mistake and it was shown to you. And, you're not to consider this photograph. This is an old photograph of the Defendant . . . you're not to consider this photograph. You're not to imply anything from this photograph as to how the sheriff's department got it or where it came from or what it has been used for in the past. Does everyone understand that? This is simply not a photograph of the Defendant at the time that he was arrested. Does everyone think you can block this from your mind and it not have any affect on any decision that you will make in the trial? It shouldn't because it's not the photograph. It's simply not the photograph of the Defendant at the time he was arrested. Does everyone understand? (Some jurors nod heads affirmatively; others do not respond).

(2 Tr. at 326-27).

Defendant contends the prosecution's failure to disclose the arrest photograph entitles him to a new trial. Although it does appear that the prosecution failed to comply with defendant's discovery request pursuant to N.C. Gen. Stat. § 15A-903(d), it does not necessarily follow that a court is required to prohibit the State from introducing undisclosed evidence or that a defendant is entitled to a new trial because the court permitted introduction of undisclosed evidence. *State v. Kessack*, 32 N.C. App. 536, 541, 232 S.E.2d 859, 862 (1977). N.C. Gen. Stat. § 15A-910 sets forth several remedies (including declaration of a mistrial) by which the trial court may redress a party's noncompliance with a discovery request; however, whether these remedies should be invoked is a matter within the trial court's sound discretion. *Id.*

Defendant argues that despite the trial judge's admonition to the jury not to consider the arrest photograph, the court was required to declare a mistrial since admission of the photograph ultimately implied to the jury that defendant had been arrested on a previous occasion. In *State v. Adams*, 347 N.C. 48, 65-66, 490 S.E.2d 220, 229 (1997), our Supreme Court held that a mistrial was not warranted where the State inadvertently elicited testimony from a defense witness that defendant had been previously sentenced to death. While the State was attempting to establish the length of time in which the defendant knew the testifying witness, the witness stated he knew defendant when he was on death row. *Id.* at 64, 490 S.E.2d at 228. The statement was made in a "fairly offhand way without the intent to emphasize it to the jury." *Id.* at 64, 490 S.E.2d at 228. Incidentally, the Court noted that it did not appear from the record that the prosecutor had any improper motive or that it intentionally elicited the information. *Id.* at 66, 490 S.E.2d at 229.

Likewise, in this case there is no evidence in the record suggesting the State's improper admission was intentional, or that it admitted the photograph in an attempt to improperly suggest that the defendant in this case had been previously arrested. The State's focus in admitting the photograph was the absence of scratches or bruises on defendant's body; the fact that the photograph was a previous arrest photograph was never emphasized to the jury. In addition, the trial judge withdrew the evidence and provided a curative instruction for the jury to strike the photograph from their minds and give it no consideration. Ordinarily, when objectionable evidence is withdrawn, no error is committed. *State v. Thomas*, 350 N.C. 315, 358, 514 S.E.2d 486, 512, *cert. denied*, —— U.S. ——, 145 L. Ed. 2d 388 (1999).

Furthermore, the trial court instructed the jury to disregard the testimony, and we must presume that the jury followed the instructions. *State v. Clark*, 298 N.C. 529, 534, 259 S.E.2d 271, 274-75 (1979). In light of the foregoing, we conclude admission of the photograph itself did not result in substantial or irreparable prejudice to defendant's case.

[2] Defendant also contends admission of the arrest photograph compelled him to testify in his own behalf, violating his Fifth Amendment right against self-incrimination. Our review of defendant's testimony, however, reveals that he took the stand not to answer the State's evidence regarding any prior arrests, but in order to put on evidence of self-defense. In his testimony on direct examination, defendant did not speak to his prior arrests; we thus find no inference that his taking the stand on his own behalf was induced by the erroneous admission of the photograph. *See, e.g., State v. Wills*, 293 N.C. 546, 550, 240 S.E.2d 328, 331 (1977).

[3] We next consider whether the trial court's admission of evidence that approximately one week before the victim's death, defendant (1) pointed and shot a gun over his mother's head and (2) pointed a gun at his brother, Ken Allen, and threatened to kill him violated our Rules of Evidence. 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.R. Evid. 404(b). "Evidence of another offense is admissible under Rule 404(b) so long as it is relevant to any fact or issue other than the character of the accused." *State v. Scott*, 343 N.C. 313, 330, 471 S.E.2d 605, 615 (1996) (citation omitted). Relevant evidence is evidence tending "to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401 (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 argues the only probative value of this evidence was to show that he had the propensity or disposition to commit an offense of the nature charged. We instead conclude defendant's alleged wrongful conduct was admissible to establish the "chain of circumstances" of the crime charged. *State v. Agee*, 326 N.C. 542, 546, 391 S.E.2d 171, 173 (1990). Under this principle, "[w]hen evidence leading up to a crime is part of the scenario which helps explain the setting, there is no error in permitting the jury to view the criminal episode in the context in which it happened." *State v. Parker*, 119 N.C. App. 328, 340, 459 S.E.2d 9, 16 (1995); *see also Agee*, 326 N.C. at 549, 391 S.E.2d at 174 (holding evidence of "other wrongs" is admissible for the purpose of " 'complet[ing] the story of a crime by proving the immediate context of events near in time and place' ") (quoting *United States v. Currier*, 821 F.2d 52, 55 (1st Cir. 1987)). The challenged evidence in this case was part of the chain of circumstances leading up to the victim's murder and was admissible to show defendant's state of mind in the days prior to the murder. *See, e.g., State v. Price*, 118 N.C. App. 212, 217, 454 S.E.2d 820, 823-24 (1995). These prior acts reveal not only defendant's intensifying display of violent behavior toward his family, but also tend to show the possibility that defendant was angry with Mitch for confronting him about the treatment of his family. Thus, the trial court did not err in admitting this evidence.

[4] Defendant nonetheless contends the trial court erred in failing to provide, in addition to the pattern jury instruction dealing with Rule 404(b) evidence, an immediate instruction limiting the use of evidence of defendant's prior misconduct to establish a chain of events establishing defendant's state of mind. However, defendant made no request for an immediate limiting instruction. Rule 105 of the North Carolina Rules of Evidence provides in part that when evidence is admissible for one purpose but not another purpose, the trial "court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." N.C.R. Evid. 105. "The admission of evidence which is competent for a restricted purpose without limiting instructions will not be held to be error in the absence of a request by the defendant for such limiting instructions." *Coffey*, 326 N.C. at 286, 389 S.E.2d at 59.

[5] Defendant also contends the trial court erred in admitting evidence that the victim was peaceful before defendant put forth evidence that the victim was the first aggressor, in violation of Rule of Evidence 404(a)(2). Apparently, defendant recognized that he made no objection at trial to the admission of this evidence since he urges

this Court to review the record for plain error. The plain error doctrine applies only in truly exceptional cases, placing a much heavier burden on the defendant than the burden imposed by N.C. Gen. Stat. § 15A-1443, which applies to defendants who have preserved their rights by timely objection. *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000). In order to meet its burden under the plain error doctrine, a defendant must convince the court, with support from the record, that the claimed error is so fundamental, so basic, so prejudicial, or so lacking in its elements that absent the error the jury probably would have reached a different verdict. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Although defendant has alleged plain error in his assignment of error on this issue, he provides "no explanation, analysis or specific contention in his brief supporting the bare assertion that the claimed error is so fundamental that justice could not have been done." *Cummings*, 352 N.C. at 636, 536 S.E.2d at 61. By failing to provide argument in support of plain error, defendant has thereby waived appellate review. N.C.R. App. P. 10(c)(4). This assignment of error is dismissed.

[6] In his next assignment of error, defendant contends the trial court erred in denying his motion for mistrial due to the emotional outbursts of Melissa Grimes, the victim's sister, following defendant's testimony on direct examination. As the jury was exiting the courtroom for a recess, Grimes began to cry loudly and shouted, "You liar! You lied!" (3 Tr. at 118). She then hit the courtroom exit door and left the courtroom. Counsel for the defendant moved for a mistrial, which the trial court denied. The trial judge then instructed the prosecutor that those persons who cannot control their emotions cannot re-enter the courtroom until they demonstrate they can remain calm. No curative instruction was requested by defendant's counsel, and none was provided.

N.C. Gen. Stat. § 15A-1061 provides in part that the judge may declare a mistrial if conduct inside or outside the courtroom results in substantial or irreparable prejudice to the defendant's case. Not every disruptive event which occurs during trial automatically requires the court to declare a mistrial. *State v. Newton*, 82 N.C. App. 555, 559, 347 S.E.2d 81, 84 (1986). Whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge. *State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985).

We do not believe the trial judge abused his discretion in refusing to grant a mistrial in this case. After the outburst, the judge demonstrated the inappropriateness of the outburst by his statement to the prosecutor that persons unable to control their emotions will not be allowed in the courtroom. Defendant contends the trial court should have given a curative instruction with regard to Melissa Grimes's outburst. However, defendant's attorney made no request for a curative instruction or other remedial action. "Our rule has long been that where a charge fully instructs the jury on substantive features of the case, defines and applies the law thereto, the trial court is not required to instruct on a subordinate feature of the case absent a special request." *Blackstock*, 314 N.C. at 245, 333 S.E.2d at 253. As the court noted in *Blackstock*, such an instruction may well have highlighted the witness's emotional state; indeed it is possible that the defense attorney declined to request a curative instruction because of the likelihood it would emphasize the witness's outburst. *See also State v. Turner*, 330 N.C. 249, 265, 410 S.E.2d 847, 856 (1991). This assignment of error is overruled.

[7] Defendant next contends the trial court committed plain error in refusing to instruct the jury that defendant had no duty to retreat. "Where the defendant's or the State's evidence when viewed in the light most favorable to the defendant discloses facts which are 'legally sufficient' to constitute a defense to the charged crime, the trial court must instruct the jury on the defense." *State v. Marshall*, 105 N.C. App. 518, 522, 414 S.E.2d 95, 97, *disc. review denied*, 332 N.C. 150, 419 S.E.2d 576 (1992). If an instruction is required, it must be comprehensive. *State v. Brown*, 117 N.C. App. 239, 241, 450 S.E.2d 538, 540 (1994). Here, defendant contends he was entitled to an instruction on self-defense, mandating a comprehensive self-defense instruction which included an instruction on no duty to retreat.

The general rules of self-defense allow a defendant to use the amount of force "necessary or apparently necessary to save himself from death or great bodily harm." *State v. Pearson*, 288 N.C. 34, 39, 215 S.E.2d 598, 602 (1975). When confronted with an assault that does not threaten the person assaulted with death or great bodily harm, a party claiming self-defense is required to retreat "if there is any way of escape open to him, although he is permitted to repel force by force and give blow for blow." *Id. at* 39, 215 S.E.2d at 602-03. There is *no* duty to retreat when (1) the person assaulted is confronted with an assault that threatens death or great bodily harm or (2) the person assaulted is not confronted with an assault that threatens death or

great bodily harm and the assault occurs in the dwelling, place of business, or premises of the person assaulted, provided the person assaulted is free from fault in bringing on the difficulty. *Id.* at 39-40, 215 S.E.2d at 603.

Here, the evidence most favorable to defendant is his own testimony as follows. Defendant and Mitch were both at the apartment of Robert Davenport the day of the shooting. Defendant was armed with a gun, which he kept under his coat behind his back. The victim was not armed. Defendant testified that the victim was "in a rage" and "all in [his] face," and began to push the defendant. (3 Tr. at 107-08). They both then began to push each other around Davenport's apartment, moving from the kitchen to the dining room. Defendant testified that the victim eventually began to reach around his back in an attempt to get his gun, at which point defendant freely left the altercation to go to the bathroom. When defendant returned, he testified he attempted to retreat from the apartment, in order to "go to church." (3 Tr. at 110). Defendant testified the victim pushed him away from the front door and into the bedroom, trying to get his gun. Defendant shot the victim before the victim obtained the gun.

Defendant's testimony reveals a series of escalating events eventually leading to the victim's death. At no time did this testimony reveal that it was actually or reasonably necessary under the circumstances to kill the victim. The unarmed victim never obtained defendant's gun and there was no evidence refuting the possibility that the victim attempted to obtain defendant's gun in order to protect himself. Accordingly, defendant was required to retreat if there was "any way of escape open to him." *Pearson*, 288 N.C. at 39, 215 S.E.2d at 602-03. Defendant's testimony indicates that after the victim began to reach around his back in an attempt to obtain defendant's gun, defendant left the altercation to go to the bathroom. At this time, defendant had an avenue of escape open to him. The diagram of Davenport's apartment reveals that in order to travel from the dining room to the bathroom, defendant was required to pass by the front door of the apartment. Defendant's testimony did not indicate that at that time, the front door was obstructed in any way. We therefore conclude defendant was not entitled to an instruction that he had no duty to retreat.

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

No error.

Judges McGEE and HORTON concur.

PEARL KANIPE, EMPLOYEE, PLAINTIFF v. LANE UPHOLSTERY, HICKORY TAVERN FURNITURE CO., EMPLOYER, SELF-INSURED (ALEXSIS RISK MANAGEMENT SERVICES), ADMINISTRATOR, DEFENDANTS

No. COA99-1425

(Filed 29 December 2000)

1. **Workers' Compensation— employer's right to control medical treatment—once accept employee's claim as compensable**

The full Industrial Commission did not err in a workers' compensation case by its conclusion that defendant employer had the right to control plaintiff employee's medical treatment because an employer's right to direct medical treatment, including the right to select the treating physician, attaches once the employer accepts the claim as compensable under N.C.G.S. § 97-25.

2. **Workers' Compensation— employer's right to control medical treatment—acceptance of liability through methods other than filing Form 60 or Form 21**

The full Industrial Commission did not err by concluding that defendant employer accepted plaintiff employee's claim as compensable prior to plaintiff's carpal tunnel surgeries, entitling defendant to direct plaintiff's medical treatment, because: (1) defendant could have accepted liability for medical expenses through methods other than the filing of a Form 60 or Form 21 since plaintiff was not yet disabled under the Workers' Compensation Act; (2) defendant verbally notified plaintiff prior to surgeries that it was accepting plaintiff's claim; (3) defendant thereafter also sent plaintiff's counsel written notification of its acceptance; and (4) plaintiff even understood acceptance had occurred when she admitted that going into surgery, she knew her medical expenses would not be covered by workers' compensation.

3. Workers' Compensation— employer's right to direct medical treatment—exceptions to rule not met

Although there are exceptions to the employer's general right to direct medical treatment including when the employer has failed to direct medical treatment in a prompt and adequate manner, in the case of an emergency, and if plaintiff's selection of physicians is approved by the Industrial Commission, plaintiff employee did not fall under these three exceptions and did not have the right to select the surgeon to perform plaintiff's carpal tunnel surgeries, because: (1) defendant acted promptly and adequately; (2) plaintiff has nowhere maintained that her surgeries were an emergency, and the fact that she canceled her initial scheduled surgery and waited nearly a month to have surgery with another doctor lends no support to such a contention; and (3) the full Commission denied authorization of plaintiff's choice of doctors when it concluded that plaintiff did not have good cause to refuse treatment by the authorized doctor.

4. Workers' Compensation— disability compensation—failure to make specific findings

The full Industrial Commission erred in a workers' compensation case by denying plaintiff employee's claim for disability compensation, because the Commission failed to make any specific findings to allow the Court of Appeals to determine whether the Commission denied disability compensation on a lawful or unlawful basis.

Appeal by plaintiff from opinion and award filed 25 May 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 October 2000.

Patterson, Harkavy & Lawrence, L.L.P., by Henry N. Patterson, Jr. and Martha A. Geer, for plaintiff-appellant.

Robinson & Lawing, L.L.P., by Jolinda J. Babcock, for defendant-appellees.

LEWIS, Judge.

Plaintiff has been employed as a sewer for defendant Lane Upholstery ("Lane") since 1969. Over a period of several years, plaintiff began experiencing numbness in her hands. However, she never reported any of these problems to either her employer or her regular

physician. Finally, in the Spring of 1997, the pain intensified, and she reported the pain and numbness to her gynecologist, Dr. Paul Caporossi. Dr. Caporossi referred her to Dr. John L. de Perczel, a general orthopedic surgeon.

Prior to seeing Dr. de Perczel, plaintiff informed various supervisors at work about her symptoms and her upcoming appointment with Dr. de Perczel. No one objected to her seeing Dr. de Perczel. Anne Story, Lane's Director of Human Resources, however, did inform plaintiff that, if her condition was work-related, she would need to seek treatment from a physician approved by Lane.

On 6 May 1997, plaintiff presented herself to Dr. de Perczel. Dr. de Perczel diagnosed her as having bilateral carpal tunnel syndrome, caused by her work. Upon learning of this diagnosis, Lane arranged for plaintiff to see its physician, Dr. Robert Hart of the Hart Industrial Clinic. Dr. Hart eventually concurred in Dr. de Perczel's diagnosis. He assigned plaintiff to light duty work pending further evaluation. On 3 June 1997, Dr. Eric Hart, also of the Hart Industrial Clinic, referred plaintiff to Dr. Carl Michael Nicks for a surgical evaluation of her condition. Dr. Nicks recommended that plaintiff undergo carpal tunnel release surgery. Dr. Nicks scheduled this surgery for 12 June 1997.

Two days before the scheduled surgery, plaintiff unilaterally canceled her appointment with Dr. Nicks. She informed her employer that she wished to have Dr. de Perczel perform the surgery instead. She stated that she had no specific objection to Dr. Nicks; she just felt more comfortable with Dr. de Perczel. Ms. Story explained to plaintiff that Lane would not pay for the surgery because only Dr. Nicks had been authorized to perform the surgery—Dr. de Perczel was not one of its authorized physicians.

On 1 July 1997, Lane's claims adjuster wrote a letter to plaintiff's counsel, advising plaintiff that Lane had accepted her claim as compensable. The letter again informed plaintiff that Lane had only authorized the carpal tunnel release surgery with Dr. Nicks and thus would not voluntarily pay for her surgery with Dr. de Perczel. A copy of this letter was forwarded to the Industrial Commission.

Notwithstanding her employer's refusal to pay for the surgery, plaintiff presented herself to Dr. de Perczel on 7 July 1997. Two days later, on July 9, Dr. de Perczel performed a right carpal tunnel release, and a few weeks later, he followed up by performing

a carpal tunnel release on the left hand. Following the first surgery, Dr. de Perczel ordered plaintiff to cease work. She has not returned to work since then.

In addition to refusing to pay for her surgery with Dr. de Perczel, Lane has also refused to provide plaintiff with any disability compensation. This apparently stems from conflicting treatment plans. Dr. Nicks testified that, had he performed the carpal tunnel surgeries, he would have assigned plaintiff to light duty work, but would not have removed her from work for more than seven days. Thus, under his plan, plaintiff would not have been entitled to any disability compensation, only reimbursement for the costs of her medical treatment. *See* N.C. Gen. Stat. § 97-28 (1999) ("No compensation . . . shall be allowed for the first seven calendar days of disability resulting from an injury, except [medical expenses]."). Dr. de Perczel, however, opined that plaintiff was unable to perform any work whatsoever and thus removed plaintiff from work indefinitely. Under his plan, therefore, plaintiff would be entitled to some disability compensation.

Plaintiff filed a Form 33 Request for Hearing with the Industrial Commission, seeking the authorization of Dr. de Perczel, reimbursement of the medical expenses associated with the carpal tunnel surgeries, and disability compensation. The deputy commissioner concluded Lane never had the authority to control plaintiff's medical treatment because it had never officially accepted liability. As such, the deputy commissioner awarded plaintiff past and future medical expenses, as well as temporary total disability benefits in the amount of $252.15 per week from the period of 9 July 1997 forward.

The Full Commission reversed. It concluded that Lane had indeed accepted liability and thus had the right to control plaintiff's medical treatment. It further denied plaintiff's request to have Dr. de Perczel authorized as her treating physician. Accordingly, the Full Commission denied her claims for medical expenses and disability compensation. Plaintiff now appeals to this Court.

[1] Plaintiff first contests Lane's right to select her treating physician for purposes of her carpal tunnel release surgeries. In particular, plaintiff argues that Lane had no right of control prior to the surgeries because it never formally accepted liability until it filed a Form 60 after the surgeries. We reject this argument.

Generally speaking, the employer has the right to direct the medical treatment for a compensable injury. *Schofield v. Tea Co.*, 299 N.C.

582, 586, 264 S.E.2d 56, 60 (1980). This includes the right to select the treating physician. *Id.* However, neither our courts nor our legislature has ever explicitly articulated at what point this right of the employer attaches. The Commission treated the employer's acceptance of liability as the triggering point. We agree with this proposition and therefore hold that an employer's right to direct medical treatment (including the right to select the treating physician) attaches once the employer accepts the claim as compensable.

As soon as the employee claims he or she is entitled to compensation, the employer has the right to require the employee to submit to an examination with one of its authorized physicians. N.C. Gen. Stat. § 97-27(a) (1999). One of the implicit purposes of this requirement is to enable the employer to ascertain whether the injury is work-related or not and thus whether the claim is indeed compensable. At this point, however, the statute only confers upon the employer the right to require its employee to submit to an examination. We do not believe this limited right can be equated with a right to direct medical treatment in general. Were that the case, an employer could ostensibly force its employee to undergo treatment with one of its physicians and then still turn around and deny liability. We do not believe our Legislature intended such a result by enacting section 97-27.

Instead, we conclude the right to direct medical treatment is triggered only when the employer has accepted the claim as compensable. N.C. Gen. Stat. § 97-25 confers upon the employer the duty to provide all medical compensation. This medical compensation includes the providing of medical supplies, services, and treatment. N.C. Gen. Stat. § 97-2(19). But until the employer accepts the obligations of its duty, i.e., paying for medical treatment, it should not enjoy the benefits of its right, i.e., directing how that treatment is to be carried out.

[2] Having concluded that Lane's right to direct medical treatment and thereby select plaintiff's carpal tunnel surgeon attached upon acceptance of liability, we must next address when that acceptance occurred here. Plaintiff claims Lane's acceptance did not occur until it filed a Form 60 with the Industrial Commission—after her carpal tunnel surgeries had been performed. Lane counters that acceptance occurred prior to the surgeries, when it notified plaintiff both orally and in writing that it was treating her claim as compensable. The Commission ultimately agreed with Lane, as do we.

Our statutes nowhere set forth exclusive methods of accepting liability. The employer's filing of a Form 21 agreement (if approved by the Commission) has repeatedly been held to constitute an acceptance of liability. *See, e.g., Kisiah v. W.R. Kisiah Plumbing,* 124 N.C. App. 72, 77, 476 S.E.2d 434, 436 (1996), *disc. review denied,* 345 N.C. 343, 483 S.E.2d 169 (1997). Similarly, directly paying the employee, coupled with the filing of a Form 60, is also sufficient to accept liability. N.C. Gen. Stat. § 97-18(b); *Calhoun v. Wayne Dennis Heating & Air Cond.*, 129 N.C. App. 794, 798, 501 S.E.2d 346, 349 (1998), *disc. review denied,* 350 N.C. 92, 532 S.E.2d 524 (1999). But these forms are premised upon there being a disability. Here, as of the time of the surgeries, this was a "medical only" claim. Plaintiff was only seeking medical expenses associated with her surgeries; she was not yet seeking disability compensation. In particular, plaintiff had not yet missed any days of work and, although she was assigned to light duty work, she was still earning the same wages as she was before. Therefore, plaintiff was not yet "disabled" under our Workers' Compensation Act. *See generally* N.C. Gen. Stat. § 97-2(9) (defining disability as the incapacity to earn the same wages). And because she was not yet "disabled," Lane was not required to file a Form 60 or Form 21. As such, Lane could have accepted liability for medical expenses through methods other than the filing of these forms.

Lane did so here. Prior to the surgeries, Lane verbally notified plaintiff it was accepting her claim. Lane thereafter also sent plaintiff's counsel written notification of its acceptance. Plaintiff even understood that acceptance had occurred, as she admitted that, going into surgery, she knew her medical expenses would not be covered by workers' compensation. On these facts, we conclude that Lane acted sufficiently to accept liability prior to the carpal tunnel surgeries. *Cf. Craver v. Dixie Furniture Co.*, 115 N.C. App. 570, 579-80, 447 S.E.2d 789, 795 (1994) (holding that employer's verbal acceptance of liability was sufficient to estop it from later denying liability before the Commission); *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 371, 396 S.E.2d 626, 629 (1990) (same). Accordingly, Lane had the right at that time to direct plaintiff's medical treatment, including selecting her surgeon.

[3] Although Lane had the right to select the surgeon to perform the carpal tunnel surgeries, this right is not unlimited. There are a few recognized exceptions to the employer's general right to direct medical treatment. First, an employee may procure his own physician when the employer has failed to direct medical treatment in a prompt

and adequate manner. *Schofield*, 299 N.C. at 587, 264 S.E.2d at 60. Here, there is no question that Lane acted promptly and adequately. As soon as plaintiff informed Lane of Dr. de Perczel's carpal tunnel diagnosis, Lane directed plaintiff to the Hart Industrial Clinic for further examinations and treatment. And it continued to do so right up until plaintiff's surgeries. Second, an employee may procure treatment on his or her own in the case of an emergency. N.C. Gen. Stat. § 97-25. Plaintiff has nowhere maintained that her carpal tunnel surgeries were an emergency. Moreover, the fact that she canceled her 12 June 1997 scheduled surgery with Dr. Nicks and waited nearly a month to have the surgery with Dr. de Perczel lends no support to such a contention.

Third, even in the absence of an emergency or the employer's failure to direct timely and adequate treatment, an employee still may select his or her own physician if such selection is approved by the Commission. *Id.*; *Schofield*, 299 N.C. at 591, 264 S.E.2d at 62. The employee's request for approval may even be filed after the treatment has been procured, just as long as the request is filed within a reasonable time thereafter. *Schofield*, 299 N.C. at 592-93, 264 S.E.2d at 63. Doing so, however, involves some element of risk for the employee. Approval of an employee-selected physician is left to the sound discretion of the Commission. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 207, 472 S.E.2d 382, 387, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996).

Here, the Full Commission denied authorization of Dr. de Perczel based upon two grounds. First, it concluded that plaintiff's request for authorization was not filed within a reasonable time because her request came after her surgeries with Dr. de Perczel. As just stated, this reasoning is flawed; the request for approval need not be filed before treatment is actually administered. Were this the only ground upon which the Commission denied authorization, we would be constrained to hold that the Commission abused its discretion. However, the Commission also denied authorization on the ground that plaintiff did not have good cause to refuse treatment by Dr. Nicks. We find no abuse of discretion as to this ground. The evidence reflects Dr. Nicks was both well-qualified and competent to perform the carpal tunnel release surgeries. In fact, plaintiff never questioned his abilities. Her *only* explanation for wanting Dr. de Perczel was she "didn't like Dr. Nicks's attitude and the way he did not explain stuff to [her]." (Tr. at 38). Given that this was her only reason, we cannot say the Commission abused its discretion in refusing to authorize treatment

with Dr. de Perczel. Accordingly, we conclude the Commission properly denied plaintiff's claims for medical expenses associated with her carpal tunnel surgeries.

[4] Plaintiff also contests the Commission's denial of her claim for disability compensation. Specifically, she contends the Commission made insufficient findings to support its denial of her claim. We agree and therefore vacate and remand that portion of the opinion and award denying plaintiff's disability compensation claim.

In denying her claim, the Commission summarily concluded, "Any inability by plaintiff to earn wages subsequent to 9 July 1997 [the date of her first carpal tunnel surgery with Dr. de Perczel] was not related to her occupational disease and she is, therefore, not entitled to any disability compensation after that date." The Commission, however, never made any findings explaining its basis for denying disability compensation. Perhaps the Commission based its denial on plaintiff's refusal to undergo medical treatment with Dr. Nicks. If so, this is not a valid reason for denial. Although medical expenses are not covered when an employee refuses to see an authorized physician, disability compensation may not be cut off unless the Commission has first ordered the employee to undergo treatment with that physician. N.C. Gen. Stat. § 97-25; *Deskins v. Ithaca Industries, Inc.*, 131 N.C. App. 826, 832, 509 S.E.2d 232, 236 (1998). No such prior order by the Commission existed here.

Alternatively, the Commission might have based its denial of disability compensation on Dr. Nicks' treatment plan, in which he determined that plaintiff would not have missed more than a week of work due to her injury. If that were the case, this basis would be lawful. *See* N.C. Gen. Stat. § 97-28 ("No compensation . . . shall be allowed for the first seven calendar days of disability resulting from an injury, except [medical expenses]."). But because the Commission never made any specific findings, we simply do not know whether it denied disability compensation on a lawful or unlawful basis. We therefore remand to the Commission to reconsider plaintiff's claim for disability compensation and to make explicit findings with respect to this claim.

Affirmed in part, vacated in part and remanded.

Judges WYNN and HUNTER concur.

JAMES L. PIERSON, KATHY L. PIERSON, LINCOLN M. HAIRE, AND DONNA B. HAIRE, PLAINTIFFS v. CUMBERLAND COUNTY CIVIC CENTER COMMISSION, DEFENDANT

No COA99-1333

(Filed 29 December 2000)

1. Appeal and Error— appealability—denial of summary judgment—sovereign immunity

An appeal of the denial of a motion for summary judgment was heard on appeal where the motion was predicated upon the doctrine of sovereign immunity.

2. Immunity— sovereign—operation of coliseum—commercial activity

The trial court correctly concluded that the operation of the Cumberland County Coliseum was a proprietary function and that defendant-commission was not protected from a nuisance action by sovereign immunity where the evidence demonstrated that defendant's operation of the Coliseum is a commercial enterprise. A benefit inuring to the public as a result of the municipal undertaking is not dispositive as to whether the activity is governmental or propriety.

3. Evidence— summary judgment hearing—excerpts from magazine—self-authenticating—timely

The trial court did not abuse its discretion by considering excerpts from a magazine when ruling on a summary judgment motion based upon the Cumberland County Civic Center Commission claim of sovereign immunity. Defendant argues that the materials were not properly authenticated and that they were presented in contravention of the requirements of Rule 56, but the excerpts were admissible against defendant as its own admissions and, since the magazine was self-titled "The Official Cumberland County Coliseum Complex News Magazine," it was self-authenticating. While Rule 56(c) concerns the timeliness of affidavits in a summary judgment motion, affidavits are but one form of evidence properly considered by the court in ruling on a motion for summary judgment and Rule 56(c) does not specify that other forms of evidence be presented at any particular time.

Appeal by defendant from order entered 7 July 1997 by Judge William C. Gore, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 9 October 2000.

The Lane Law Firm, P.A., by Freddie Lane, Jr., for plaintiffs-appellees.

Cumberland County Attorney's Office, by Douglas E. Canders, Fayetteville, for defendant-appellant.

TIMMONS-GOODSON, Judge.

This appeal arises out of an action for private nuisance *per accidens* brought by James L. Pierson, Kathy L. Pierson, Lincoln M. Haire, and Donna B. Haire (hereinafter collectively referred to as "plaintiff") against the Cumberland County Civic Center Commission (hereinafter referred to as "defendant") concerning its operation of the Cumberland County Crown Coliseum, also known as the Cumberland County Coliseum Complex, (hereinafter referred to as "the Coliseum"). Defendant moved for summary judgment based on the doctrine of sovereign immunity. The trial court concluded that in managing the Coliseum, defendant was acting in a proprietary capacity and, therefore, was not cloaked with the protection of sovereign immunity. For the reasons stated herein, we affirm the court's ruling.

The facts relevant to this appeal show that James and Kathy Pierson own parcels of land in Cumberland County described as Lots 1 and 2 of the G.A. Draughone Subdivision. The Piersons reside in a home situated on one lot, which is positioned at the intersection of Old Wilkes Road and Draughone Avenue. Their tenants, Lincoln and Donna Haire, lease and reside at a home situated on the other lot, which is located on Draughone Avenue. Cumberland County owns the vast majority of the G.A. Draughone Subdivision and leases the property to defendant as a situs for the Coliseum.

Since the Coliseum opened in October 1997, employees and agents of defendant have directed vehicular traffic to and from events held at the venue via Draughone Avenue. Because these events typically draw thousands of patrons and conclude late at night, inordinate numbers of motor vehicles are made to travel within close proximity to plaintiffs' homes after 10:00 p.m. Moreover, during such events, many of the patrons consume alcoholic beverages sold on the premises by defendant or under defendant's direction. This often results in patrons engaging in a variety of disruptive behaviors, such as sounding their car horns, urinating in public, and shouting obscenities to each other, the general public, and members of plaintiffs' families.

Plaintiffs instituted an action on 22 July 1998 alleging that defendant, through its operation of the Coliseum, has created and maintained a private nuisance *per accidens* that has substantially and permanently impaired the value of plaintiffs' property. Defendant filed an answer, a motion to dismiss, and a motion for summary judgment, all of which asserted the doctrine of sovereign immunity as a bar to plaintiffs' claim. The trial court conducted a hearing on the motion to dismiss and the motion for summary judgment. After reviewing the evidence, memoranda, and arguments of counsel, the court concluded that defendant was not entitled to governmental immunity because (1) operating the Coliseum was a proprietary, rather than a governmental, enterprise, and (2) the General Assembly forfeited the protection as to defendant in Chapter 27 of the 1991 Session Laws. From the denial of summary judgment, defendant appeals.

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[1] At the outset, we note that an order denying a motion for summary judgment is interlocutory and, as such, does not ordinarily undergo immediate appeal. *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999). However, where the motion for summary judgment is predicated upon the doctrine of sovereign immunity, denial of the motion affects a substantial right, which entitles the moving party to prompt appellate review. *Id.* As defendant's appeal is rightly before us, we proceed to the assignments of error.

[2] By its first assignment of error, defendant argues that the trial court erroneously denied its motion for summary judgment. Defendant contends that operating a Coliseum is a governmental function and, thus, it is not precluded from asserting the defense of governmental immunity in the present action. We cannot agree.

Summary judgment is appropriately granted where the pleadings, depositions, and other documentary evidence show that no genuine issue of material fact exists and that any party 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 burden to demonstrate the absence of a triable issue lies with the moving party, which it can accomplish by one of two means:

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

Wilhelm v. City of Fayetteville, 121 N.C. App. 87, 89, 464 S.E.2d 299, 300 (1995) (citation omitted). In deciding whether summary judgment is proper, the trial court must consider the evidence in the light most beneficial to the non-moving party, drawing all inferences from the evidence against the moving party and in favor of the nonmovant. *Schmidt*, 134 N.C. App. at 251-52, 517 S.E.2d at 174.

As a general rule, the doctrine of sovereign immunity shields a municipality from liability for torts committed by its agencies and organizations. *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461, *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). Application of the doctrine depends upon whether the activity out of which the tort arises is properly characterized as "governmental" or "proprietary" in nature. *Schmidt*, 134 N.C. App. at 252, 517 S.E.2d at 174. Specifically, "[t]he doctrine applies when the entity is being sued for the performance of a governmental function[,] [b]ut it does not apply when the entity is performing a ministerial or proprietary function." *Herring*, 137 N.C. App. at 683, 529 S.E.2d at 461 (citations omitted).

Our Supreme Court has articulated the following test for determining whether an activity falls within the governmental or proprietary classification:

> When a municipality is acting "in behalf of the State" in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers. In either event it must be for a public purpose or public use.
>
> So then, generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and "private" when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security, or general welfare of the residents of the municipality.

Britt v. Wilmington, 236 N.C. 446, 450-51, 73 S.E.2d 289, 293 (1952).

With respect to a proprietary endeavor, we have said that " '[i]n order to deprive a municipal corporation of the benefit of governmental immunity, the *act or function* must involve special corporate benefit or pecuniary profit inuring to the municipality.' " *Hickman v. Fuqua*, 108 N.C. App. 80, 83-84, 422 S.E.2d 449, 451 (1992) (quoting *Rich v. City of Goldsboro*, 282 N.C. 383, 386, 192 S.E.2d 824, 826 (1972) (emphasis added)). "Charging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary." *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235 (1990). Nevertheless, "a 'profit motive' is not the sole determinative factor when deciding whether an activity is governmental or proprietary. Using the *Britt* test, courts look to see whether an undertaking is one 'traditionally' provided by the local governmental units." *Hickman*, 108 N.C. App. at 84, 422 S.E.2d at 451-52 (citation omitted).

Viewed in the light most favorable to plaintiffs, the evidence demonstrates that defendant's operation of the Coliseum is a commercial enterprise. The facts show that since its inception, the Coliseum has hosted a variety of entertainment activities, i.e., professional hockey and basketball games, WWF wrestling matches, concerts, theater/stage productions, rodeos, Monster Truck rallies, and miscellaneous family programs. The evidence further shows that defendant charges each promoter a fee for leasing the facility and receives a percentage of the total ticket sales. This evidence notwithstanding, defendant, relying on this Court's decision in *McIver v. Smith*, 134 N.C. App. 583, 518 S.E.2d 522 (1999), *disc. review dismissed as improvidently allowed*, 351 N.C. 344, 525 S.E.2d 173 (2000), takes the position that managing the Coliseum is a governmental function, because it provides "cultural, educational, and informational programming" that benefits the public.

In *McIver*, a motorist and his passenger filed suit against Forsyth County and the driver of an EMS unit for personal injuries resulting from a collision between the ambulance and their vehicle. The trial court entered summary judgment for the defendants on the grounds of governmental immunity. On appeal to this Court, the plaintiffs argued that operating an ambulance service was a proprietary function, because (1) the service "was historically provided by private companies," (2) "Forsyth County charged for the service[,]" and (3) the service was one "that a private individual, corporation or company could provide." *McIver*, 134 N.C. App. at 586, 518 S.E.2d at 525. This Court disagreed, concluding that the county-managed ambu-

lance service was a governmental undertaking to which the protection of sovereign immunity applied. We reasoned that:

> "Providing for the health and welfare of the citizens of the county is a legitimate and traditional function of county government." [*Casey v. Wake County*, 45 N.C. App. 522, 524, 263 S.E.2d 360, 361 (1980).] . . . The fact that Forsyth County charged a fee for its ambulance service does not alone make it a proprietary operation. The test to determine if an activity is governmental in nature is "whether the act is for the common good of all without the element of . . . pecuniary profit." [*McCombs v. City of Asheboro*, 6 N.C. App. 234, 241, 170 S.E.2d 169, 174 (1969).]

Id. (citation omitted). We further held that although a private company could provide "ambulance services similar to Forsyth County's[,] [that fact did] not transform the county's [service] into a proprietary function." *Id.* at 587, 518 S.E.2d at 526.

Defendant's reliance on *McIver* is misplaced. A benefit inuring to the public as a result of the municipal undertaking is not dispositive as to whether the activity is governmental, as opposed to proprietary, in nature. As the *Britt* court acknowledged, "[s]ince, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security, or general welfare of the residents of the municipality." *Britt*, 236 N.C. at 451, 73 S.E.2d at 293. Thus, in determining which classification applies, the focus must be whether "the activity is commercial or chiefly for the private advantage of the compact community." *Id.* at 450, 73 S.E.2d at 293. Concerning the management of a coliseum, our Supreme Court resolved this issue in *Aaser v. Charlotte*, 265 N.C. 494, 144 S.E.2d 610 (1965).

Aaser filed an action against the City of Charlotte, the Auditorium-Coliseum Authority, and the Charlotte Hockey Club for injuries she sustained while attending a hockey game. In affirming the trial court's denial of the defendants' motion for nonsuit, the Court stated that:

> The Coliseum is an arena for the holding of exhibitions and athletic events owned by the city of Charlotte and administered for it by the Authority to produce revenue and for the private advantage of the compact community. A city is engaging in a proprietary function when it operates such an arena, or leases it to the promoter of an athletic event, and when it operates refresh-

> ment stands in the corridors of the building for the sale of drinks and other items to the patrons of such an event. Consequently, the liability of the city and the Authority to the plaintiff for injury, due to an unsafe condition of the premises, is the same as that of a private person or corporation.

Aaser, 265 N.C. at 497, 144 S.E.2d at 613 (citations omitted). Therefore, we hold that the trial court was correct in concluding that operation of the Coliseum was a proprietary function and that defendant was not protected by the doctrine of sovereign immunity. In light of our ruling on this issue, we need not address and we express no opinion as to whether the court correctly concluded that under Chapter 27 of the 1991 Session Laws, defendant was prevented from asserting the doctrine.

[3] With its final assignment of error, defendant contends that the trial court improperly considered excerpts of "Insight" magazine, a promotional publication distributed by defendant, in ruling on the motion for summary judgment. The record reveals that plaintiffs first presented these documents in opposition to the motion while the summary judgment hearing was underway. In challenging their consideration by the court, defendant argues that the materials were not properly authenticated and that they were presented in contravention of the requirements of Rule 56 of the Rules of Civil Procedure. Again, we disagree.

A decision to admit and consider evidence offered at a summary judgment hearing is committed to the trial court's discretion. *Home Indemnity Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 189, 200, 494 S.E.2d 774, 781, *disc. review denied*, — N.C.—, 505 S.E.2d 889 (1998). Because a discretionary ruling is accorded great deference, it will not be disturbed on appeal absent a showing that the decision was manifestly unsupported by reason, or "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).

Initially, we note that the magazine excerpts were admissible against defendant as its own admissions. *See Wright v. American General Life Ins. Co.*, 59 N.C. App. 591, 596, 297 S.E.2d 910, 914 (1982) (quoting 2 *Brandis on North Carolina Evidence* § 167, at 6 (2d rev. ed. 1982)) (" 'Anything that a party to the action has done, said or written, if relevant to the issues and not subject to some specific exclusionary statute or rule, is admissible against him as an admis-

sion.' ") Furthermore, since "Insight" magazine is self-titled "The Official Cumberland County Coliseum Complex News Magazine," the publication was self-authenticating and could be admitted without any extrinsic showing of legitimacy. *See* N.C.R. Evid. 902(5) & (6) (dispensing with requirement that extrinsic evidence of authenticity be presented prior to admission of official publications, newspapers, and periodicals). Therefore, the trial court did not err in receiving the excerpts into evidence.

As to the timeliness of the materials, Rule 56(c) of the Rules of Civil Procedure provides that when one party moves for summary judgment,

> [t]he adverse party may serve opposing affidavits at least two days before the hearing. If the opposing affidavit is not served on the other part[y] at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require.

N.C.R. Civ. P. 56(c). Affidavits, however, are but one form of evidence properly considered by the court in ruling on a motion for summary judgment. The court may also consider "the pleadings, depositions, answers to interrogatories, and admissions on file." *Id.* Furthermore, Rule 56(c) does not specify that these other forms of evidence be presented at any particular time, much less prior to the hearing. *See id.* Therefore, we have no basis to conclude that plaintiffs violated the mandates of Rule 56(c), and we hold that the trial court did not abuse its discretion by considering the "Insight" excerpts.

In light of the foregoing reasoning, we affirm the denial of defendant's motion for summary judgment.

Affirmed.

Chief Judge EAGLES and Judge FULLER concur.

YADKIN VALLEY LAND COMPANY, L.L.C., PLAINTIFF v. H. WADE BAKER AND WIFE, LOLA W. BAKER AND JAMES MICHAEL TRENT AND WIFE, JUDY TRENT AND BETTY M. FLINCHUM, DEFENDANTS

YADKIN VALLEY LAND COMPANY, L.L.C., PLAINTIFF v. H. WADE BAKER AND WIFE, LOLA W. BAKER, DEFENDANTS

No. COA99-1243, 1244

(Filed 29 December 2000)

Easements— prescription—failure to establish requisite hostile nature of use

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's claims for an easement by prescription because the evidence presented is insufficient to establish the alleged use of the extensions by plaintiff and its predecessors over defendants' lands was adverse, hostile, or under claim of right when: (1) there is no evidence indicating whether defendants ever consented or objected to any use of the extensions by plaintiff, nor is there evidence of the manner in which the alleged extensions have been used; (2) there is no evidence that permission was ever sought to use the extensions, and plaintiff's evidence indicates that none of the defendants ever voiced an objection to the use of the extensions by plaintiff's predecessors; (3) there is no evidence that plaintiff or its predecessors ever made repairs or improvements to the extensions that would give notice to defendants of their use of the extensions; and (4) using the extensions as the sole means of access to the combined property alone does not rebut the presumption of permissive use.

Appeal by plaintiff from judgments entered 15 June 1999 by Judge Howard R. Greeson, Jr. in Superior Court, Surry County. Heard in the Court of Appeals 25 August 2000.

Daniel J. Park, P.A., by Daniel J. Park, for plaintiff-appellant.

Wilson & Iseman, L.L.P., by Linda L. Helms, for defendants-appellees H. Wade Baker and wife, Lola W. Baker, and Conner Gwyn Schenk PLLC, by Allen Holt Gwyn and Paul E. Davis, for defendants-appellees James Michael Trent and wife, Judy Trent, and Betty M. Flinchum, in case No. 97 CVS 677.

Wilson & Iseman, L.L.P., by Linda L. Helms, for defendants-appellees H. Wade Baker and wife, Lola W. Baker, in case No. 97 CVS 676.

WYNN, Judge.

In February 1996, Yadkin Valley Land Company, L.L.C., a North Carolina limited liability company, acquired title in fee to certain real property located in Surry County consisting of approximately 887 acres divided into various tracts. The portion of Yadkin's property at issue in case No. 97 CVS 677 is a tract consisting of approximately 63 acres (the "south property"). The portion of Yadkin's property consisting of approximately 50 acres (the "east property") is the subject of case No. 97 CVS 676, a companion case also before this Court. Because the issues presented in these companion cases are identical, and the facts virtually so, we refer to the south property and the east property collectively as "the combined property"; and, we consolidate the two cases on appeal to render this single opinion on all issues.

Yadkin's south property is bordered generally on three sides, to the south, east and west, by the Ararat River. To the north, Yadkin's south property is bordered by property owned by defendants James Michael Trent and his wife, Judy Trent, and by property owned by defendant Betty M. Flinchum. Defendants H. Wade Baker and his wife, Lola W. Baker, own property located adjacent to and generally north of the Trents' property and the Flinchum property.

Yadkin's east property is bordered generally on three sides, to the south, east and north, by the Ararat River. To the west, Yadkin's east property is bordered by property owned by the Bakers.

Prior to Yadkin's ownership, Crescent Resources, Inc. (formerly Crescent Land and Timber Corp.) owned the property from 16 January 1989 until 13 February 1996. Before that time, Duke Power Company owned the property. Neither the south property nor the east property is accessed by any public road. Crackers Neck Road, a public road (SR 2046), ends as a state-maintained road on the Bakers' property.

On 23 June 1997, Yadkin filed separate complaints—one each in connection with the south property and the east property—setting forth three claims: (1) easement by necessity, (2) easement by prescription, and (3) right to statutory cartway under N.C. Gen. Stat. §§ 136-68 and 136-69. The complaint regarding the south property

alleged that the only means of access to the south property "is across the defendant Bakers' property, or across the defendant Trents' or the defendant Flinchum, or both." The complaint alleged that an extension of Crackers Neck Road extended from the Bakers' property to Yadkin's south property, which extension was allegedly used by Yadkin and its predecessors-in-title to access the south property. The complaint regarding the east property alleged that "[t]he only means of access to plaintiff's [east] property is across the [Bakers'] property." Correspondingly, that complaint alleged than an extension of Crackers Neck Road extended from the Bakers' property to Yadkin's east property, which extension was allegedly used by Yadkin and its predecessors-in-title to access the east property. On 16 March 1999, Yadkin voluntarily dismissed without prejudice its third claim for a statutory cartway easement as to both the south property and the east property. In April 1999, the defendants moved for summary judgments on the remaining two claims concerning the south and east properties. At the outset of the hearing on the two motions, Yadkin took a voluntary dismissal of its first claim for easement by necessity regarding both the south property and the east property, leaving only the second claim for easement by prescription at issue for each tract.

Superior Court Judge Howard R. Greeson, Jr., granted both of defendants' motions for summary judgment on the claims for easement by prescription by orders filed on 21 June 1999. From those orders Yadkin appeals.

The issue on appeal is whether the trial court committed reversible error in granting the defendants' motions for summary judgment on Yadkin's claims for an easement by prescription. Yadkin argues in each case that the record on appeal supports its contention that there existed a genuine issue of material fact, and that the defendants, therefore, were not entitled to judgment as a matter of law. We disagree.

An order of summary judgment by the trial court is fully reviewable by this Court. *Virginia Elec. and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986) (citation omitted). Indeed, "[s]ummary judgment is appropriate when the pleadings, depositions, affidavits, and other evidentiary materials demonstrate the absence of any triable issue of fact and the moving party's right to judgment as a matter of law." *Murakami v. Wilmington Star News, Inc.*, 137 N.C. App. 357, 359,

528 S.E.2d 68, 69, *disc. review denied*, 352 N.C. 148, — S.E.2d — (2000) (citing *Yamaha Int'l Corp. v. Parks*, 72 N.C. App. 625, 325 S.E.2d 55 (1985); N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999)). "Defendants are thereby entitled to summary judgment if they establish either the nonexistence of an essential element of plaintiff's claim or show that plaintiff could not produce evidence of an essential element of her claim." *Mitchell v. Golden*, 107 N.C. App. 413, 417, 420 S.E.2d 482, 484 (1992) (citing *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992)). "In reviewing the trial court's grant of summary judgment this court must examine the evidence in the light most favorable to the non-movant[.]" *Delk v. Hill*, 89 N.C. App. 83, 84-85, 365 S.E.2d 218, 219, *disc. review denied*, 322 N.C. 605, 370 S.E.2d 244 (1988).

To establish an easement by prescription, a claimant must prove by the greater weight of the evidence that: (1) the use is adverse, hostile or under claim of right; (2) the use has been open and notorious such that the true owner had notice of the claim; (3) the use has been continuous and uninterrupted for at least twenty years; and (4) there is substantial identity of the easement claimed throughout the prescriptive period. *Potts v. Burnette*, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981). Prescriptive easements are not favored in the law, and the burden is therefore on the claiming party to prove every essential element thereof. *Id.* at 666, 273 S.E.2d at 288.

It is well-settled that mere permissive use of a way over another's land cannot ripen into an easement by prescription no matter how long it continues. *Dickinson v. Pake*, 284 N.C. 576, 581, 201 S.E.2d 897, 900 (1974). Furthermore, any such use is presumed to be permissive unless that presumption is rebutted by evidence to the contrary. *Id.* at 580, 201 S.E.2d at 900 (citations omitted).

To rebut the presumption of permissive use, the party claiming the prescriptive easement must present evidence that establishes a hostile use. *Id.* at 581, 201 S.E.2d at 900 (citation omitted). To establish a hostile use, a claimant must show "a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966). This Court has previously stated that "[n]otice to the true owner of the existence of the alleged easement is 'crucial to the concept of holding under a claim of right.' " *Johnson v. Stanley*, 96 N.C. App. 72, 75, 384 S.E.2d 577, 579 (1989) (quoting *Taylor v. Brigman*, 52 N.C. App. 536, 541, 279 S.E.2d

82, 85-86 (1981)). "A party can give notice to the true owner by 'open and visible acts such as repairing or maintaining the way over [the true owner's] land.' " *Pitcock v. Fox*, 119 N.C. App. 307, 310, 458 S.E.2d 264, 267 (1995) (quoting *Johnson*, 96 N.C. App. at 75, 384 S.E.2d at 579).

While the claimant need not show that "there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate," *Dulin*, 266 N.C. at 260-61, 145 S.E.2d at 875 (quoting 17A Am. Jur. *Easements* § 76, p. 691), "there must be some evidence refuting the inference that the use is permissive and with the owner's consent." *Perry v. Williams*, 84 N.C. App. 527, 529, 353 S.E.2d 226, 227 (1987) (citing *Dickinson*).

Yadkin's evidence in the record on appeal consists of the affidavits of Brad Howard (an employee of Weyerhaeuser Company), Terry Key (employee of Crescent), Harold Allen Eason (employee of Duke Energy, formerly Duke Power), James R. "Randy" Hobbs (employee of Duke Energy) and Jake N. M. Guyer (member of Yadkin). Those affidavits tend to show the following: That there is an extension of Crackers Neck Road that leads southward from the defendant Bakers' property, across the defendant Trents' property to the Yadkin south property; that there is an extension of Crackers Neck Road that leads eastward from the Bakers' property to the Yadkin east property; these extensions are the only means of ingress and egress for the combined property; these extensions are not public roads, nor are they paved or otherwise improved; the combined property is used for the growing of timber; Yadkin has sold the timber on the combined property to Weyerhaeuser for harvesting; Yadkin acquired the combined property on 13 February 1996; from 16 January 1989 until 13 February 1996, the combined property was owned by Crescent; Crescent acquired the combined property from Duke Power, which acquired the land during the 1930s; Yadkin, Crescent and Duke Power have used the extensions to access the combined property at various times since the 1930s; members of Yadkin have "gone upon the [combined] property" by using the extension "to check on the timber and the condition of the [combined] property in general"; members of Yadkin "went onto the [combined] property before and after buying it and up until the time" the complaint was filed "by traveling Cracker[s] Neck Road to a point where it ceases to be a public road and then continuing with that same road" to the combined property; representatives of Yadkin and Weyerhaeuser have walked the extensions of Crackers Neck Road to

the combined property; none of the defendants ever complained of or expressed any opposition to such use of the extensions by Crescent or Duke Power.

The evidence thus presented is insufficient to establish that the alleged use by Yadkin, Crescent and Duke Power was adverse, hostile or under claim of right, and therefore fails to rebut the inference of permissive use. There is no evidence indicating whether the defendants ever consented or objected to any use of the extensions by Yadkin (as opposed to Crescent or Duke Power), nor is there evidence of the manner in which the alleged extensions have been used, whether for vehicular traffic, foot traffic, or otherwise. There is no evidence that permission was ever sought by Yadkin, Crescent or Duke Power to use the extensions, and Yadkin's evidence indicates that none of the defendants ever voiced an objection to the use of the extensions by Crescent or Duke Power. There is no evidence that Yadkin, Crescent or Duke Power ever made repairs or improvements to the extensions. This evidence:

> is tantamount to an assertion that [Yadkin] used the [extensions] in silence. "Neither law nor logic can confer upon a silent use a greater probative value than that inherent in a mere use." . . . The mere use of a way over another's land cannot ripen into an easement by prescription, no matter how long it may be continued.

Godfrey v. Van Harris Realty, Inc., 72 N.C. App. 466, 469-70, 325 S.E.2d 27, 29 (1985) (quoting *Henry v. Farlow*, 238 N.C. 542, 544, 78 S.E.2d 244, 246 (1953)).

In *Pitcock*, the party claiming the prescriptive easement testified that he never requested nor received permission to use the land in question for an access drive, which provided the only means of access to the claimant's property. 119 N.C. App. at 310, 458 S.E.2d at 267. Furthermore, he never made any improvements or changes to the drive. *Id.* While holding that "performing maintenance or repair work to a road is not the sole way to give the true landowner notice of adverse use," we found that the evidence presented showed that the claimant and his predecessors "only used the drive as a means of ingress and egress," which failed to establish that the use was adverse, hostile or under claim of right for the prescriptive period of twenty years. *Id.* at 311, 458 S.E.2d at 267. Similarly, in the instant cases Yadkin has never requested nor received permission to use the extensions, nor has Yadkin or its predecessors made any repairs or performed any maintenance on the extensions that would give notice

to defendants of their use of the extensions. Assuming, *arguendo*, that Yadkin, Crescent and Duke Power occasionally (although admittedly infrequently) used the extensions as the sole means of access to the combined property, such use alone does not rebut the presumption of permissive use and establish that such use was adverse, hostile or under claim of right.

As Yadkin has failed to establish that its use of the extensions (in addition to the use by Crescent and Duke Power) was not permissive, in the absence of such a showing we must assume that such use was with the consent of the defendants and was therefore not adverse, hostile or under claim of right. Accordingly, we hold that the absence of evidence establishing the requisite hostile nature of the use of the extensions over the defendants' lands entitled the defendants to judgment as a matter of law. Each order of summary judgment by the trial court is therefore,

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. DENNIE LEE CHERRY, III, DEFENDANT

No. COA99-1536

(Filed 29 December 2000)

1. Evidence— opinion testimony—victim died from gunshot wounds to back of head

The trial court did not err in a first-degree murder case by allowing a deputy sheriff to testify that in his opinion the victim died from the gunshot wounds to the back of his head, because: (1) the deputy described the position of the victim's body and testified that he had seen bullet wounds to human bodies numerous times; (2) the deputy illustrated the nature and extent of the wounds with a photograph of the victim's body; and (3) the victim's wounds were lethal in nature to a sufficient degree to render expert medical testimony as to the cause of death unnecessary.

2. Jury— excusal for cause—opposition to death penalty—jury recommended life—no prejudicial error

Although defendant contends the trial court improperly excused jurors for cause in a first-degree murder case after they expressed their opposition to the death penalty, defendant cannot show that he was prejudiced when the jury recommended life imprisonment rather than the death penalty.

3. Criminal Law— prosecutorial misconduct—reading defense counsel's billing records that were in open court file—not attorney-client privilege

The trial court did not err in a first-degree murder case by denying defendant's motion for a mistrial based on the district attorney's alleged prosecutorial misconduct of reading some of defense counsel's billing records that had been inadvertently placed in the open court files, because: (1) billing records do not automatically fall under the attorney-client privilege; (2) the billing records in this case disclose only general professional activities such as travel, interviews, phone calls, and memo writing; and (3) the records do not contain any confidential communications such as specific research or litigation strategy undertaken by defense counsel.

4. Jury— *Batson* challenge—no prima facie showing

The trial court did not err in a first-degree murder case by denying defendant's Batson motion and concluding that defendant failed to make a prima facie case of discrimination, because: (1) the trial court found no evidence of racial motivation; (2) the jury pool was predominantly African-American, and the State had six peremptory challenges left; and (3) the trial court accepted the prosecutor's race-neutral explanations that the excusal was based upon the potential black juror's record for prostitution and the fact that the potential juror did not understand the prosecutor's questions.

5. Homicide— first-degree murder—instructions—second-degree murder as lesser-included offense not required

The trial court did not err in a first-degree murder case by refusing to submit the lesser-included offense of second-degree murder to the jury because: (1) the lesser-included offense is not required to be submitted if the evidence is sufficient to satisfy the State's burden of proving each and every element of the offense of premeditated murder; and (2) there was ample

evidence to conclude defendant acted with premeditation and deliberation.

Appeal by defendant from judgment entered 6 March 1999 by Judge W. Russell Duke, Jr., in Bertie County Superior Court. Heard in the Court of Appeals 8 November 2000.

Evidence for the State tended to show that about 3:30 a.m. on the morning of 4 October 1997, defendant Dennie Cherry and Teon Stanford broke into a Bertie County residence which Ms. Sonja Williams shared with her boyfriend, Robert Earl Edwards, Jr. Both defendant and Stanford were armed. Ms. Williams was sleeping in her bedroom when she heard a bang at the front door and voices saying, "Police, M-F, don't move." Defendant and Stanford entered the bedroom, pointed their guns at Ms. Williams and Mr. Edwards, and ordered them to lie on the floor. While defendant watched Ms. Williams and Mr. Edwards, Stanford searched the house for valuables. When Stanford found nothing, defendant dragged Mr. Edwards to the living room and beat him until he revealed the location of some jewelry.

The State's evidence further tended to show that, after taking the jewelry, the men bound Mr. Edwards with a sheet. Defendant unsuccessfully attempted to tie Ms. Williams to Mr. Edwards, then made her lie down in a bedroom. Defendant told Stanford to shoot Mr. Edwards, whereupon Mr. Edwards began to plead for his life. Stanford fired a shot towards Mr. Edwards' legs, but refused to follow defendant's order to "shoot [Mr. Edwards] in the head." Defendant then crouched down next to Mr. Edwards and fired three shots into the back of Mr. Edward's head.

Ms. Williams further testified that defendant ordered Stanford to shoot her, and that Stanford fired towards Ms. Williams, hitting her leg. Defendant then instructed Stanford to shoot her in the head, but Stanford refused. Defendant then shot Ms. Williams three times in the head. Ms. Williams testified that she felt blood running and heard a loud ringing in her ears. Incredibly, she survived her wounds. After her attackers left, Ms. Williams phoned for emergency assistance. Responding to the call, Bertie County Deputy Sheriff Tim Terry arrived at Ms. Williams' residence and found the front door broken open and the lights on. Ms. Williams was lying on the floor next to the telephone. She had blood on her head, a gunshot wound in her thigh, and she said she had been beaten and shot. Deputy Terry also found

Mr. Edwards lying face down in the hallway with gunshot wounds to the back of his head. Mr. Edwards appeared to be dead.

Defendant was tried at the 15 February 1999 Criminal Session of Bertie County Superior Court for first-degree murder, first-degree burglary, robbery with a firearm, and assault with a deadly weapon with intent to kill, inflicting serious injury. The jury returned guilty verdicts on all of the charges, recommending a sentence of life imprisonment without parole on the murder conviction. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder of Robert Earl Edwards, Jr., and to terms of imprisonment on the remaining charges. Defendant appealed from the judgments.

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

Donnie R. Taylor; and Charles A. Moore for defendant appellant.

HORTON, Judge.

[1] Defendant first argues that the trial court erred when it allowed Deputy Sheriff Terry to testify that, in his opinion, Robert Edwards died from the gunshot wounds to the back of his head. At trial, the State offered no expert medical testimony as to Mr. Edwards' cause of death. Defendant contends that, because the only foundation for Deputy Terry's opinion was that he had seen bullet holes before, his opinion was in fact speculative and should have been excluded.

In homicide cases the cause of death may be established "without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character." *State v. Minton*, 234 N.C. 716, 721, 68 S.E.2d 844, 848 (1952). Where the cause of death is obscure and beyond the experience and knowledge of the average layman, the prosecution must present expert medical testimony on the cause of death. *Id.* at 722, 68 S.E.2d at 848.

In *State v. Starnes*, 16 N.C. App. 357, 360, 192 S.E.2d 89, 91, *cert. denied*, 282 N.C. 429, 192 S.E.2d 841 (1972), a deputy sheriff who investigated a shooting testified that, in his opinion, the victim had died of a gunshot wound to the neck. Noting that the witness had described in detail the position in which he had found the deceased's

body, as well as the nature and extent of the wounds, this Court stated that "[i]t did not require a medical expert to conclude that the wounds described had caused the death. Any intelligent person who examined the body could have testified to that fact." *Id.*

In the instant case, Deputy Terry described the position of Mr. Edwards' body and testified that he had seen bullet wounds to human bodies "numerous times." He illustrated the nature and extent of the wounds with a photograph of Mr. Edwards' body, pointing out the bullet holes in Mr. Edwards' head. We find that Mr. Edwards' wounds were obviously lethal in nature to a sufficient degree to render expert medical testimony as to the cause of death unnecessary. The fact that Ms. Williams miraculously survived a similar assault by defendant does nothing to negate the clearly fatal character of Mr. Edwards' injuries. Thus, the trial court did not err in allowing Deputy Terry to testify as to the victim's cause of death, and we overrule defendant's first assignment of error.

[2] Defendant next argues that a number of jurors were improperly excused by the trial court for cause after they expressed their opposition to the death penalty. Defendant contends that their automatic exclusion, without rehabilitation offered to defendant, was prejudicial error. We disagree with defendant's contention. The jury did not recommend the death penalty, but rather life imprisonment, and therefore defendant cannot show that he was prejudiced by the excusing of the prospective jurors. *See State v. Goode*, 350 N.C. 247, 257, 512 S.E.2d 414, 420 (1999) (finding that even if it was error to excuse a prospective juror, the excusal "did not prejudice defendant since the jury recommended not the death sentence, but life imprisonment."). Defendant's second assignment of error is overruled.

[3] Next, defendant argues that the district attorney engaged in prosecutorial misconduct when he read some of defense counsel's billing records that had been inadvertently placed in the open court files. Defendant maintains that such billing records are absolutely protected under the attorney-client privilege and that their publication gave the district attorney an unacceptable advantage during trial. Defendant contends that the trial court's denial of his motion for a mistrial based on the district attorney's misconduct irreparably prejudiced him at trial.

The attorney-client privilege operates to protect confidential communications between attorneys and their clients. Billing records do not automatically fall under the attorney-client privilege, however,

regardless of their contents. *In re Grand Jury Proceedings*, 33 F.3d 342, 354 (4th Cir. 1994); *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999), *cert. denied*, 528 U.S. 891, 145 L. Ed. 2d 181 (1999). The attorney-client privilege *may* protect information in a billing record showing the " 'motive of the client in seeking representation, litigation strategy, or the specific nature of the service provided, such as researching particular areas of law.' " *Chaudhry*, 174 F.3d at 402 (quoting *Clarke v. American Commerce Nat. Bank*, 974 F.2d 127, 129 (9th Cir. 1992)).

In *Chaudhry*, the Fourth Circuit found that, although the attorney-client privilege normally protects only confidential communications, the billing records at issue in the case deserved protection because they identified the specific federal statutes researched by the attorney. Where the disputed materials contained only general information, however, the Fourth Circuit refused to extend attorney-client protection to an attorney's billing records, expense reports and travel records. *In re Grand Jury Proceedings*, 33 F.3d at 353-54.

After examining the billing record, we agree with the trial court that its publication did not irreparably harm defendant. The billing record in the instant case discloses only general professional activities such as travel, interviews, phone calls, and memo writing. Unlike *Chaudhry*, the records mention no specific research or litigation strategy undertaken by defense counsel. As such, we do not believe the billing records contain any confidential communications such as would deserve attorney-client protection. Therefore, we overrule this assignment of error.

[4] Defendant next asserts that he established a *prima facie* case of racial discrimination under *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), and that the trial court erred in overruling such motion at trial. A defendant making a *Batson* motion establishes a *prima facie* case of discrimination by showing that he is a member of a cognizable racial group whose members the State has peremptorily excused from the venire under circumstances which raise an inference of racial motivation. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87. When determining whether the defendant has made the requisite showing, "the trial court should consider all relevant circumstances." *Id.* at 96, 90 L. Ed. 2d at 88.

Defendant made his motion when the prosecutor peremptorily challenged Juror Sutten, the twelfth out of fifteen African-Americans whom the prosecutor had stricken. Defendant argues that at that

point, he had established a *prima facie* case of racial discrimination, and the trial court erred in denying his motion. We disagree. Although defendant established the first two factors for a *Batson* claim, he did not demonstrate any circumstances which would impute improper motivation.

Because the trial court is in the best position to determine whether circumstances support an inference of purposeful discrimination, this Court will not disturb its determination absent clear error. *State v. Thomas*, 350 N.C. 315, 332, 514 S.E.2d 486, 497, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). The trial court in the instant case found no evidence of racial motivation to support a *prima facie* case for discrimination. When defendant made his *Batson* motion, the trial court noted that the jury pool was predominantly African-American, which meant that the State necessarily had passed over several African-Americans, since it had six peremptory challenges left. Moreover, the prosecutor stated, and the trial court accepted as a race-neutral explanation, that Juror Sutten's excusal was based upon her purported record for prostitution. Further, the prosecutor stated that Juror Sutten did not understand his questions to her. This Court has "confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88. We find no evidence of record that the trial court abused its discretion in rejecting defendant's *Batson* motion. Defendant's assignment of error is therefore overruled.

[5] Finally, defendant argues that the trial court erred in refusing to submit the lesser included offense of second-degree murder to the jury. If the evidence at trial is sufficient to fully satisfy the State's burden of proving each and every element of the offense of premeditated murder in the first degree, and there is no evidence to negate this, either from the State or the defendant, then the denial is proper. *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled on other grounds*, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Defendant argues that he never told anyone that he was going to murder Earl Edwards, but rather only that he was going to rob him, and that his statement negates the element of premeditation and deliberation such as to necessitate an instruction on second-degree murder.

Defendant's argument is without merit. Defendant's earlier statement that he intended to rob Mr. Edwards does nothing to negate his

later actions from which premeditation and deliberation are inferred. Defendant carried a loaded gun to his victims' home. Once there, despite complete submission and lack of provocation by Mr. Edwards and Ms. Williams, defendant twice instructed his accomplice, Teon Stanford, to shoot Mr. Edwards and Ms. Williams in the head. When Stanford refused, defendant deliberately shot his victims three times each to the back of the head in an execution-style fashion. We find these facts to be ample evidence that defendant acted with premeditation and deliberation. The trial court was correct in refusing to give an instruction on second-degree murder, and therefore defendant's final assignment of error is overruled.

We find that defendant received a fair trial, free from prejudicial error. In the judgment of the trial court we find

No error.

Judges LEWIS and McGEE concur.

WILLIAM V. KEECH, PLAINTIFF v. WILLIAM G. (WILLIE) HENDRICKS, DEFENDANT

No. COA99-1297

(Filed 29 December 2000)

Assault— summary judgment—genuine issue of material fact of defendant's intent and whether equitable estoppel applies

The trial court erred by granting summary judgment in favor of defendant based on the one-year statute of limitations for assault and battery claims, because: (1) there is a question of material fact on the issue of defendant's intent; and (2) there is a question of material fact as to whether equitable estoppel applies to bar defendant from asserting the one-year statute of limitations defense.

Appeal by plaintiff from an order and judgment entered 20 July 1999 by Judge Richard B. Allsbrook in Pitt County Superior Court. Heard in the Court of Appeals 13 September 2000.

Ward and Smith, P.A., by Lynwood P. Evans and John M. Martin, for plaintiff-appellant.

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

HUNTER, Judge.

William V. Keech ("plaintiff") appeals the trial court's grant of summary judgment in favor of William G. (Willie) Hendricks ("defendant") based on the one-year statute of limitations for assault and battery claims. Because the record before us gives rise to actions for (1) assault and battery and (2) negligence, we hold the trial court erred in granting defendant's summary judgment motion. Therefore, we reverse and remand for a jury trial.

On 9 December 1995, when plaintiff entered the lobby of Pitt County Memorial Hospital ("hospital"), defendant was already there. Upon recognizing defendant (who is plaintiff's nephew), plaintiff approached defendant and offered to shake defendant's hand. In response, defendant either hit or shoved plaintiff so that plaintiff fell backwards and hit his head on the floor. As a result, plaintiff suffered "serious, permanent personal injuries, including, . . . back injury, groin injury, left inguinal hernia, neck injury and a closed head injury . . . ." Shortly "[a]fter the incident and investigation, [but well before the one-year limitations period for intentional torts had run, defendant] was charged with assault inflicting serious injury pursuant to N.C. Gen. Stat. § 14-33(b)(1)."

At defendant's criminal trial, plaintiff testified that defendant assaulted him for no reason. However, before judgment was rendered, defendant's attorney wrote a letter to plaintiff's attorney inquiring as to whether plaintiff might be willing to dismiss the criminal charges against defendant, since "this case has always been a civil case and never a criminal matter. Certainly, Willie never had criminal intent, and . . . this case [does not] warrant[] criminal prosecution." Because plaintiff had no idea as to why defendant pushed him, plaintiff accepted defendant's representation that he had not intended to injure plaintiff. Therefore plaintiff requested and the court granted dismissal of the criminal charges against defendant.

On 30 November 1998, after the one-year statute of limitations for intentional tortious acts had run but before the three-year statute of limitations expired on negligence actions, plaintiff filed this civil

action against defendant. In his answer, defendant stated that he "intentionally pushed Plaintiff and that Plaintiff fell. . . . [However, he] did not intend to cause injury to the Plaintiff." Additionally in his answer, defendant moved the court for dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), arguing that plaintiff's "cause of action is therefore barred by the [one-year] statute of limitations" set out in N.C. Gen. Stat. § 1-54(3) for the tortious acts of assault and battery. On 2 June 1999, defendant moved for summary judgment, and on 12 July 1999, the trial court granted defendant's request finding "that there is no genuine issue as to any material fact and that Defendant is entitled to Judgment as a matter of law dismissing all claims by the Plaintiff against him."

It has long been the law in North Carolina that:

> This Court's standard of review on appeal from summary judgment requires a two-step analysis. Summary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c) (1999). Once the movant makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, establishing at least a prima facie case at trial. *Gaunt v. Pittaway*, 135 N.C. App. 442, 447, 520 S.E.2d 603, 607 (1999). . . .

Stephenson v. Warren, 136 N.C. App. 768, 771-72, 525 S.E.2d 809, 811-12, *disc. review denied*, 351 N.C. 646, —— S.E.2d —— (2000). Furthermore, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

Plaintiff brings forward only one assignment of error, that the trial court erred in granting defendant's summary judgment motion because there is a genuine issue of material fact as to defendant's intent or state of mind when he pushed plaintiff. Contrarily, defendant argues that because, in his answer, he admitted he pushed plaintiff "intentionally," plaintiff's claim against him must fail.

North Carolina courts have consistently held that " '[t]here are situations where the evidence presented raises questions of both

assault and battery and negligence.' " *Vernon v. Barrow*, 95 N.C. App. 642, 643, 383 S.E.2d 441, 442 (1989) (quoting *Lail v. Woods*, 36 N.C. App. 590, 592, 244 S.E.2d 500, 502, *disc. review denied*, 295 N.C. 550, 248 S.E.2d 727 (1978)). Additionally, our Supreme Court has stated that "[a]s a general proposition, issues of negligence are ordinarily not susceptible [to] summary adjudication either for or against the claimant 'but should be resolved by trial in the ordinary manner.' " *Vassey v. Burch*, 301 N.C. 68, 73, 269 S.E.2d 137, 140 (1980) (quoting 6 James W. Moore et al., *Moore's Federal Practice* ¶ 56.17[42], at 946 (2d. ed. 1980)). Furthermore, our Supreme Court has held that "*summary judgment is particularly inappropriate where issues such as motive, intent, and other subjective feelings and reactions are material and where the evidence is subject to conflicting interpretations.*" *Creech v. Melnik*, 347 N.C. 520, 530, 495 S.E.2d 907, 913 (1998) (emphasis added). Instead, "[t]he better practice is for the trial court to submit the case to the jury and enter a judgment notwithstanding the verdict if the evidence is insufficient to support the verdict." *Freeman v. Sugar Mountain Resort, Inc.*, 134 N.C. App. 73, 76, 516 S.E.2d 616, 618, *reversed on other grounds*, 351 N.C. 184, 522 S.E.2d 582 (1999).

Therefore, in order for this Court to uphold the trial court's grant of the present defendant's summary judgment motion, we must find that the evidence in the record before us supports no other conclusion "as to any material fact" but that defendant *intended* to push plaintiff, thereby making defendant entitled to summary judgment "as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). A finding otherwise requires that we reverse the trial court because "[i]t is for the trier of fact to resolve issues of credibility and to determine the relative strength of competing evidence." *Upchurch v. Upchurch*, 128 N.C. App. 461, 464, 495 S.E.2d 738, 740, *review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998). *See also Lawing v. Lawing*, 81 N.C. App. 159, 177, 344 S.E.2d 100, 112 (1986).

In the present case, the record plainly reflects that defendant (through his attorney) approached plaintiff during the criminal suit stating that he did *not* intend the injurious act against plaintiff. Conversely, now in the civil suit, defendant argues that he *did* intend the actions against plaintiff. Yet defendant can point to nothing, save his own contradictory statements, to show that he intended the act and should not now be held negligently liable. Therefore, because the entire basis of plaintiff's complaint depends on defendant's intent (which thereby determines the applicable statute of limitations), the

issue of intent is "material" and the contradiction renders summary judgment inappropriate. *Smith v. Currie*, 40 N.C. App. 739, 742-43, 253 S.E.2d 645, 647, *disc. review denied*, 297 N.C. 612, 257 S.E.2d 219 (1979). Thus, considering the evidence in the light most favorable to plaintiff, we hold the trial court erred in granting defendant's motion for summary judgment based on intent, because defendant's intent is a question for the jury.

However, our analysis cannot stop at this juncture for we recognize that upon submission to the jury, should the jury find (from the evidence presented) that defendant *did* intend the injurious act, plaintiff's claim would then be barred by the one-year statute of limitations for intentional torts, unless an intervening theory of law is present. Therefore, we feel it necessary to address plaintiff's argument that defendant should be equitably estopped from asserting the statute of limitations as a defense to his intentional tort.

The law has long been that

> in determining whether the doctrine of estoppel applies in any given situation, the conduct of both parties must be weighed in the balances of equity and the party claiming the estoppel no less than the party sought to be estopped must conform to fixed standards of equity. . . . [T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be . . . relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Hawkins v. Finance Corp., 238 N.C. 174, 177-78, 77 S.E.2d 669, 672 (1953). Additionally:

> Where there is but one inference that can be drawn from the undisputed facts of a case, the doctrine of equitable estoppel is to be applied by the court. However, . . . where the evidence raises a permissible inference that the elements of equitable estoppel are

> present, but where other inferences may be drawn from contrary evidence, estoppel is a question of fact for the jury, upon proper instructions from the trial court.

Creech, 347 N.C. at 528, 495 S.E.2d at 913 (citations omitted).

Looking to defendant's conduct, we have already established that the record in the present case plainly reflects defendant's contradicting assertions of intent. By gaining a dismissal in criminal court due to his assertion that he "never had criminal intent," and then claiming that he "intentionally pushed" plaintiff, defendant at bar is clearly attempting to preclude plaintiff from seeking any remedy at all, in our courts, for the injuries suffered. Accordingly, plaintiff argues that defendant should be estopped from asserting either the one-year statute of limitations for intentional torts or intent as a defense to the claim of negligence. Looking to plaintiff's conduct, the record reflects plaintiff did not even know what happened. Plaintiff testified in his deposition that defendant "was right behind the wheelchair, and I just reached my hand up to shake—[his hand]." "Well, the next thing I knew I was laying on the floor." Neither does plaintiff remember (nor does defendant contend) that defendant said anything to establish defendant's state of mind at the time. Yet plaintiff relinquished his right to any remedy in criminal court, based solely on defendant's assertion that he had no criminal intent.

Therefore, in applying the law to the facts of this case, we hold that "it would be against the principles of equity and good conscience" to disallow plaintiff from *asserting* equitable estoppel against defendant while allowing defendant to assert a statute of limitations defense or, in the alternative, intent as a defense to plaintiff's negligence claim. *Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 550, 206 S.E.2d 155, 161 (1974). We note however, that our holding by no means is intended to say that as a matter of law the defendant is equitably estopped from asserting the statute of limitations as a defense. Instead, we find that because "the evidence raises a permissible inference that the elements of equitable estoppel are present, but [also raises] other inferences [by] contrary evidence, estoppel [in this case] is a question of fact for the jury, upon proper instructions from the trial court." *Creech*, 347 N.C. at 528, 495 S.E.2d at 913.

We urge the General Assembly to reexamine the one-year statute of limitations for intentional torts and determine whether it is in the interest of justice to have a one-year statute of limitations for an "intentional" act yet, conversely, a three-year statute of limitations for

a "negligent" act. The shorter statute of limitations for the intentional tort is often a trap for laymen and lawyers alike. What is even more confusing is that very often the act resulting in harm (as in the case *sub judice*) is difficult to categorize; and we know that rarely, if ever, will a defendant assert that his act was intentional before the one-year statute of limitations has run on the intentional tort. The interest of justice may be better served by having a three-year statute of limitations for both torts.

Nevertheless, having held that there is a question of material fact with regard to the present defendant's intent and as to whether equitable estoppel applies, we hold that summary judgment was improper and the trial court erred in granting it. Therefore, we reverse and remand to the superior court for trial.

Reversed and remanded.

Judges LEWIS and WALKER concur.

SUZANNE M. BLACKBURN, PLAINTIFF v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT

No. COA99-1408

(Filed 29 December 2000)

Insurance— automobile—UIM—rejection form—added language

The trial court erred by granting plaintiff's motion for summary judgment in a declaratory judgment action to determine the validity of a UIM selection/rejection form where plaintiff contended that the form used by her husband to reject UIM coverage was not valid because it contained language not promulgated by the Rate Bureau and approved by the Department of Insurance. The added language offered an explanation of UIM and UM coverage which would aid the insured in making an informed decision and did not require the insured to take additional steps to reject UIM coverage.

Appeal by defendant from judgment entered 1 October 1999 by Judge Frank R. Brown and filed 5 October 1999 in Wilson County Superior Court. Heard in the Court of Appeals 21 September 2000.

Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by W. Earl Taylor, Jr., for plaintiff-appellee.

DeBank & Honeycutt, by John T. Honeycutt, for defendant-appellant.

Young, Moore and Henderson, P.A., by R. Michael Strickland and Robert C. Paschal, for amicus curiae North Carolina Rate Bureau.

WALKER, Judge.

On 3 May 1999, plaintiff filed this action seeking a declaratory judgment that the policy of automobile insurance issued by defendant provided underinsured motorists (UIM) coverage to plaintiff on 26 March 1998 because the purported UIM and uninsured (UM) selection/rejection form executed by plaintiff's husband (Mr. Blackburn) was invalid.

Mr. Blackburn procured automobile insurance coverage with defendant on 15 August 1995, at which time he chose to "reject Combined [UM/UIM] Coverage and select [UM] Coverage" by executing a selection/rejection form. On 26 March 1998, plaintiff was injured in an automobile accident, which she alleged was caused by the negligence of Ganapa S. Murthy (Murthy). Plaintiff sued Murthy to recover damages for personal injuries sustained in the accident but received only $25,000, which amount represented the limits of the liability coverage. Plaintiff then sought additional compensation from defendant, which was denied on the basis that Mr. Blackburn elected not to carry UIM coverage. Both parties filed motions for summary judgment and the trial court granted plaintiff's motion.

In its sole assignment of error, defendant contends the trial court erred in granting plaintiff's motion for summary judgment because Mr. Blackburn, the named insured under defendant's insurance policy, had rejected UIM coverage. In support of its contention, defendant asserts that: (1) pursuant to N.C. Gen. Stat. § 20-279.21(b)(4), a named insured may reject UIM coverage in writing on a form promulgated by the North Carolina Rate Bureau (Rate Bureau) and approved by the Department of Insurance; and (2) the selection/rejection form in this case was promulgated by the Rate Bureau and was approved by the Department of Insurance. N.C. Gen. Stat. § 20-279.21(b)(4) (1999). On the other hand, plaintiff contends the selection/rejection form executed by Mr. Blackburn was not valid

because it contains language not promulgated by the Rate Bureau and approved by the Department of Insurance.

Summary judgment is proper when, from the materials presented to the court, there exists "no genuine issue as to any material fact." N.C.R. Civ. P. 56 (1999); *Lowe v. Murchison*, 44 N.C. App. 488, 490, 261 S.E.2d 255, 256 (1980). However, a non-moving party may defeat summary judgment by presenting "substantial evidence which would allow that issue to be resolved in his favor." *Best v. Perry*, 41 N.C. App. 107, 110, 254 S.E.2d 281, 284 (1979) (citations omitted).

The rejection of UIM coverage by an insured is governed by N.C. Gen. Stat. § 20-279.21(b)(4), which provides in pertinent part:

> The selection or rejection of [UIM] coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy.
>
> Rejection of or selection of different coverage limits for [UIM] coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.

N.C. Gen. Stat. § 20-279.21(b)(4). Further, the Rate Bureau and Department of Insurance expressed in 1991 their approval of a selection/rejection form that "[a]dd[s] explanations of [UM] and/or combined [UM/UIM] coverages" which otherwise complies with the form promulgated by the Rate Bureau and approved by the Department of Insurance. However, our courts have not addressed whether additional, explanatory language, as here, renders a selection/rejection form invalid.

In *Sanders v. American Spirit Ins. Co.*, 135 N.C. App. 178, 519 S.E.2d 323 (1999), this Court held the rejection of UIM coverage to be ineffective where the form provided the option of rejecting "[UM/UIM] Coverage" instead of providing the option of rejecting "Combined [UM/UIM] Coverage" as contained on the form promulgated by the Rate Bureau and approved by the Department of Insurance. *Id.* at 183, 519 S.E.2d at 326. Thus, the failure to identify the "[UM] and [UIM] Coverage" as "Combined" coverage on the selection/rejection form rendered it invalid, even though it complied with the Rate Bureau and Department of Insurance in other respects. *Id.* at 183-186, 519 S.E.2d at 326-28.

In addition, this Court in *Hendrickson v. Lee*, 119 N.C. App. 444, 459 S.E.2d 275 (1995) rejected an insurer's assertion that a selection/rejection form was valid because it was in "substantial compliance" with the form promulgated by the Rate Bureau and approved by the Department of Insurance. In that case, the selection/rejection form failed because the "sole option" it offered was to "reject [UM] Coverage Limits equal to [insured's] automobile liability limits and select [UM] Coverage at Limits of: . . . Statutory per [North Carolina's] requirement . . . ." *Id.* at 451-52, 459 S.E.2d at 279-80. The language was found to be more restrictive than the language on the form promulgated by the Rate Bureau and approved by the Department of Insurance, which allowed the insured to reject both UM and UIM coverage in their entirety. *Id.* This Court also found that the language on the form in *Hendrickson* was ambiguous, in that it gave the insured the impression that by rejecting [UM] coverage, he or she was "purchasing the minimum required amounts . . . in the state[,]" which amount was "none." *Id.* at 452-53, 459 S.E.2d at 280. This Court thus construed the ambiguous language of the form "against the insurer and in favor of coverage." *Id.* at 453, 459 S.E.2d at 280 (citation omitted).

Plaintiff relies on *State Farm Mut. Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 513 S.E.2d 782, *reh'g denied*, 350 N.C. 600, 536 S.E.2d 323 (1999), where our Supreme Court held that a rejection form was invalid because it was not promulgated by the Rate Bureau and was not approved by the Department of Insurance. In that case, the selection/rejection form was identical to that promulgated by the Rate Bureau and approved by the Department of Insurance with the exception of additional language which required the insured to contact the agent as a final step in rejecting UIM coverage. *Id.* at 269-71, 513 S.E.2d at 784-85. This requirement was held to be in conflict with N.C. Gen. Stat. § 20-279.21(b)(4), which specifically requires rejection to be made in writing on the approved form. *Id.*, N.C. Gen. Stat. § 20-279.21(b)(4).

While the selection/rejection form in this case adds language explaining UM and UIM coverage, it did not require the insured to take additional steps to reject UIM coverage, as did the insured in *Fortin*, 350 N.C. at 269-70, 513 S.E.2d at 784-85. In addition, the selection/rejection form at issue is identical to the form promulgated by the Rate Bureau and approved by the Department of Insurance in 1991, with the exception of the following additional language which defendant contends explains UM and UIM coverage:

> North Carolina law states that unless rejected, no policy of motor vehicle liability insurance shall be issued or delivered unless it contains coverage for the persons insured who are legally entitled to recover damages from owners or operators of [UM] vehicles. (Coverage for property damage is subject to an exclusion of the first $100.00.) In addition to [UM] coverage (Coverage U), an optional Combined [UM][UIM] Coverage (Coverage U1) must be made available. Coverage U1 also includes [UIM] protection. A motor vehicle is underinsured if the liability limits of the at-fault owner or driver are less than the Uninsured/Underinsured limits of the insured's policy. Coverage U1 can only be purchased if your liability insurance limits are greater than the minimum required by North Carolina law.
>
> Coverage U and Coverage U1 are available with limits of up to $1,000,000 per accident for bodily injury and up to the policy property damage liability limits for property damage. Coverage for property damage is applicable only to damages caused by uninsured motor vehicles.

A careful review of this added language reveals that it offers an explanation to the insured of UM and UIM coverage which we believe would aid the insured in making an informed decision on whether to select or reject such coverage. This additional language comports with the authorization given by the Rate Bureau and the Department of Insurance. Therefore, we conclude as a matter of law that this additional language does not render invalid the selection/rejection form executed by Mr. Blackburn.

We therefore reverse the decision of the trial court which granted summary judgment in favor of plaintiff and remand the case to the trial court for entry of summary judgment in favor of defendant.

Reversed and remanded.

Judges McGEE and HORTON 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 2 January 2001)

Appeal and Error— appellate rules—failure to file record on appeal within time allotted—appeal dismissed

Class counsel's appeal from the trial court's denial of their motion for additional attorney fees and motion for extension of time is dismissed for failure to follow the appellate rules because: (1) class counsel violated N.C. R. App. P. 12(a) by failing to file the record on appeal within fifteen days after the record was settled; and (2) denial of class counsel's motion for extension of time and dismissal of this appeal will not prejudice any rights of the individual named class plaintiffs.

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.

An opinion was filed in this case on 17 October 2000. On 21 November 2000, plaintiffs' class counsel filed a Petition for Rehearing. On 1 December 2000, we allowed this petition but stipulated that the case would be reconsidered without the filing of additional briefs and without oral argument. The following opinion supersedes and replaces the opinion filed 17 October 2000.

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. 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 until 21 November 2000, which was after the original opinion had been filed. The petition for a writ of certiorari was denied by this Court on 13 December 2000.

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. 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 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.

WALKER, Judge, 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 prej-

udiced by the late filing of several days and such did not delay this Court's calendaring the case for argument.

Further, the majority states that class counsel did not petition this Court for a writ of certiorari until 21 November 2000. However, after appellees filed their motion to dismiss the appeal, 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 application under N.C.R. App. P. 2 for this Court to suspend the rules.

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).

FILMAR RACING, INC., PLAINTIFF v. DONALD W. STEWART, STEWART & SMITH, P.C., AND GILFORD H. MARTIN, II, DEFENDANTS

No. COA99-1507

(Filed 2 January 2001)

1. Jurisdiction— personal—long arm

The trial court did not err by granting a motion to dismiss for lack of personal jurisdiction pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2) by an Alabama attorney and his law firm where plaintiff was a Tennessee corporation which brought an action against Martin (a North Carolina resident), Stewart (the Alabama attorney), and Stewart's law firm arising from plaintiff's contract to purchase Pinnacle Motorsports Group, a letter from Stewart to Pinnacle informing Pinnacle of the status of Tennessee litigation, and Pinnacle's refusal to go forward with the sale. The only contact between Stewart, his law firm, and North Carolina is the mailing of a single letter from Alabama written by Stewart on Stewart & Smith letterhead on behalf of his client; North Carolina's interest in adjudicating the matter is insignificant; the litigation giving rise to this action has been pending in Tennessee at all relevant times; and permitting this lawsuit to proceed would not be convenient for the parties or in the interests of fairness to Stewart and his firm. The necessary minimum contacts do not exist.

2. Contracts— tortious interference—failure to state claim—non-malicious motive

The trial court did not err by granting a Rule 12(b)(6) motion to dismiss plaintiff's claims against all defendants in an action for tortious interference with contract arising from the proposed sale

of a North Carolina business to plaintiff which did not take place after defendants informed the business of the status of litigation in Tennessee. The complaint described the litigation in Tennessee between defendant-Martin and plaintiff so that, on the face of the complaint, plaintiff alleged that defendants have a legitimate business interest and a motive for interference other than malice.

Appeal by plaintiff from judgment entered 20 September 1999 by Judge William Freeman in Cabarrus County Superior Court. Heard in the Court of Appeals 6 November 2000.

Cozen and O'Connor, by Paul A. Reichs, Hunter Quick and Anna Daly, for plaintiff-appellant.

Hartsell, Hartsell & White, P.A., by Fletcher L. Hartsell, Jr. and Kimberly A. Lyda, for defendant-appellees.

EAGLES, Chief Judge.

On 28 January 1999, Filmar Racing, Inc. (Filmar) brought an action against Donald W. Stewart (Stewart), Stewart & Smith, P.C. (Stewart & Smith) and Gilford H. Martin II (Martin) alleging tortious interference with a contract. On 30 March 1999 a motion to dismiss was filed by Stewart, Stewart & Smith and Martin. On 20 September 1999, Judge William Freeman dismissed all claims as to all defendants. Filmar appeals.

Filmar is a Tennessee corporation which until about 11 January 1999 maintained a place of business in Concord, North Carolina. Martin is a North Carolina resident and minority shareholder in Filmar. Stewart is a resident of Alabama licensed to practice law in that state. He is a principal in Stewart & Smith, P.C., a law firm organized as a professional corporation for the practice of law in Alabama.

This appeal arises from a Tennessee lawsuit instituted by Martin against Filmar. The Tennessee litigation was pending at all times relevant to this appeal. According to the appellees' brief, in the Tennessee litigation, Martin, represented by Stewart, sued Filmar Racing, Inc. as a minority shareholder, a creditor and an employee of Filmar.

Prior to 11 January 1999, Filmar entered into a contract with Pinnacle Motorsports Group (Pinnacle) of Concord, North Carolina.

According to the terms of the contract Filmar agreed to sell substantially all of its corporate assets to Pinnacle for approximately $1,350,000.00. Shortly thereafter, Stewart, on behalf of Martin, filed a request for injunctive relief asking the Tennessee court to sequester any funds received by Filmar from the sale of assets to Pinnacle pending the outcome of the Tennessee litigation. The Tennessee court denied the request following a hearing on 15 January 1999. On 20 January 1999, Stewart, on behalf of Martin, then moved the court for reconsideration of its order.

On 25 January 1999, before the Tennessee court ruled on Stewart's motion to reconsider, Stewart mailed a letter from Alabama to Pinnacle in Concord, North Carolina. In the letter Stewart informed Pinnacle about the status of the Tennessee litigation, including the pendency of the motion to reconsider. The letter also provided in pertinent part that

> upon a sale of the corporate assets and distribution of the sale proceeds, Mr. Martin will hold Pinnacle Motorsports Group liable for his lawful share of the corporate assets. If [the majority shareholder in Filmar] distributes the sale proceeds to creditors . . . then Mr. Martin will be forced to seek recourse against Pinnacle Motorsports Group . . . We suggest that Pinnacle not transfer any funds to [the majority shareholder] or Filmar Racing, Inc. until the Motion to Reconsider is heard and decided . . . .

After receiving this letter, Pinnacle refused to go forward with the assets sale pursuant to their contract with Filmar. As a result, on 28 January 1999, Filmar filed this lawsuit in Cabarrus County Superior Court alleging tortious inference with a contract. On 30 March 1999, Stewart, Stewart & Smith and Martin filed a motion to dismiss under the provisions of Rule 12(b) of the North Carolina Rules of Civil Procedure. On 20 September 1999, Judge William Freeman granted the motion to dismiss as to defendants Stewart and Stewart & Smith pursuant to Rules 12(b)(2)(4) and (5), and as to defendants Stewart, Stewart & Smith and Martin pursuant to Rule 12(b)(6). From this order and judgment of dismissal, Filmar appeals.

[1] By their first assignment of error, Filmar contends that the trial court erred in granting Stewart and Stewart & Smith's motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Rules of Civil Procedure. Filmar argues that the exercise of personal jurisdiction here is statutorily and constitutionally permissible. We disagree.

The determination of whether the trial court can properly exercise personal jurisdiction over a non-resident defendant is a two-part inquiry. *Godwin v. Walls*, 118 N.C. App. 341, 345, 455 S.E.2d 473, 478 (1995); *Murphy v. Glafenhein*, 110 N.C. App. 830, 833, 431 S.E.2d 241, 243 (1993); *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 629, 394 S.E.2d 651, 654 (1990). First, the North Carolina long-arm statute must permit the exercise of personal jurisdiction. *Godwin*, 118 N.C. App. at 345, 455 S.E.2d at 478. Second, the exercise of personal jurisdiction must comport with the due process clause of the Fourteenth Amendment of the United States Constitution. *Id.* However, "[w]hen personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry—whether defendant has the minimum contacts necessary to meet the requirements of due process." *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999). The burden is on the plaintiff to prove by a preponderance of the evidence that grounds exist for the exercise of personal jurisdiction over a defendant. *Murphy*, 110 N.C. App. at 834, 431 S.E.2d at 243.

Filmar argues that the North Carolina long-arm statute, G.S. § 1-75.4, confers jurisdiction over Stewart and Stewart & Smith. The statute provides in pertinent part that jurisdiction is proper "[i]n any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant." G.S. § 1-75.4(3) (1999). Assuming *arguendo* that Stewart and Stewart & Smith were subject to the long-arm statute, the exercise of personal jurisdiction over them by the North Carolina courts would violate due process.

The Due Process Clause of the Fourteenth Amendment operates as a limitation on the power of a state to exercise *in personam* jurisdiction over a non-resident defendant. *Hiwassee*, 135 N.C. App. at 28, 519 S.E.2d at 320. In determining whether the exercise of personal jurisdiction comports with due process, the crucial inquiry is whether the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend '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)). To generate minimum contacts, the defendant must have acted in such a way so as to purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the laws of North Carolina. *Id.* at 319, 90 L.Ed. at 104;

Buying Group, Inc. v. Coleman, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979); *Hiwassee*, 135 N.C. App. at 28, 519 S.E.2d at 320-21; *Godwin*, 118 N.C. App. at 353, 455 S.E.2d at 482. Moreover, the relationship between the defendant and the state must be such that the defendant should "reasonably anticipate being haled into" a North Carolina court. *Cherry Bekaert*, 99 N.C. App. at 632, 394 S.E.2d at 656. Whether a defendant's activities satisfy due process depends upon the facts of each case. *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 445, 96 L.Ed. 485, 492 (1952).

Our courts have developed a list of factors helpful to determining the existence of minimum contacts. Such factors include, "(1) the quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience of the parties." *Cherry Bekaert*, 99 N.C. App. at 632, 394 S.E.2d at 655 (quoting *New Bern Pool & Supply Co. v. Graubart*, 94 N.C. App. 619, 624, 381 S.E.2d 156, 159, *aff'd per curium*, 326 N.C. 480, 390 S.E.2d 137 (1990); *Tutterrow v. Leach*, 107 N.C. App. 703, 708, 421 S.E.2d 816, 819 (1992). The Court must also weigh and consider the interests of and fairness to the parties involved in the litigation. *Tutterrow*, 107 N.C. App. at 708, 421 S.E.2d at 819.

Absent a request by a party, a trial court is not required to make findings of fact when ruling on a motion. *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986). Rather, on appeal it is presumed that the trial court found facts sufficient to support its ruling. *Id.* If these presumed factual findings are supported by competent evidence, they are conclusive on appeal. *Id.* Here, Filmar did not request the trial court to make findings of fact. Accordingly, the dispositive issue before us is the sufficiency of the evidence to support a determination that personal jurisdiction did not exist.

When we apply the factors articulated in our case law for determining whether the necessary minimum contacts exist to the facts presented here, we conclude they do not. First, the only contact demonstrated by Filmar between Stewart and Stewart & Smith and North Carolina is the mailing of a single letter from Alabama to Pinnacle in North Carolina written by Stewart on Stewart & Smith letterhead on behalf of their client Martin. In addition, North Carolina's interest in adjudicating this matter is insignificant. Plaintiff Filmar is not a North Carolina corporation. Defendants Stewart and Stewart & Smith are not residents of North Carolina, though defendant Martin

does reside in North Carolina. Moreover, litigation giving rise to this cause of action has been pending in a state court in Tennessee at all relevant times. Finally, permitting this lawsuit to proceed in North Carolina would not be convenient for the parties, nor would it be in the "interests of and fairness to" Stewart and Stewart & Smith.

This conclusion is consistent with *Tutterrow v. Leach*, 107 N.C. App. 703, 421 S.E.2d 816 (1992). In *Tutterrow*, we reversed the trial court's denial of a motion to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction over a non-resident defendant. In *Tutterow*, the defendant, a Rhode Island resident, and the plaintiff, a North Carolina resident, entered into an oral contract over the telephone. This oral contract was later memorialized by letter. Thus, the only contacts between the defendant and the state of North Carolina were telephone conversations and a "handful of letters." *Id.* at 709, 421 S.E.2d at 820. All acts to be performed under the contract were to occur outside North Carolina. Moreover, any services actually rendered by the defendant were discharged outside North Carolina. We held that these contacts were insufficient to satisfy due process. *Id.*

Here, as in *Tutterrow*, to exercise personal jurisdiction over these non-residents would violate due process of law. By the single act of mailing a letter from Alabama to North Carolina on behalf of their client, Stewart and Stewart & Smith did not purposefully avail themselves of the privilege of conducting activities within North Carolina. As such, they did not invoke the benefits and protections of our laws. Moreover, by this one act, Stewart and Stewart & Smith could not have reasonably anticipated being haled into court in this state. Although we are cognizant of the liberal trend toward exercising personal jurisdiction over non-resident defendants, the minimum contacts which are "absolutely necessary" between the defendant and our state for North Carolina to invoke jurisdiction are missing here. *Tutterrow*, 107 N.C. App. at 708, 421 S.E.2d at 819. Accordingly, this assignment of error fails.

[2] Filmar next argues that the trial court erred in dismissing the claims against all defendants pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. Filmar contends that because the complaint stated a claim for tortious interference with a contract, the motion to dismiss under Rule 12(b)(6) should have been denied. We disagree.

Under Rule 12(b)(6) of the Rules of Civil Procedure, a cause of action should be dismissed if it fails "to state a claim upon which

relief can be granted." G.S. § 1A-1, Rule 12(b)(6) (1999). A Rule 12(b)(6) motion tests the legal sufficiency of a complaint. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 345, 511 S.E.2d 309, 312 (1999); *Derwort v. Polk County*, 129 N.C. App. 789, 791, 501 S.E.2d 379, 380-81 (1998); *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). When ruling on a Rule 12(b)(6) motion, the trial court must accept as true the allegations contained in the complaint. *Hudson-Cole*, 132 N.C. App. at 345, 511 S.E.2d at 312. "[W]hen the complaint on its face reveals the absence of fact sufficient to make a good claim," dismissal of the claim pursuant to Rule 12(b)(6) is properly granted. *Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986); *Hudson-Cole*, 132 N.C. App. at 345-46, 511 S.E.2d at 312; *Harris*, 85 N.C. App. at 670-71, 355 S.E.2d at 840-41.

Here, Filmar's complaint alleges that Stewart, Stewart & Smith and Martin tortiously interfered with their contractual relationship with Pinnacle. The essential elements of tortious interference with a contract are:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

Embree Construction Group v. Rafcor, Inc., 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992) (quoting *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)); *Lexington Homes, Inc. v. W.E. Tyson Builders, Inc.*, 75 N.C. App. 404, 410-11, 331 S.E.2d 318, 321 (1985). "The interference is 'without justification' if the defendants' motives for procuring termination of the employment contract were 'not reasonably related to the protection of a legitimate business interest' of the defendant." *Privette v. University of North Carolina*, 96 N.C. App. 124, 134, 385 S.E.2d 185, 190 (1989) (quoting *Smith v. Ford Motor Co.*, 289 N.C. 71, 94, 221 S.E.2d 282, 292 (1976)). Accordingly, we have held that the complaint must admit of no motive for interference other than malice. *Id.* at 134-35, 385 S.E.2d at 191; *Sides v. Duke University*, 74 N.C. App. 331, 346, 328 S.E.2d 818, 829 (1985), *rev'd on other grounds, Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997).

Filmar's complaint alleges that Stewart, Stewart & Smith and Martin "lacked justification" for their acts in mailing the 25 January

1999 letter to Pinnacle. However, the complaint also describes the litigation pending in Tennessee. Thus, on the face of the complaint Filmar alleges that defendants have a legitimate business interest both in Filmar's contract with Pinnacle, as well as for mailing the 25 January letter. Because the face of the complaint admits of "motive for interference other than malice," the trial court did not err in granting the Rule 12(b)(6) motion to dismiss.

Finally, Filmar argues on appeal that the trial court erred in granting Stewart and Stewart & Smith's motion to dismiss pursuant to Rules 12(b)(4) and (5). We conclude that Filmar complied with the provisions of these rules, and therefore the trial court improperly granted Stewart and Stewart & Smith's motion to dismiss under Rules 12(b)(4) and (5). However, such error was harmless as the trial court properly granted the motion to dismiss pursuant to Rules 12(b)(2) and (6). *Hajmm Co. v. House of Raeford Farms*, 328 N.C. 578, 589, 403 S.E.2d 483, 490 (1991).

For the foregoing reasons, the order and judgment of dismissal of 20 September 1999 is affirmed.

Affirmed.

Judges WALKER and HUNTER concur.

STATE OF NORTH CAROLINA v. VICTOR MANUEL MUNOZ A/K/A VICTOR MANUEL MUNOZ-BEDOYA

No. COA99-1338

(Filed 16 January 2001)

1. Search and Seizure— traffic stop—motion to suppress—reasonable suspicion

The trial court's finding that an officer had a reasonable suspicion to detain defendant after a traffic stop of defendant's truck which was transporting two cars was supported by the evidence, because: (1) the issue was whether a reasonable officer would be suspicious based upon the information known to him and not whether those circumstances would raise the suspicions of someone knowledgeable about the trucking industry; and (2) a trooper testified at the voir dire hearing that given fuel prices and the dis-

tance traveled, the $200 flat fee amount per vehicle that defendant stated he was going to receive seemed suspicious.

2. Search and Seizure— traffic stop—voir dire hearing—finding defendant cooperated with police not required

The trial court did not err by denying defendant's motion to suppress the evidence of cocaine obtained in the search of defendant's truck and the two cars being transported on the truck even though defendant contends the trial court should have been required to make a finding at a voir dire hearing that defendant cooperated with the police when a trooper asked if he could search defendant's truck, because a judge does not have to make findings summarizing all of the evidence before him in a voir dire hearing.

3. Search and Seizure— traffic stop—delay in detention—reasonable suspicion

The trial court did not err by denying defendant's motion to suppress the evidence of cocaine obtained in the search of defendant's truck and the two cars being transported on the truck even though defendant contends it took only a few minutes to check defendant's driver's license and that neither officer was able to explain the reason for the forty-five-minute delay, because the court's findings describe actions the officers took during the forty-five-minute period to confirm their reasonable suspicion, including checking the license, the fuel stickers, the EPIC system to see if there were any previous violations, and defendant's log book.

4. Search and Seizure— lawful detention—reasonable and articulable suspicion

The trial court did not err by denying defendant's motion to suppress the evidence of cocaine obtained in the search of defendant's truck and the two cars being transported on the truck even though defendant contends the trial court's findings of fact do not support its conclusion of law that the officers had a reasonable suspicion to detain defendant, because applying the totality of circumstances test to the facts reveals that a reasonable cautious officer would have a reasonable and articulable suspicion that criminal activity was afoot when there were inconsistencies in defendant's log book and shipping documentation.

5. Search and Seizure— automobile—voluntariness of consent to search

The trial court did not err by concluding that the search of defendant's truck and the two cars being transported on the truck was not illegal after defendant's lawful detention, because: (1) two troopers testified that defendant said they could search his vehicle, and willingly signed the consent form; (2) defendant was not confined to the patrol car the entire time that the troopers were checking defendant's license, registration, and paperwork; (3) defendant did not attempt to refute the voluntariness of the consent on cross-examination, nor by presenting his own evidence; and (4) defendant voluntarily told the officers they could search his truck before they even asked.

6. Drugs— trafficking in cocaine by possession—trafficking in cocaine by transportation—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of trafficking in cocaine by possession and trafficking in cocaine by transportation, because: (1) constructive possession can be inferred where the evidence shows that defendant had the power to control the vehicle where the controlled substance was discovered; (2) defendant could have found the cocaine had he inspected the vehicle in a manner consistent with the inspection he conducted on the other vehicle on his truck; (3) the fax indicated the vehicle was to be shipped to Junior City, New Jersey, which the State Bureau of Investigation testified does not exist, and the contact number was a New York area code; and (4) defendant told the agents he did not know the buyer and that the buyer would not be able to contact defendant directly, but a call was received on defendant's pager from the number identified on the fax as the buyer's number.

7. Jury— motion to dismiss juror—juror submitted note to court inquiring about defendant—failure to undertake further investigation not error

The trial court did not abuse its discretion by failing to undertake a further investigation and by denying defendant's motion to dismiss a juror after the juror submitted a note to the court inquiring as to whether defendant had a prior record, the length of time he had been in the United States, his nationality, and his citizenship status, because: (1) the trial court informed defendant and both counsel of the question, the response it intended to

make, and gave defendant's counsel an opportunity to state his position; (2) defendant did not request any further inquiry or investigation after his motion to dismiss the juror was denied; and (3) the trial court was in a better position to determine whether the juror's questions were potentially prejudicial, and whether the situation could be cured by an appropriate instruction.

8. Drugs— trafficking in cocaine by possession—trafficking in cocaine by transportation—requested instruction improper

The trial court did not err in a trafficking in cocaine case by refusing to give defendant's requested instruction to the jury that he was operating as a licensed common carrier who holds himself out to the public to transport persons or property for hire, that he is not required by law to inventory the contents of a package or vehicle that he has undertaken to transport for hire, and that it would be necessary to find that defendant had actual knowledge of the controlled substances, because: (1) whether a common carrier is required by law to inventory the contents of a package or vehicle is not relevant; (2) the issue regarding the lack of an inspection of the pertinent vehicle was whether defendant's failure to inspect was consistent with his actions with respect to the other vehicles, and not whether the inspection was required; and (3) defendant's instruction is inaccurate since possession can be actual or constructive, and a defendant's knowledge of the controlled substance may be inferred from other evidence in the case.

Appeal by defendant from judgments entered 11 October 1995 by Judge C. Preston Cornelius in Guilford County Superior Court. Heard in the Court of Appeals 11 October 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Douglas A. Johnston, for the State.

Polly D. Sizemore for defendant-appellant.

MARTIN, Judge.

Defendant was convicted on 1 September 1995 of trafficking in cocaine by possession and trafficking in cocaine by transportation. He appeals from judgments imposing concurrent terms of imprisonment.

The State offered evidence tending to show that defendant was driving his tractor trailer truck with a car carrier north on I-85 on 31 December 1994, and was transporting a Ford Aerostar and a Nissan Sentra at the time. He was spotted by Sergeant L.E. Lowry of the North Carolina Highway Patrol, who determined that defendant was traveling in excess of seventy-five miles per hour. When Sergeant Lowry turned his vehicle around and caught up to defendant, defendant had already been pulled over by Trooper William Gray of the Highway Patrol. Trooper Gray stopped defendant because the tractor trailer was "drifting back and forth in its lane of travel and at times driving over the divided lines to the left," did not have its headlights on, and had only the driver's side windshield wiper in operation despite steady rain. Trooper Gray requested that defendant produce his license and registration. Defendant handed the trooper his license, his registration, a notebook containing his log book, and a clipboard holding shipping documents and bills of lading.

Defendant sat in the front seat of the patrol car while Trooper Gray checked his Texas driver's license. Shortly thereafter, Trooper Lowry joined defendant and Trooper Gray in the car. Despite defendant's strong accent, the troopers determined that he could understand them because he was answering their questions appropriately. Defendant stated that he was sleepy and that he forgot to turn his headlights back on after an earlier stop.

Upon inspection of the documents provided by defendant, the troopers found inconsistencies in defendant's log book and in the shipping documentation. The clipboard contained documents entitled "bill of lading" for the Aerostar and for other vehicles that were no longer on the carrier. The bills of lading included an inspection checklist done on the vehicles. There was no bill of lading for the Sentra. Defendant produced a FAX that listed the Sentra's destination as Junior City, New Jersey, a contact number, and Miguel Angel as the contact person; there was no other documentation regarding the Sentra. Defendant told the officers that he did not know Mr. Angel.

The troopers also noted that defendant smelled strongly of grease or fuel. Defendant told the troopers that he was receiving $200 per vehicle to transport the van to Delaware and the Sentra to New Jersey. Trooper Gray sent defendant back to his truck while checking the tags of the cars on the carrier and clipboard.

Defendant returned to the patrol vehicle and sat in the back seat while the checks were completed and the trooper received notice that

the license and registration were valid. Trooper Gray issued defendant a warning citation for driving out of his lanes and for operating a vehicle without headlights, and returned all of the documentation. About forty-five minutes elapsed between the time defendant was stopped until he was issued this citation.

As defendant was leaving the patrol car, Trooper Gray asked him whether there were any weapons or drugs in the truck. Defendant responded "no" to both questions. Trooper Gray then asked defendant if he could search the truck; defendant agreed and signed a consent form. Trooper Gray searched the Aerostar and found nothing. Trooper Gray noted the rear tags and the rear trunk lock mechanism were missing on the Sentra. He smelled the same grease or fuel-like odor he had detected on defendant in the interior of the car and noticed that the back seat on the passenger's side had been pulled out. He found two kilo bundles of cocaine behind the seat.

Sergeant Lowry handcuffed defendant and seated him in the back seat of the patrol car. When he was later asked to step out of the car, he was holding his beeper with the bottom off and the batteries removed. Trooper Gray took the beeper and replaced the batteries, but the memory had been cleared. The next day defendant's beeper went off; the number recorded on the beeper was the contact number listed on the FAX.

Agents from the State Bureau of Investigation questioned defendant. He stated that he did not inspect the Sentra because it was raining in Houston, Texas when he picked it up. Upon further investigation, however, the officers determined there had been no rain in the Houston area on the day defendant said he had picked up the car. In addition, the officers determined there is no such town as Junior City, New Jersey, and that the area code of the contact number shown on defendant's documentation was in New York City. A subsequent inspection of the Sentra revealed additional packages of cocaine hidden under the floor; the cocaine located in the car was estimated to have a "street value" of approximately ten million dollars.

Defendant offered evidence tending to show that he was an automobile transporter and was leased to Freight Shakers. Ruth Ontevaras testified that she is employed with AAA Auto Trucking in Las Vegas, Nevada, and that she received an order on 27 December 1994 from a person who identified himself as Miguel Angel of Houston, Texas, requesting that a 1989 Sentra be transported from Houston Auto Auction to himself at 1001 74th Street, Junior City, New

Jersey. He gave her a pager number as a contact number. Angel wired Ms. Ontevaras a partial payment, and she faxed the contract to defendant on 28 December and asked him if he could pick up the car. She also instructed him to call her when he got to Virginia or New Jersey for instructions as to how much to collect for the balance. There was also evidence tending to show that defendant was dependable and had a good reputation in the transport business. Finally, defendant's former employer testified a grease or fuel-like smell is consistent with an old truck such as the one owned by defendant.

I.

[1] Defendant first assigns error to the trial court's denial of his motion to suppress the evidence obtained in the search because he was unlawfully detained or, in the alternative, because the search was illegal. Defendant assigns error to both the court's findings of fact and conclusions of law made after a *voir dire* hearing.

A trial court's findings of fact made after a suppression hearing are conclusive and binding on the appellate courts if supported by competent evidence. *State v. Brooks*, 337 N.C. 132, 446 S.E.2d 579 (1994). Defendant argues the following finding of fact is not supported by competent evidence:

> That the officer had a suspicion once he talked with the defendant about the two used cars on a big rig coming from Houston, Texas going to Delaware, and the defendant had told him he was receiving $200 per car for the transportation. A reasonable officer would have a reasonable suspicion that the economics of the situation did not match the situation as he observed it.

Defendant argues that because neither officer was knowledgeable about the auto transport business, the circumstances were not such as to raise a reasonable suspicion, especially since there was evidence that an additional vehicle had been carried earlier in the trip. We disagree. At issue is whether a reasonable officer would be suspicious based upon the information known to him, not whether those circumstances would raise the suspicions of someone knowledgeable about the trucking industry. Trooper Gray testified at the *voir dire* hearing that given fuel prices and the distance traveled, the $200 flat fee amount per vehicle seemed suspicious; he also acknowledged that he knew a third vehicle had been transported. The trial court's finding is supported by competent evidence.

[2] Defendant also argues that the trial court should have included a finding that defendant cooperated with the police. "When conflicting evidence is offered at a *voir dire* hearing held to determine the admissibility of evidence, the trial judge must make findings of fact *to show the basis of his rulings on the admissibility of the evidence offered.*" *State v. Basden*, 8 N.C. App. 401, 407, 174 S.E.2d 613, 617 (1970) (emphasis added). A judge does not have to make findings summarizing all of the evidence before him in a *voir dire* hearing. *State v. Dunlap*, 298 N.C. 725, 259 S.E.2d 893 (1979). Therefore, we find no error in this omission.

[3] Defendant also contends the trial court should have found that it took only a few minutes to check his driver's license, and that neither officer was able to explain the reason for the forty-five minute delay. We note that the trial court found that "[Trooper Gray] did take a few minutes to check [the] out-of-state license", and that the court's findings also described actions taken by the officers during the 45 minute period; i.e., they checked the license, the fuel stickers, and the EPIC system to see if there were any previous violations, and also reviewed defendant's log books. These findings are sufficient to explain the time involved in the stop.

[4] Defendant next argues that the trial court's findings of fact do not support its conclusion of law that the officers had a reasonable suspicion to detain defendant. This assignment of error is reviewable *de novo*. *Brooks*, 337 N.C. at 141, 446 S.E.2d at 585. "In order to further detain a person after lawfully stopping him, an officer must have reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot." *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999). In its analysis, the court must "view the facts 'through the eyes of a reasonable, cautious officer, guided by his experience and training' " at the time he determined to detain defendant. *State v. Parker*, 137 N.C. App. 590, 598, 530 S.E.2d 297, 302 (2000) (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)). The court may draw reasonable inferences from those facts, and should employ a totality of the circumstances test. *Id.* The law in North Carolina as to what constitutes a "reasonable and articulable suspicion" following traffic stops is evolving.

In *State v. Pearson*, 348 N.C. 272, 276, 498 S.E.2d 599, 601 (1998), a case dealing with a frisk, the Court held that there was insufficient evidence to show a reasonable and articulable suspicion that the defendant might be armed and dangerous where the officer noted: (1)

a slight odor of alcohol, (2) that the defendant acted nervous and excited, and (3) that the defendant and his passenger's statements as to their travel destinations were inconsistent. The Court additionally noted that the stop was in the middle of the afternoon, and that defendant was both polite and cooperative. *Id.* Following the Supreme Court's decision in *Pearson*, this Court held that there was not sufficient evidence to detain the defendant where the defendant was nervous and a passenger was uncertain as to the day the trip began. *State v. Falana*, 129 N.C. App. 813, 817, 501 S.E.2d 358, 360 (1998).

In *State v. McClendon*, 350 N.C. 630, 639, 517 S.E.2d 128, 134 (1999), on the other hand, the Court held that there was sufficient evidence where the defendant could not produce the registration for the car, provided inconsistent information as to whose vehicle he was driving and where the driver lived, gave vague travel information, and acted nervous. The Court clarified its holding in *Pearson*, noting that the nervousness of the defendant in that case "was not remarkable," while deeming McLendon's rapid breathing, fidgeting, perspiration, and lack of eye contact to be of a different nature. *Id.* Use of the totality of the circumstances test led to different results in the two cases. *Id.*

We now turn to the case before us. During the stop, the troopers noted: (1) that the log book was not properly filled out and there were discrepancies in it; (2) that defendant did not have a bill of lading or an inspection for the Sentra but did have one for the van and other cars he had previously transported; (3) that defendant smelled like grease, and (4) that the economics of traveling from Texas to Delaware and New Jersey for $200 per car seemed suspicious. Applying a totality of the circumstances test to the foregoing facts, we believe a "reasonable, cautious officer" would have a reasonable and articulable suspicion that criminal activity was afoot. The inconsistencies in the log book and in the shipping documentation make this case more like *McClendon* than *Pearson*. We, therefore, hold that the trial court's findings of fact support its legal conclusions, and that defendant was not unlawfully detained.

[5] Defendant next argues that the search was illegal. Since we have held that defendant's detention was not unlawful, the State was required to show only that defendant's consent to the search was freely given, and was not the product of coercion. *State v. Aubin*, 100 N.C. App. 628, 397 S.E.2d 653 (1990).

At the *voir dire* hearing, the State offered the testimony of the two troopers who stated that defendant said they could search his vehicle, and willingly signed the consent form. They further testified that defendant was not confined to the patrol car the entire time that they were checking defendant's license, registration and paperwork. Defendant did not attempt to refute the voluntariness of the consent on cross-examination nor by presenting his own evidence. In fact, on cross-examination of Trooper Gray, defendant's counsel asked:

> He voluntarily told you you could search his truck before you even asked to search his truck, did he not?

Shortly thereafter, counsel asked:

> And then after that, without you even asking him, he said you can search if you want to?

The trial court's finding that defendant's consent to the search was voluntary is supported by the evidence and supports the conclusion that the search of the truck was lawful. Defendant's motion to suppress was properly denied.

II.

[6] Defendant next argues that the court erred in denying his motion to dismiss. In ruling on a motion to dismiss, the trial court must determine that the State presented substantial evidence as to every essential element of the crime. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 66, 296 S.E.2d at 652 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). "The trial court's function is to determine whether the evidence allows a 'reasonable inference' to be drawn as to the defendant's guilt of the crimes charged." *Id.* at 67, 296 S.E.2d at 652 (quoting *State v. Thomas*, 296 N.C. 236, 244-45, 250 S.E.2d 204, 209 (1978)). Any inference should be drawn in the light most favorable to the prosecution, and "contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *Id.* at 67, 296 S.E.2d at 652 (citation omitted).

Both trafficking in cocaine by possession and trafficking in cocaine by transportation require proof that defendant knowingly committed the acts charged. Defendant contends there was insufficient evidence to show that he knowingly possessed and transported the cocaine. He argues the same grease-like odor on defendant and on

the cocaine is the sole evidence that defendant knew of the existence of the cocaine, and that such evidence was rebutted.

This Court has repeatedly stated that constructive possession can be inferred where the evidence shows that defendant had the power to control the vehicle where the controlled substance was discovered. *See e.g. State v. Hunter*, 107 N.C. App. 402, 420 S.E.2d 700 (1992), *overruled on other grounds* in *State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994); *State v. Dow*, 70 N.C. App. 82, 318 S.E.2d 883 (1984). This Court has further articulated that:

> [A] defendant's power to control the automobile where a controlled substance was found is enough to give rise to the inference of knowledge and possession sufficient to go to the jury.

Hunter, 107 N.C. App. at 409, 420 S.E.2d at 705.

An inference that defendant had knowledge of the presence of the cocaine can be drawn from defendant's power to control the Sentra. The Sentra had been under defendant's exclusive control since it was loaded onto the car carrier in Houston, Texas six days prior to defendant's arrest, and Trooper Gray testified that he had to obtain keys from defendant to unlock the cars to be able to search them. In addition, the State presented other evidence from which an inference of defendant's knowledge could be drawn. First, defendant presented the troopers with bills of lading for the Aerostar and the other vehicles which he had transported, but had no such document for the Sentra. Each bill of lading contained an inspection checklist. Defendant explained that he had no such inspection checklist for the Sentra because it was raining when he picked up the car in Houston, Texas; however, a certified copy of a report by the National Climatic Data Center was introduced into evidence showing that there was no precipitation in the Houston area on that date. Trooper Gray's testimony regarding the lack of rear tags, the absence of a trunk lock, the grease-like odor and the displacement of the rear seat indicates that defendant could have found the cocaine had he inspected the Sentra in a manner consistent with the inspection he conducted on the Aerostar. Second, the FAX indicated that the Sentra was to be shipped to Junior City, New Jersey and provided a contact number with an area code of 917. Agents from the State Bureau of Investigation testified that Junior City, New Jersey does not exist and that 917 is a New York City area code. Finally, defendant told the agents that he did not know Mr. Angel and that Mr. Angel would not be able to contact defendant directly; however, a call was received on defendant's pager

from the number identified as Mr. Angel's on the FAX. Taking the facts in the light most favorable to the State and leaving discrepancies and inconsistencies in the testimony for the jury to resolve, we conclude there was sufficient evidence from which it could be inferred that defendant had knowledge of the presence of the cocaine.

III.

[7] Defendant's next assignment of error arises from a note submitted to the court by one of the jurors, in which she inquired as to whether defendant had a prior record, the length of time he had been in the United States, his nationality, and his citizenship status. The note acknowledged "these questions may not be admissible." The trial court informed defendant and both counsel of the question, and the response it intended to make, and gave defendant's counsel an opportunity to state his position. Defendant's counsel moved to dismiss the juror. The trial court denied defendant's motion, concluding the questions "were appropriate for the juror of an inquiring mind." Defendant did not request any further inquiry or investigation. The trial court then instructed the juror, in the presence of the other jurors, as follows:

> In response to your questions, I would instruct you that you must restrict your consideration to the evidence that's presented here in the courtroom. You must not guess or speculate or conjecture [sic] as to what may or may not have been. And the attorneys have the right to present their case in the fashion they choose to present it. You must base your decision solely upon the evidence and law as presented here under oath in the courtroom and not something you might guess or surmise outside that. Some of the questions that you had would be inappropriate for the purpose of determining guilt or innocence. That would not be relevant to that determination. So, please remember and consider what you hear here in the courtroom under oath. The attorneys will make some of those things clear to you in their final arguments to you.

The standard of appellate review applicable to this assignment of error is abuse of discretion. *State v. Drake*, 31 N.C. App. 187, 229 S.E.2d 51 (1976). Defendant cites *Drake* in support of his argument that the court abused its discretion by not conducting an investigation of the witness prior to denying his motion. This Court said in *Drake* that "where instructions fail to prevent alleged [juror] misconduct, an investigation may be required." *Id.* at 191, 229 S.E.2d at 54. In *State v. Harrington*, 335 N.C. 105, 115, 436 S.E.2d 235, 240 (1993), the

Court clarified *Drake*, noting that an investigation is not "an absolute rule"; instead it is only required "where some prejudicial content is reported." Defendant contends that the juror questions indicate "potential bias" based on national origin.

We cannot say the trial court abused its discretion in this case by failing to undertake a further investigation or in denying defendant's motion to dismiss the juror. As this Court said in *Drake*,

> [t]he reason for the rule of discretion is apparent. Misconduct is determined by the facts and circumstances in each case. The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings.

31 N.C. App. at 190, 229 S.E.2d at 54. In this case, the trial judge was in the better position to determine whether the juror's questions were potentially prejudicial, and whether the situation could be cured by an appropriate instruction. This assignment of error is overruled.

IV.

[8] Defendant next contends the trial court erred by refusing to instruct the jury as requested by defendant. Defendant requested the following jury instruction:

> The defendant was operating as a licensed common carrier. A licensed common carrier holds itself out to the public to transport persons or property for hire. A licensed common carrier is not required by the law to inventory the contents of a package or vehicle that he has undertaken to transport for hire. As a common carrier, the defendant was in constructive possession of the automobiles that he had undertaken to transport for hire. He was not, however, in constructive possession of the contents of any such vehicle. In order for you to find the defendant guilty of the offenses of trafficking by possessing and trafficking by transportation of controlled substances, it would be necessary for you to find beyond a reasonable doubt that the defendant had actual knowledge of the controlled substances as alleged in the indictment.

Instead, the trial court gave the following instruction:

> I will instruct you that the defendant was operating as a licensed common carrier. A licensed common carrier holds himself out to the public to transport persons or property for hire.

"If a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance" and failure to do so constitutes reversible error. *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993). However, if the requested instruction is not a correct statement of the law, the trial court can properly refuse to give it. *Pasour v. Pierce*, 76 N.C. App. 364, 370, 333 S.E.2d 314, 319 (1985), *disc. review denied*, 315 N.C. 589, 341 S.E.2d 28 (1986).

We find no error in the trial court's refusal to give the requested instruction. Whether a common carrier is required by law to inventory the contents of a package or vehicle is not relevant; the issue regarding the lack of an inspection of the Sentra was whether defendant's failure to inspect was consistent with his actions with respect to the other vehicles, not whether such inspection was required. Moreover, the instruction is inaccurate; as previously stated, possession can be actual or constructive and a defendant's knowledge of the controlled substance may be inferred from other evidence in the case. *Dow*, 70 N.C. App. at 85, 318 S.E.2d at 885-86. This assignment of error is overruled.

No error.

Judges GREENE and EDMUNDS concur.

Judge EDMUNDS concurred in this opinion prior to 31 December 2000.

JEFFREY D. WEST, PLAINTIFF v. DIANNA L. MARKO, DEFENDANT

No. COA99-1596

(Filed 16 January 2001)

Child Support, Custody, and Visitation— custody—modification of prior order—substantial change of circumstances—best interests of child

The modification of a child custody order was affirmed where the trial court erroneously concluded that it did not need to make findings that there had been a substantial change of circumstances affecting the welfare of the child, but negated that erro-

neous conclusion by making the findings, which were supported by the evidence.

Judge FULLER concurring.

Judge GREENE dissenting.

Appeal by plaintiff from judgment entered 22 July 1999 by Judge James M. Honeycutt in District Court, Iredell County. Heard in the Court of Appeals 7 November 2000.

Baker & Baker, PLLC, by Laura Snider Baker, for plaintiff-appellant.

No brief filed for the defendant-appellee.

WYNN, Judge.

This child custody case began with the filing of a complaint by Jeffrey D. West in which he alleged that he and Dianna L. Marko were the child's parents. He served that complaint on Ms. Marko by certified mail addressed to her former residence in North Carolina. Apparently, that mailing was forwarded to her at her new residence in Wisconsin, and she acknowledged receiving the complaint but later failed to answer it. Accordingly, the clerk of court entered default against her on 9 July 1996.

Following the entry of default, District Court Judge Jack E. Klass conducted a custody hearing in Ms. Marko's absence. At the hearing, the evidence before the trial court included Mr. West's complaint that asserted that he and Ms. Marko were the parents of the minor child. Since the entry of default deemed that allegation admitted, the trial court made no explicit finding of fact that he was indeed the child's father. We find no evidence that Mr. West offered independent evidence at the custody hearing to show that he was the biological father of the child. Instead, he presented witnesses who testified on his fitness as a parent. Under an order dated 5 August 1996 *nunc pro tunc* 23 July 1996, Judge Klass found that the child's best interest was to be in Mr. West's custody. In response, Ms. Marko delivered the child from their residence in Wisconsin to Mr. West.

Immediately thereafter, Ms. Marko moved under N.C.R. Civ. P. 55(d) to set aside the 9 July 1996 entry of default, and to vacate or stay the custody order of 5 August 1996. District Court Judge Robert W. Johnson granted temporary visitation rights to Ms. Marko and, by

an order filed 13 November 1996, set aside the entry of default against her and granted her the opportunity to answer the custody complaint. Ms. Marko then filed an answer and counterclaim, seeking permanent and exclusive custody of the minor child.

At a hearing on the matter on 9 December 1996, District Court Judge James M. Honeycutt denied Mr. West's motion to dismiss Ms. Marko's answer and counterclaim. He also orally granted Ms. Marko's motion to vacate the 5 August custody order, but this oral order was never reduced to writing and entered in accordance with N.C.R. Civ. P. 58. In a written order filed 10 March 1997, Judge Honeycutt awarded custody of the child to Ms. Marko. Mr. West appealed to this Court.

In *West v. Marko*, 130 N.C. App. 751, 504 S.E.2d 571 (1998) ("*West I*"), this Court held that since the trial court only set aside the entry of default but failed to also vacate the 5 August 1996 custody order, that order remained a binding and enforceable order. Moreover, in *West I*, this Court held that the 5 August 1996 order was a valid custody order that could only be modified by showing a substantial change of circumstances affecting the welfare of the child, and since the order dated 10 March 1997 did not make any findings regarding a change of circumstance, that order had to be vacated and the 5 August 1996 order remained in effect.

Immediately following this Court's opinion in *West I*, Ms. Marko moved for modification of the 5 August 1996 custody order, based on a substantial change of circumstances affecting the welfare of the child. At the hearing on that motion beginning 1 February 1999, Judge Honeycutt heard the testimony of both parties, several witnesses, and other evidence. Judge Honeycutt made several detailed findings of fact and concluded that the best interests of the child would be served by awarding custody to Ms. Marko. Mr. West appealed to this Court.

On appeal, Mr. West argues that the trial court erred in applying the "best interests of the child" test because this Court, in *West I*, held that the 5 August 1996 order could only be modified by a showing of a change of circumstances. We conclude that the trial court, in its latest custody order, did in fact apply the change of circumstances test in modifying the earlier custody order.

Permanent custody orders can only be modified by first finding that there has been a substantial change of circumstances affecting

the welfare of the child. *See, e.g., Metz v. Metz*, 530 S.E.2d 79, 80 (N.C. App. 2000). Once the trial court makes the threshold determination that a substantial change has occurred, the trial court then must consider whether a change in custody would be in the best interests of the child. *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 620, 501 S.E.2d 898, 900 (1998). The change of circumstances test is a harder standard to meet than the best interests of the child test, as it requires a two-step inquiry.

As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion. *King v. Allen*, 25 N.C. App. 90, 92, 212 S.E.2d 396, 397, *cert. denied*, 287 N.C. 259, 214 S.E.2d 431 (1975). While a trial court's findings of fact are conclusive on appeal if there is evidence to support them, *see Hunt v. Hunt*, 85 N.C. App. 484, 488, 355 S.E.2d 519, 521 (1987), the trial court's conclusions of law are reviewable *de novo*. *See Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000).

In the case at bar, the trial court concluded:

> 7. That the Court *may* modify the Order of [5 August 1996] on the basis of its determination of *the best interest of the minor child, without the need for finding of a substantial change in circumstances.* (emphasis added.)

Under the holding of *West I*, it was error for the trial court to apply the best interests standard to this case. However, the trial court also made findings of fact showing that there had been a substantial change of circumstances affecting the welfare of the child. Specifically, the trial court found:

> 13. . . . The court finds that there has been a *substantial change of circumstances* since the condition of the minor child is drastically different than the facts that were given to the Honorable Jack E. Klass. . . . That the Defendant has taken a job at a restaurant which has increased her ability to care for the minor child and allows her to be with the minor child and her other children. That the Defendant has made substantial improvements in her relationship with the minor child because she has arranged her work schedule to allow her to be home when the minor child is with her in the mornings and again when she returns home from pre-kindergarten in the afternoon. . . . (emphasis added).

> 14. . . . That the Court finds that there has been a *change of circumstances* since the Plaintiff has had various women residing with him and the minor child . . . . (emphasis added).

The trial court also made numerous findings of fact regarding how each parent treated the child and each other; regarding educational opportunities and medical care provided by each parent; regarding the parents' incomes; and noting that the minor child had spent the vast majority of the past four years living with her mother.

Moreover, we find that there is competent evidence supporting the trial court's findings of fact that there had been a substantial change of circumstances in this case. The parties and several witnesses testified about the minor child's care, educational opportunities, babysitters, and the amount of time each parent was able to spend with their daughter. Further, the witnesses testified about each family's living conditions, including the presence or absence of siblings and other grown-ups in the home. Each of these factors naturally affects the child's welfare. In particular, we find that the evidence supports the trial court's findings that there has been a substantial change of circumstances since the 5 August 1996 custody order, especially in regards to the relationship between the child and each parent, and the stability of each home. We find no abuse of discretion in the trial court's findings of fact.

In short, while the trial court erred under *West I* in applying the best interests standard to this case, its explicit findings that there had been a substantial change of circumstances affecting the welfare of the child support the conclusion of law modifying the 5 August 1996 custody order. Significantly, our own review of the evidence and findings of fact support such a conclusion. *See Rowe v. Rowe*, 52 N.C. App. 646, 661, 280 S.E.2d 182, 191 (1981), *aff'd in relevant part*, 305 N.C. 177, 287 S.E.2d 840 (1982) (wherein this Court concluded as a matter of law that a substantial change of circumstances had occurred in a post-divorce proceeding, even though the trial court concluded otherwise). Having already found that the trial court's findings of fact were supported by the evidence, and among these facts the trial court found a substantial change of circumstances, we conclude as a matter of law that a change of circumstances occurred.[1]

1. In open court, Judge Honeycutt stated, "Court would conclude as a matter of law from the findings that the Defendant has shown substantial and material changes of circumstance affecting the welfare of the minor child such that custody should be changed . . . ." While Judge Honeycutt did not reduce this conclusion to writing in the written custody order, this statement lends more support to our treatment of Judge

Finally, we point out for clarification in *West I* that the 5 August 1996 order was not a default judgment. In *West I*, this Court held that because the trial court set aside only the entry of default, the custody order of 5 August remained in effect. In so holding, this Court must have relied upon the rationale that the 5 August judgment was not predicated on the allegations deemed admitted by the entry of default. Indeed, when an entry of default is set aside, a resulting default judgment which is predicated on the entry of default cannot stand. *See House of Style Furniture Corp. v. Scronce*, 33 N.C. App. 365, 369-70, 235 S.E.2d 258, 261 (1977) (holding that when there is a jurisdictional defect in an entry of default, the default judgment predicated on that entry of default cannot stand); *Byrd v. Mortenson*, 308 N.C. 536, 540, 302 S.E.2d 809, 812 (1983) (remanded for a determination of whether there was "good cause" to set aside an entry of default under N.C.R. Civ. P. 55(d), and vacating the default judgment against the defendants in order for the trial court to make further findings of fact about whether the defendants should be allowed additional time to file their answer). *See also P & B Land v. Klungervik*, 751 P.2d 274, 276-77 (Ct. App. Utah 1988) (holding that no default judgment may be entered unless default has been entered); *Jacobs v. Sheriff*, 837 P.2d 436, 437 (Nev. 1992) (questioning whether a valid default judgment could be entered in the absence of a valid default).

Moreover, contrary to the dissenting opinion, our reading of *West I* does not overrule its holding; rather, we hold that the custody judgment in *West I* must have been an *independent* judgment, not a *default* judgment.[2] Simply put, when the *default* is taken from a *default* judgment, the remaining judgment, which is by definition dependent on that *default*, cannot stand. Indeed, an entry of default serves two purposes in support of a default judgment. First, the entry deems the allegations in the complaint admitted. In so doing, the plaintiff is relieved of the obligation of setting forth proof of his allegations to obtain a default judgment. Second, the entry denies the

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Honeycutt's findings of fact to support the conclusion of law that a change of circumstances had occurred in this case.

2. The dissent notes that because there are two different standards, "it does not follow" that setting aside an entry of default sets aside the default judgment. However, the reason there are two different standards is because the entry of default is based only on the failure of a party to answer, which allows the clerk of court to enter default. The standard to set that aside is less stringent than the standard to set aside a default judgment, which is based on the deemed admissions of the *entry of default*. Thus, if a party seeks only to set aside the default judgment but not the entry, the burden is more stringent because the *entry of default* supports that judgment. On the other hand, setting aside the *entry of default* robs a default judgment of its support.

responding party the opportunity to answer the complaint. *See Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991) (holding that an entry of default allows the trial court to treat the plaintiff's allegations as true and prevents the defendant from filing an answer or otherwise defending on the merits of the case). Thus, when an entry of default is set aside, a default judgment based on allegations that are deemed admitted must also be set aside as its foundation of proof has been stripped.

In this case, the custody order of 5 August 1996 was not designated as a default judgment; however, the records on both appeals indicate that Mr. West relied upon the deemed admissions of his complaint to claim rights as a biological father. In his complaint, Mr. West alleged that he and Ms. Marko were the parents of the child. That allegation was deemed admitted by the entry of default; but, upon that entry being set aside, that admission was set aside. Manifestly, neither the present record on appeal nor the one before the Court in *West I* show that Mr. West presented any independent proof that he was the biological father of the child. Without such proof, the trial court lacked subject-matter jurisdiction to accord him a custody hearing as a biological parent. *See* N.C. Gen. Stat. § 50-13.1 (1999) (to gain custody of a child, whether temporary or permanent, a party must show some right to do so); *Petersen v. Rogers*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994) (holding that there are limits on who may bring an action for custody, and that N.C. Gen. Stat. § 50-13.1 is not intended to confer upon strangers the right to seek custody of children unrelated to them). Nonetheless, while the question of subject matter jurisdiction may be raised at any time, because we uphold the trial court's change of custody order on the grounds that it made sufficient findings to support a modification of the 5 August 1996 order, we do not further address the issue of whether the 5 August 1996 custody order was predicated on the entry of default. *See In re Spivey*, 345 N.C. 404, 480 S.E.2d 693 (1997) ("It is well established . . . that a challenge to the trial court's subject matter jurisdiction may be made at any time, even on appeal to this Court.")

In sum, Judge Honeycutt made findings of fact that there had been a substantial change of circumstances affecting the welfare of the minor child. While he erroneously concluded that he did not need to make these findings, the fact that he actually did so negates any effect of his erroneous conclusion. Since the trial court applied the proper standard by making findings regarding a change of circumstances, we affirm the decision to modify the earlier custody order.

Affirmed.

Judge FULLER concurs in a separate opinion written prior to 31 December 2000.

Judge GREENE dissents.

FULLER, Judge, concurring.

I join in the majority opinion. However, I write separately for emphasis.

The trial court's initial custody order, awarding custody to the father, was the result of a hearing at which neither the mother nor the child were present. The court did not appoint a guardian ad litem to represent the interests of the child. The only evidence received by the court was presented by the father. Although the custody order was not technically denominated a default judgment, it was, in effect, a result reached by default, since the court heard only one side of the dispute.

Even in suits involving competent adults, our jurisprudence disfavors default judgments, believing that justice is more likely to result from a full, fair adversarial proceeding. *See, e.g., Estate of Teel v. Darby*, 129 N.C. App. 604, 607, 500 S.E.2d 759, 762 (1998) ("[P]rovisions relating to the setting aside of default judgments should be liberally construed so as to give litigants an opportunity to have a case disposed of on the merits."). In some instances, where parties sit on their rights, we allow dollars or widgets to go by default. However, our courts should go the extra mile to insure that custody of our children *does not* go by default. *See Qurneh v. Colie*, 122 N.C. App. 553, 559, 471 S.E.2d 433, 436 (1996) ("As a policy matter, issues such as custody should only be decided after careful consideration of all pertinent evidence in order to ensure the best interests of the child are protected.").

One way to protect the child's welfare is for the trial judge, as an exercise of discretion, pursuant to N.C.R. Civ. P. 17(b), to appoint a guardian ad litem to insure that a child's interests are adequately investigated and presented to the court. *See, e.g., Van Every v. McGuire*, 125 N.C. App. 578, 481 S.E.2d 377 (1997), *aff'd*, 348 N.C. 58, 497 S.E.2d 689 (1998) (approving trial court's decision to appoint guardian ad litem to represent minor child during custody proceeding). In short, to the extent possible, child custody determinations

should be based upon consideration of the best available evidence, and should not be based merely upon deemed admissions or one parent's perspective.

In addition, when exigencies of schedulely make ex parte proceeding unavoidable, our case law has given the trial judge an additional tool to protect the child's welfare in subsequent hearings. For this Court has clearly stated that it is permissible for a trial court to find a substantial change in circumstances based on any facts pertinent to the custody issue that were not disclosed to the court at the original custody hearing. *See Newsome*, 42 N.C. App. at 425-26, 256 S.E.2d at 854-55. This is surely true in cases where the original judgment was a default judgment, or, in cases such as this, where the original judgment was based on evidence presented by only one parent.

Regardless of the stage of the custody dispute, and taking into account necessary legal procedures, our ultimate concern is, and must be, *the child's best interest*. Here, application of either the *best interest of the child* standard or the *substantial change in circumstances* standard would lead to the same conclusion. Accordingly, I vote with the majority that the child should be placed with the mother.

GREENE, Judge, dissenting.

I respectfully dissent because I believe the trial court, in Judge Honeycutt's 22 July 1999 order, applied a best interests test in determining the custody dispute. I, therefore, would reverse the order of the trial court.

I

As noted by the majority, a permanent child custody order can be modified only upon a showing of a substantial change in circumstances affecting the welfare of the child. *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998). Because the 5 August 1996 custody order was a permanent order, *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998), its modification could not occur upon application of a best interests of the child test.

In this case, Judge Honeycutt concluded the 5 August 1996 order entered by Judge Klass was a temporary order and could be modified

on the basis of redetermining the best interests of the child.[3] On that basis, Judge Honeycutt then modified the 5 August 1996 order and gave custody to Ms. Marko. That was error and requires the 22 July 1999 order be reversed and remanded. On remand, the trial court must address Ms. Marko's motion for a change in custody and apply the "change of circumstances" standard. Because of the substantial lapse of time since the entry of the last order, the parties may offer new evidence.

II

I note the majority "point[s] out for clarification" that in *West I* we held the 5 August judgment "was not predicated on the allegations deemed admitted by the entry of default." Although this is *dicta*, it nonetheless constitutes a clear misreading of *West I* and I feel compelled to address the matter.

This Court in *West I* held the 5 August 1996 order was "binding and enforceable," even if entered as a default judgment and predicated on the entry of default. *West*, 130 N.C. App. at 755, 755 n.1, 504 S.E.2d at 573, 573 n.1. Thus, it does not follow, as the majority suggests, that the setting aside of an entry of default requires the striking of the default judgment. Indeed, *West I* clearly held contrary to the position of the majority, *West*, 130 N.C. App. at 754-55, 504 S.E.2d at 573 ("it does not follow" that the setting aside of the entry of default mandates setting aside the default judgment, as there are two different standards), and this panel is bound by that holding.

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3. I acknowledge there is some language in Judge Honeycutt's order noting "there has been a substantial change of circumstances." This finding, however, read in context, does nothing more than indicate a disagreement with the facts found by Judge Klass. Judge Honeycutt was bound by the order entered by Judge Klass, including the findings of fact included in that order. Accordingly, it was not in the province of Judge Honeycutt to reject the findings of Judge Klass. Any inadequacy of Judge Klass's findings were matters to be addressed on an appeal from Judge Klass's order. In proper context, therefore, there are no findings in Judge Honeycutt's order suggesting a change in the circumstances of the child between the time of Judge Klass's order (whether or not reflected in that order) and the time of Judge Honeycutt's order, the relevant inquiry. Even assuming such findings, there are no findings that such changes have had any affect on the welfare of the child. *Browning v. Helff*, 136 N.C. App. 420, 424-25, 524 S.E.2d 95, 98-99 (2000) (in order to modify child custody order, there must be a showing that change in circumstances affected the welfare of the child).

STATE OF NORTH CAROLINA v. DELMUS RAY THOMPSON

No. COA99-1496

(Filed 16 January 2001)

1. **Appeal and Error— preservation of issues—plea discussions—habitual offender status—introduced by defendant—no objection during cross-examination**

A cocaine defendant waived his right to appellate review of whether the court erred by not acting ex mero motu when the State elicited evidence from defendant about defendant's plea discussions and his habitual offender status by introducing evidence of plea discussions during direct examination and subsequently failing to object to the State's eliciting further evidence during cross-examination.

2. **Appeal and Error— habitual felon status—no objection—no evidence of indictment—review waived**

A cocaine defendant's assignment of error to the court's failure to give a curative instruction after sustaining his objection to the State's question concerning his habitual felon status, even though defendant had not requested an instruction, was not preserved for appellate review under *State v. Robinson*, 74 N.C. App. 323, which held that a curative instruction was necessary because it was the duty of the judge to intervene ex mero motu and instruct the jury that the evidence was incompetent when the evidence was rendered incompetent by statute. N.C.G.S. § 14-7.5, upon which defendant relies here, provides only that the habitual felon indictment shall not be revealed to the jury. The State asked defendant only whether he had been told that he qualified as an habitual offender, no evidence of any indictment of defendant as an habitual offender was introduced, and there was no evidence in the record that defendant was sentenced as an habitual offender.

3. **Appeal and Error; Evidence— plain error review—failure to argue in brief—no prejudice**

A defendant waived plain error review of the admission of plea discussions and his habitual offender status by not raising or arguing the errors as plain errors in his brief. Moreover, even if the assignment of error had been preserved for appeal, any error would have been harmless because defendant admitted the

actions underlying his convictions, then introduced evidence of his plea discussions to support his contention that he did not consider himself guilty. As to his habitual offender status, the court instructed the jury at the beginning of the trial to disregard any question and answer to which an objection was sustained.

4. Criminal Law— entrapment—selling drugs as favor without profit

The trial court in a cocaine prosecution did not err by refusing to instruct on entrapment where defendant failed to introduce sufficient evidence of persuasion by either the informant or an officer to suggest that the criminal design originated with the law enforcement agents and not with defendant. Selling drugs as a favor and taking no profit does not entitle a defendant to an instruction on entrapment.

Appeal by defendant from judgments entered 21 July 1999 by Judge Carl L. Tilghman in Pitt County Superior Court. Heard in the Court of Appeals 19 October 2000.

Attorney General Michael F. Easley, by Assistant Attorney General M. A. Kelly Chambers, for the State.

Paul Pooley for defendant-appellant.

McGEE, Judge.

Defendant appeals two convictions for possession of cocaine with intent to sell and deliver and two convictions for sale and delivery of cocaine. Defendant assigns as error the trial court's failure to take adequate action when defendant was questioned by the State about his plea discussions and his habitual offender status, and the trial court's refusal to instruct the jury on entrapment. We find no error.

Evidence for the State at trial tended to show that the Pitt County Sheriff's Office received information in November 1998 from a confidential informant that defendant was selling narcotics from his apartment. To ascertain the validity of the informant's information, the sheriff's office arranged and observed a purchase of cocaine on 19 November 1998 by the informant from defendant. The informant then introduced undercover narcotics detective Scott O'Neil (O'Neil) to defendant on 1 December 1998, and O'Neil purchased cocaine from defendant. O'Neil returned alone to defendant's apartment and again

purchased cocaine on 4 December 1998. O'Neil then told defendant that the sheriff's officers had two undercover buys from defendant, and defendant agreed to make a purchase from his supplier in return for the officers' promise to talk to the district attorney and judge on his behalf.

Defendant was charged with the 1 December and 4 December 1998 drug purchases. Carter Adkins (Adkins), the officer in charge of the investigation, acknowledged on cross-examination that the sheriff's office was principally interested in defendant's supplier, a neighbor of defendant, and that the informant told the sheriff's officers they had to go through defendant to get to the supplier. Adkins also acknowledged that, from what he saw, defendant was selling drugs to get drugs for his personal use, not for monetary gain.

Defendant testified in his own behalf that he was a heroin addict but was undergoing treatment, and that although he had an extensive criminal history due to his efforts to get money for drugs, he had no convictions for drug dealing. He knew the informant because he and the informant had been "in rehab together" and had once been in jail together. When the informant came to defendant's apartment and asked to buy cocaine, defendant told him he could not help because he used heroin only. The informant told defendant that defendant had a neighbor upstairs who sold cocaine. Defendant promised to check on the neighbor for the informant, and defendant then purchased cocaine from the neighbor for the informant. Defendant stated that he had never before gotten cocaine from anyone for the informant, and that he had not known the supplier was a drug dealer until the informant told him.

Defendant testified that on 1 December 1998, the informant called him and said he wanted to buy some cocaine, and that he was going to bring someone with him. Defendant told the informant that he did not do that any more, that he was trying to get his act together, that he had gotten medication and was trying to get help. The informant asked defendant to make a buy for him one more time. A few minutes later the informant and O'Neil knocked on defendant's door. The informant put the money in defendant's hand, and defendant told the informant and O'Neil to stay there, he would be back. Defendant then went upstairs and purchased cocaine from the supplier. Defendant stated that he first had to yell his name through the door, because the supplier would not sell to anyone he did not know. Defendant described knocking on the supplier's door, sticking his hand in with

the money, and receiving into his hand the appropriate amount of cocaine, all without seeing the supplier.

Defendant testified that on 4 December 1998, O'Neil called him and asked to buy cocaine, telling defendant that he had gotten his number from the informant. Defendant, not wanting to speak on the telephone, told O'Neil to come by, that he would see what he could do. O'Neil knocked on the door, asked to buy cocaine, and gave defendant money. Defendant then went upstairs and returned with the cocaine.

Defendant testified that he sold the cocaine only as a favor to the informant because the informant had not known that defendant was in rehab, and because the supplier would not have sold directly to the informant. Defendant stated that he had been convicted for possession of drugs in the past and had pleaded guilty then because he had been guilty, but he believed he was not guilty this time. He declared that he had refused the State's offer of a seventeen month sentence and would refuse an offer of twelve months as well, knowing that he risked seven years if found guilty at trial.

Defendant admitted on cross-examination that he gave drugs to O'Neil, and that he knew what he did was wrong. He acknowledged that, although the officer had promised to help him get probation, his criminal record was too extensive to permit probation under the law, in part due to a history of thefts in support of his heroin habit. Defendant also acknowledged several convictions in the past for possession of cocaine but insisted that he had merely possessed cocaine on prior occasions to trade it for heroin.

Defendant testified on redirect examination that he only remembered four felony convictions on his criminal record. The State asked on recross-examination:

> Q. Delmus, they told you that you qualified as a habitual offender?
>
> A. Right.
>
> Q. You do, don't you?
>
> MR. JONES: Your Honor, I object.

The trial court sustained the objection.

I.

[1] Defendant first assigns error to the trial court permitting the State to elicit evidence from defendant about his plea discussions and his habitual offender status. Defendant acknowledges that he did not object to the alleged errors at trial but asserts that the errors were nonetheless preserved for appeal.

> "It is well settled that with the exception of evidence precluded by statute in furtherance of public policy . . . the failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even if incompetent is not a proper basis for appeal."

State v. Hunter, 297 N.C. 272, 278-79, 254 S.E.2d 521, 525 (1979) (citation omitted). Defendant must therefore demonstrate that the trial court erred in introducing evidence precluded by statute before we may consider his assignments of error on appeal.

A.

Defendant asserts that the State's introduction of evidence of defendant's plea discussions during the cross-examination of defendant was in violation of N.C. Gen. Stat. § 8C-1, Rule 410 and N.C. Gen. Stat. § 15A-1025, and was therefore reversible error despite defendant's failure to object to the State's questions. As our Supreme Court has held, "where evidence is rendered incompetent by statute, it is the duty of the trial judge to exclude it, and his failure to do so is reversible error, whether objection is interposed and exception noted or not." *State v. McCall*, 289 N.C. 570, 577, 223 S.E.2d 334, 338 (1976) (citation omitted).

In *McCall*, our Supreme Court considered a statute which provided that the defendant's spouse would be a competent witness for the defense, but that the defendant's failure to examine his spouse as a witness could not be used to prejudice the defendant. The defendant in *McCall* testified on his own behalf but his wife did not. The State asked the defendant questions concerning whether he knew his wife could not testify against him and then commented in its closing argument to the jury on the defendant's wife's failure to testify. The Supreme Court held that, even though the defendant did not object during trial, the trial court was obliged to act *ex mero motu* to correct the error.

N.C. Gen. Stat. § 8C-1, Rule 410 (1999) provides that evidence of statements made in the course of plea discussions between

the defendant and the State are inadmissible for or against the defendant.

> However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

Id. Evidence of plea discussions in the present case was first introduced by defendant during his direct examination, when he described a plea offer by the State of seventeen months imprisonment and stated that he would not even have taken twelve months had it been offered. The State's subsequent questions during cross-examination concerning the plea discussions were in part an effort to explain why the State had been unable to offer defendant a plea bargain with a probationary sentence. Whether the evidence elicited by the State's questions was admissible under Rule 410 for the purposes of fairness was a determination for the trial court, and hence the evidence was not incompetent as a matter of law. The trial court had no duty to act *ex mero motu* under *McCall* and defendant's assignment of error under Rule 410 is not preserved for appeal.

N.C. Gen. Stat. § 15A-1025 (1999) does not include Rule 410's exception. It states, in its entirety:

> The fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

N.C. Gen. Stat. § 15A-1025 would appear to render incompetent all evidence elicited from defendant about his plea discussions, whether introduced by defendant or by the State, and preserve under *McCall* defendant's assignment of error despite defendant's failure to object. In understanding the apparent conflict between N.C. Gen. Stat. § 8C-1, Rule 410, enacted in 1983, and N.C. Gen. Stat. § 15A-1025, last amended in 1975, we note that the commentary to the later Rule 410 concludes with the statement, "North Carolina practice in this area is governed in part by G.S. 15A-1025 which is consistent with this rule. G.S. 15A-1025 should be amended after Rule 410 is adopted." N.C. Gen. Stat. § 8C-1, Rule 410, Commentary (1999).

However, we need not determine whether the trial court erred under N.C. Gen. Stat. § 15A-1025 by failing to act *ex mero motu*, because we hold that defendant waived appellate review of the issue

under *State v. Flowers*, 347 N.C. 1, 24, 489 S.E.2d 391, 404-05 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d. 150 (1998). In *Flowers*, the defendant assigned error to the trial court's admission of a transcript of the defendant's testimony at a prior trial, arguing that portions of the transcript dealing with plea discussions should have been redacted under N.C. Gen. Stat. § 15A-1025. Our Supreme Court held that the defendant waived appellate review when, after the trial court asked the defendant to bring to the court's attention any specific objections regarding any portion of the transcript, the defendant neither objected nor requested any portion of the transcript be omitted. We hold that, in the present case, defendant similarly waived his right to appellate review by introducing evidence during his own direct examination of plea discussions and subsequently failing to object to the State's eliciting of further evidence during cross-examination.

B.

[2] Defendant asserts that the State's introduction of evidence of defendant's habitual felon status during his recross-examination violated N.C. Gen. Stat. § 14-7.5, and that the trial court's failure to give a curative instruction to the jury after sustaining defendant's objection was reversible error despite the failure of defendant to request such an instruction. Applying *McCall* to the State's closing argument in *State v. Robinson*, 74 N.C. App. 323, 328 S.E.2d 309 (1985), our Court held that the trial court's sustaining of the defendant's objection alone was inadequate to remedy the State's improper reference to the defendant's wife's failure to testify. We held that a curative instruction was necessary because, when evidence is rendered incompetent by statute, " 'it is the duty of the judge *ex mero motu* to intervene *and promptly instruct the jury*' " that the evidence is incompetent. *Id.* at 325, 328 S.E.2d at 311 (quoting *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976)) (emphasis added).

However, N.C. Gen. Stat. § 14-7.5 (1999), upon which defendant relies in asserting the evidentiary incompetence of defendant's habitual felon status, provides only that "[t]he indictment that the person is an habitual felon shall not be revealed to the jury[.]" No evidence of any indictment of defendant as an habitual felon was introduced, nor is there any evidence in the record that defendant was indicted or sentenced as an habitual felon. Instead, the State asked defendant only whether he had been told that he qualified as an "habitual offender." *See, e.g., State v. Aldridge*, 67 N.C. App. 655, 659, 314 S.E.2d 139, 142 (1984) (holding that cross-examination of a defendant which disclosed prior felonies, but did not disclose an indictment as

an habitual felon, did not violate N.C. Gen. Stat. § 14-7.5). We hold that the State's question was not prohibited under N.C. Gen. Stat. § 14-7.5, and therefore that defendant's assignment of error was not preserved for appellate review under *McCall* and *Robinson*. *Cf. State v. Lewis*, 32 N.C. App. 298, 300, 231 S.E.2d 693, 694 (1977) (narrowly interpreting N.C. Gen. Stat. § 15A-1025 to apply only to plea discussions with prosecutors, not with police officers).

C.

[3] Defendant's assignment of error in the record on appeal to the admission of evidence of plea discussions and his habitual offender status concludes: "Alternatively, defendant assigns these errors as plain error." However, defendant does not raise or argue the errors as plain error in his brief. We therefore deem defendant to have waived any assignment of plain error. *See* N.C.R. App. P., Rule 28(a); *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 593-94 (1975) ("[I]t is well recognized that assignments of error not set out in an appellant's brief, and in support of which no arguments are stated or authority cited, will be deemed abandoned.").

However, even had defendant's assignment of error been preserved for appeal, any error would have been harmless. Under N.C. Gen. Stat. § 15A-1443 (1999), a prejudicial error is one for which, but for its occurrence, there is a reasonable possibility that a different result would have been reached at trial. Defendant admitted to the actions underlying the crimes for which he was convicted, then introduced evidence of his plea discussions to support his contention that he did not consider himself guilty of the crimes with which he was charged, presumably an effort to indicate his lack of criminal intent. Had the trial court excluded that testimony of plea discussions, defendant's likelihood of being convicted would only have *increased*.

As to defendant's habitual offender status, the trial court had instructed the jury at the beginning of the trial to disregard any question and any answer thereto to which an objection was sustained; defendant was asked about his habitual offender status only after he had already been questioned extensively about his prior felonies; and defendant's objection was sustained. In light of the overwhelming evidence presented to the trial court of defendant's guilt, we see no reasonable possibility that an additional curative instruction following defendant's objection would have led the jury to a different result.

II.

[4] Defendant's other assignment of error is to the trial court's refusal to instruct the jury on the defense of entrapment, a claim by a defendant that, although he committed the acts underlying a crime, the intent to commit the crime came not from him but from a law enforcement agent. *See State v. Neville*, 302 N.C. 623, 626, 276 S.E.2d 373, 375 (1981).

> Entrapment is the inducement of a person to commit a criminal offense not contemplated by that person, for the mere purpose of instituting a criminal action against him. To establish the defense of entrapment, it must be shown that (1) law enforcement officers or their agents engaged in acts of persuasion, trickery or fraud to induce the defendant to commit a crime, and (2) the criminal design originated in the minds of those officials, rather than with the defendant. The defense is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials. The defendant has the burden of proving entrapment to the satisfaction of the jury.

State v. Davis, 126 N.C. App. 415, 417-18, 485 S.E.2d 329, 331 (1997) (citations omitted). However, a defendant must first present credible evidence tending to support a defense of entrapment before a trial court may submit the question to a jury. *See State v. Walker*, 295 N.C. 510, 513, 246 S.E.2d 748, 749-50 (1978).

Our Court has held that a defendant introduced sufficient evidence of inducement to justify a jury instruction on entrapment where the defendant's testimony tended to show that the defendant had sold drugs to an undercover officer: because the defendant was in need of a job and believed that the officer had promised him one in *State v. Blackwell*, 67 N.C. App. 432, 313 S.E.2d 797 (1984); only after the officer and his informant initiated the conversation about drugs, the officer repeatedly urged the defendant to provide the drugs, the informant located a person who would sell the drugs and drove the officer and the defendant to the location, and the officer then provided the defendant the money to buy the drugs in *State v. Jamerson*, 64 N.C. App. 301, 307 S.E.2d 436 (1983); only after the undercover officer had already provided the defendant with gifts of beer, food, cigarettes, and money to fix her car and leaky basement, first raised the subject of a drug purchase, drove the defendant to each of the drug purchase locations, and provided the defendant with money to

buy the drugs in *State v. Grier*, 51 N.C. App. 209, 275 S.E.2d 560 (1981).

We find no similar evidence of inducement by law enforcement officers in defendant's testimony in the present case. Neither the informant nor O'Neil provided gifts or made promises before asking to purchase cocaine from defendant. Also, although defendant testified that he had been reluctant to sell cocaine to the informant and O'Neil, his own testimony showed defendant required little urging before acquiescing to their requests. "That [the undercover officer] gave defendant the money and asked him to obtain the cocaine is not evidence of inducement, just an opportunity to commit the offense." *State v. Martin*, 77 N.C. App. 61, 67, 334 S.E.2d 459, 463 (1985), *cert. denied*, 317 N.C. 711, 347 S.E.2d 47 (1986). As we held in *Martin*, selling drugs as a favor and taking no profit from the transaction does not entitle a defendant to an instruction on entrapment. *See also State v. Booker*, 33 N.C. App. 223, 234 S.E.2d 417 (1977). Defendant failed to introduce sufficient evidence of persuasion by either the informant or O'Neil to suggest that the criminal design originated with the law enforcement agents and not with defendant. The trial court did not err in refusing to instruct the jury on entrapment.

No error.

Judges WALKER and HORTON concur.

JACOB E. MILES, ET AL., PLAINTIFFS-APPELLANTS v. CAROLINA FOREST ASSOCIATION, DEFENDANT-APPELLEE AND CROSS-APPELLANT

No. COA99-1500

(Filed 16 January 2001)

1. Deeds— subdivision's declaratory statement of covenants and restrictions—fees and assessments—summary judgment proper

The trial court did not err by granting partial summary judgment in favor of plaintiffs, subdivision property owners, in an action to determine the validity of fees and assessments which arise out of defendant subdivision association's declaratory statement of covenants and restrictions, because: (1) there was ample

evidence before the trial court to decide the summary judgment motion; and (2) the record indicates the evidence before the trial court included copies of recorded deeds, a declaration, amendments, and affidavits from defendant which documented plaintiffs' voting records.

2. Deeds— subdivision's declaratory statement of covenants and restrictions—fees and assessments—extension of declaration by amendment not permissible

The trial court erred in only granting partial summary judgment in favor of plaintiffs, subdivision property owners, regarding the termination of the subdivision association's declaration on 1 January 1990, because: (1) the language in the declaration granting authority to change, alter, amend, or revoke did not clearly permit an extension by amendment; and (2) the declaration's failure to provide authority to extend it beyond 1 January 1990 means it cannot be enforced against any of the plaintiffs.

3. Deeds— subdivision's declaratory statement of covenants and restrictions—fees and assessments—implied-in-law contract

Even though the amendments purporting to extend defendant subdivision association's declaration are invalid, this case is remanded to the trial court for a determination of whether all plaintiffs, subdivision property owners, have impliedly agreed to pay for maintenance, upkeep and operation of the roads, common areas, and recreational facilities within the subdivision based on an implied-in-law contract since they have received benefits under the terms of the declaration.

Appeals by plaintiffs and defendant from judgment dated 20 September 1999 by Judge Melzer A. Morgan, Jr. in Montgomery County Superior Court. Heard in the Court of Appeals 19 October 2000.

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

Karl N. Hill, Jr. for defendant-appellant-appellee.

WALKER, Judge.

This case arises out of a dispute between a subdivision association, defendant Carolina Forest Association (CFA), and the plaintiffs

who own property in the subdivision. Defendant seeks to enforce fees and assessments which arise out of its declaratory statement of covenants and restrictions (declaration), and plaintiffs object to paying such fees and assessments.

On 1 June 1970, the land development company Russwood, Incorporated (Russwood) prepared a declaration to run with Carolina Forest subdivision, a gated community which it had developed in Montgomery County, North Carolina. The declaration was recorded on 8 July 1970. Russwood conveyed certain land, rights and obligations to defendant by deed which was recorded on 16 August 1973. The declaration contains the following paragraph which limited duration of the covenants and restrictions to 1 January 1990:

> 10. These restrictions and covenants run with the land, and shall bind the PURCHASERS, their heirs, executors, administrators, personal representatives and assigns, and if any of them shall violate or attempt to violate any of the covenants or restrictions herein contained, it shall be lawful for any person(s) or corporation(s) owning any such lots in the sub-division to prosecute any proceedings at law or in equity against those violating or attempting to violate any such covenants or restrictions and either to prevent him, them or it from doing so, or to recover damages for such violation. *All of the restrictions, conditions, covenants and agreements contained herein shall continue until January 1, 1990, except that they may be changed, altered, amended or revoked in whole or in part by the record owners of the lots in the sub-division whenever the individual and corporate record owners of at least ⅔ of the said platted lots so agree in writing.* Provided, however, that no changes shall be made which might violate the purposes set forth in Restrictions No. 1 [limiting lots to residential purposes generally] and No. 8 [providing a perpetual easement and rights of ingress and egress for utility lines]. Any invalidation of any one of these covenants and restrictions shall in no way affect any other of the provisions thereof which shall hereafter remain in full force and effect.

(emphasis added).

With the 1 January 1990 expiration date of the declaration approaching, defendant requested the lot owners to consent in writing to amend the declaration so the covenants and restrictions would extend beyond 1 January 1990. Of the 906 lots in the subdivision, 618 lot owners signed consent forms, which exceeded the two-thirds of

the lot owners required by the declaration to pass an amendment. Amendments were recorded on 31 October 1988, 20 April 1989 and 17 April 1990, and a corrected amendment was recorded on 17 April 1990. Each amendment stated in pertinent part: (1) pursuant to the declaration, defendant has obtained consent to the amendment by more than 2/3 of the record lot owners in the subdivision; (2) each property owner agrees to abide by the defendant's bylaws which may be amended from time to time; (3) lot owners agree to pay annual fees and assessments to defendant for maintenance, upkeep and operation of the various areas and facilities; (4) failure to pay such fees and assessments may result in a lien upon the land; and (5) the declaration shall continue until 1 January 1990, "after which time [it] shall be automatically extended for successive and additional periods of ten (10) years . . . ."

In 1997 and 1998, because some of the lot owners did not pay assessments, defendant voided their gate cards which prevented their access to the subdivision. Plaintiffs brought this action against defendant seeking: (1) a declaratory judgment regarding their rights and obligations as lot owners; and (2) an injunction to prohibit levying fees and assessments and to allow access to the subdivision and common areas. In its answer, defendant moved to dismiss on the theory that plaintiffs were bound by the amendments which extended the declaration.

On 30 April 1998, the trial court entered a temporary restraining order prohibiting defendant from blocking plaintiffs' access to the subdivision. Plaintiffs moved for summary judgment and after a hearing, the trial court granted partial summary judgment in favor of plaintiffs and certified the case for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. N.C. R. Civ. P. 54(b)(1999).

In its order, the trial court divided plaintiffs into two categories: (1) those to whom the amendments to extend the declaration were valid and against whom fees and assessments could be enforced; and (2) those to whom the amendments were invalid and the fees and assessments could not be enforced but they would be required to pay maintenance fees and assessments. The trial court placed in the first category those lot owners who: (1) voluntarily consented in writing to amending and extending the declaration and were therefore "estopped from claiming absolute exemption from charges and assessments;" or (2) purchased their lot(s) after 16 August 1973, thereby receiving a deed which expressly referred to the covenants

and restrictions and the deed from Russwood to defendant, which the trial court therefore provided "sufficient particularity to place those lot owners on notice of assessment charges and to make [d]efendant's assessments generally valid and enforceable." The claims of these lot owners were therefore dismissed.

Next, the trial court upheld the claims of the second category of lot owners who did not consent to the amendments or who did not receive a deed to their property after 16 August 1973 with reference to the covenants and restrictions and the deed from Russwood to defendant. However, the trial court found an implied contract existed between this second category of lot owners and defendant, which required them to contribute to the maintenance, repair and upkeep of all roadways for three years preceding the filing of the answer. In addition, defendant was enjoined from preventing these lot owners access to the subdivision so long as they paid these fees and assessments.

[1] In its first assignment of error, defendant argues the trial court improperly granted partial summary judgment for plaintiffs because it relied solely on the allegations in plaintiffs' complaint. Defendant contends that plaintiffs failed to support their motion with affidavits or other materials, and that no competent evidence was presented to establish that: (1) any particular plaintiff did not affirmatively vote in writing to extend and amend the declarations; (2) any particular plaintiff did not receive a deed after 16 August 1973 which contained reference to the covenants and restrictions and the deed from Russwood to defendant; and (3) any particular plaintiff was not estopped from asserting the invalidity of the covenants and restrictions in the declaration.

Summary judgment is limited to cases where "all of the facts on all of the essential elements of [a party's] claim are in his favor and that there is no genuine issue of material fact with respect to any one of the essential elements of his claim." *Development Corp. v. James*, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980). In addition, "an issue is material if the facts as alleged would constitute a legal defense, would affect the result of the action or would prevent the party against whom it is resolved from prevailing in the action." *Id.* In evaluating the evidence presented, the movant "has the burden of 'clearly establishing the lack of any triable issue of fact by the record properly before the court.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (citation omitted).

In its order which granted partial summary judgment to plaintiffs, the trial court stated ". . . the Court, after having reviewed the pleadings, affidavits, and briefs filed by the parties to this action, and after having heard the arguments of counsel, concludes . . . 1. No genuine of [sic] issues of material fact exist as to certain aspects of this action, as enumerated more fully herein . . . ." The record indicates the evidence before the trial court included copies of recorded deeds, a declaration, amendments and affidavits from defendant which documented plaintiffs' voting records. Thus, there was ample evidence before the trial court for it to decide the summary judgment motion.

[2] In its sole assignment of error, plaintiffs contend the trial court erred in only granting partial summary judgment, since no genuine issue of material fact existed as to the termination of the declaration on 1 January 1990. Plaintiffs contend the amendments to extend the declaration were not enforceable, even as to the first category of lot owners who voted for the amendments or who received notice in their deeds, because the language of the declaration did not grant authority for the declaration to be extended beyond 1 January 1990. In support of this argument, plaintiffs assert that although the language in the declaration grants authority for it to be "changed, altered, amended or revoked in whole or in part[,]" it does not give permission to extend the declaration by amendments.

This case is controlled by *Allen v. Sea Gate Assn.*, 119 N.C. App. 761, 460 S.E.2d 197 (1995), where lot owners of a residential subdivision brought a declaratory judgment action seeking to have declared void the restrictive covenants on the basis that they had expired. The declaration which embodied the restrictive covenants contained the following language which limited its duration:

> 12. . . . All of the restrictions, conditions, covenants and agreements contained herein shall continue until January 1, 1992, *except that they may be changed, altered, amended or revoked in whole or in part* by the record owners of the lots in the Subdivision whenever the individual and corporate record owners of at least ⅔ of said platted lots so agree in writing.

Id. at 765, 460 S.E.2d at 200 (emphasis added). On 31 December 1991, defendant purported to extend the declaration by recording an amendment that had been consented to in writing by more than two-thirds of the lot owners. *Id.* at 762-63, 460 S.E.2d at 198. Defendant contended "that this provision allowing the covenants to be 'altered,

amended, or revoked' upon written agreement of two-thirds of the lot owners confers the power to extend." *Id.* at 765, 460 S.E.2d at 200. This Court disagreed, however, because "[c]ovenants that restrict the use of property are 'strictly construed against limitation on use . . . and will not be enforced unless clear and unambiguous." *Id.* at 765, 460 S.E.2d at 200. This Court found the language in the original declaration granting authority to change, alter, amend or revoke did not clearly permit an extension. *Id.* Thus, an ambiguity was created which was construed in favor of limited duration and against restricting property. *Id.* This Court held that because the original declaration expired, it could not be extended by amendment. *Id.*

Likewise in the case *sub judice*, a similar provision in the declaration permits it to be "changed, altered, amended or revoked" but does not clearly authorize an extension. This ambiguity must likewise be construed in favor of limited duration and against restricting property. We hold that because the declaration failed to provide authority to extend it beyond 1 January 1990, it expired upon this date and cannot be enforced against any of the plaintiffs.

[3] Defendant argues that even if the amendments purporting to extend the declaration are invalid, plaintiffs are still bound to pay fees and assessments because they have received benefits under the terms of the declaration for which they are obligated to pay. This Court has held that "[a]n implied in law contract will usually lie wherever one man has been enriched or his estate enhanced at another's expense under circumstances that, in equity and good conscience, call for an accounting by the wrongdoer." *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 646, 312 S.E.2d 215, 218 (1984).

Here, although the trial court found that an implied contract exists between defendant and the second category of plaintiffs to whom it held the declaration extension enforceable, it did not determine whether an implied contract exists between defendant and all the plaintiffs notwithstanding the validity of the amendments to extend the declaration. In its order, the trial court stated that it still needed to determine the following:

> The history of [defendant] road maintenance fund as well as its current status, including whether the fund has been used by Defendant for non-road-related matters, and whether the Plaintiffs may be entitled to some monetary credit for a road maintenance fee and whether or not Plaintiffs are in arrears in the

payment of road maintenance fees for the three years preceding the filing of the Answer in this cause[.]

We therefore remand this case to the trial court to address whether all of the plaintiffs have impliedly agreed to pay for maintenance, upkeep and operation of the roads, common areas and recreational facilities within the subdivision, and if so, in what amount.

In light of the foregoing, we need not address the remaining contentions.

We reverse the trial court's order in part and remand for entry of partial summary judgment in favor of all the plaintiffs for the reason that the declaration was not extended by the amendments. The remaining matters at issue in this case are remanded to the trial court for a determination as to all of the plaintiffs.

Reversed in part and remanded.

Judges McGEE and HORTON concur.

ALFRED T. POTTER, JR., D/B/A GREEN'S GROCERY, PLAINTIFF v. CITY OF HAMLET, DEFENDANT

No. COA99-1450

(Filed 16 January 2001)

1. Zoning— validity of ordinance creating extraterritorial jurisdiction—barred by statute of limitations

The trial court did not err in a zoning case by granting summary judgment in favor of defendant City of Hamlet based on plaintiff's challenge to the validity of the ordinance creating extraterritorial jurisdiction (ETJ) being barred by the two-month statute of limitations under N.C.G.S. § 160A-364.1 even though the City failed to record the ETJ map at the register of deeds, because: (1) the requirement in N.C.G.S. § 160A-22 that a map and/or written description depicting the ETJ be recorded in the register of deeds office is to give property owners notice as to whether their property is within the extraterritorial zoning authority of a city; (2) the City's actions both before and after the

ordinance creating the ETJ was adopted gave all persons with an interest in property affected by the ordinance sufficient notice of the ETJ's existence; and (3) except for the City's failure to timely record the map or written description of the ETJ at the register of deeds, the City fulfilled all the requirements under N.C.G.S. § 160A-360(b).

2. Zoning— jurisdiction—review of zoning officer's determination—failure to avail self of judicial review

The trial court did not err in a zoning case by finding that it lacked jurisdiction over the zoning officer's determination that the sale of beer in the store would constitute an unlawful expansion of a non-conforming use, because: (1) plaintiff failed to file an appeal under N.C.G.S. § 160A-388 with the City's Board of Adjustment contesting the zoning officer's determination and instead filed a rezoning petition requesting that his property be rezoned; and (2) therefore, plaintiff failed to avail himself of the only judicial review authorized by statute and may not otherwise collaterally attack the determination of the zoning officer.

Appeal by plaintiff from judgment entered 16 July 1999 by Judge Michael E. Beale in Richmond County Superior Court. Heard in the Court of Appeals 6 November 2000.

Drake & Pleasant, by Henry T. Drake, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart, for defendant-appellee.

EAGLES, Chief Judge.

In August 1997, Alfred Potter (Potter) purchased Green's Grocery (store) from William Green (Green). Approximately one month after purchasing the store, Potter contacted the ABC Commission about acquiring a permit to sell beer for off-premises consumption. The ABC Commission granted Potter a temporary permit, but informed him that he would need to obtain zoning approval from the City before a permanent permit could be issued.

In an effort to obtain the necessary zoning approval from the City, Potter's brother-in-law, Woodrow Herring (Herring), took an ABC zoning compliance form to Hamlet City Hall. Lisa Vierling (Vierling), the zoning officer responsible for enforcing the City's zoning ordinance and issuing zoning permits, received the form. Vierling determined

that the store was not in compliance with the zoning ordinance because it was located in an area zoned I-2, "heavy industrial." Vierling interpreted the zoning ordinance to mean that Potter could continue to operate the store as a non-conforming use but that the addition of beer sales would be an unlawful expansion of a non-conforming use. Accordingly, on 22 September 1997, Vierling completed the ABC zoning compliance form indicating a zoning classification of I-2, "heavy industrial," and "non compliance." In her affidavit, Vierling said she then informed Herring that Potter could either appeal her non-conforming use interpretation to the City's Board of Adjustment or could petition the City Council to change the zoning of the property to allow convenience stores.

Potter did not appeal Vierling's decision to the City's Board of Adjustment. Instead, in November 1997, Potter requested the tract upon which the store is located be rezoned to B-3, "neighborhood business." Pursuant to Hamlet's zoning ordinance, Potter's rezoning petition was first presented to the City's Planning Board for consideration and a non-binding recommendation. Public hearings were held on 15 December 1997, after which the Planning Board recommended that Potter's petition be denied. On 13 January 1998, Potter's request to rezone his property from I-2 to B-3 came before the Hamlet City Council. The City Council voted unanimously to deny the rezoning, citing concern about illegal spot zoning.

Following the decision by the City Council, on 12 February 1998, Potter filed a complaint against the City in Richmond County Superior Court. In Potter's complaint, he alleged that: (1) his store was more than one mile outside the City limits and was therefore not subject to the City's zoning regulations; (2) even if the store was within one mile of the City limits, there was "some question . . . as to whether or not the extra-territorial zoning ordinance was adopted as required under the Statutes;" and (3) even if Potter was subject to the City's zoning authority, Vierling erred in determining that the sale of beer would constitute an unlawful expansion of a non-conforming use.

On 19 April 1999, Potter moved for summary judgment in Richmond County Superior Court. On 27 May 1999, the City also moved for summary judgment. On 16 July 1999, the trial court granted the City's summary judgment motion, dismissing all counts of Potter's complaint. In its order, the trial court made the following relevant findings:

1. That the plaintiff is barred by the Statute of Limitations to challenge the validity of the zoning ordinance.

That in any event the City of Hamlet complied with North Carolina G.S. 160A in exercising its extra territorial jurisdiction and the only irregularity was in the failing to file a map in the Register of Deeds Office, and that this does not invalidate an otherwise valid procedure.

2. That there is no genuine issue of material fact in regards to the question of whether or not the plaintiff's property is within the extra territorial jurisdiction of the City of Hamlet . . . .

3. That the plaintiff has failed to properly contest the issue of a non-conforming use by failing to appeal to the Board of Adjustment and the Court is without jurisdiction to hear the plaintiff's claims . . . .

Potter appeals.

Summary judgment is properly granted if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." G.S. § 1A-1, Rule 56(c). The moving party has the burden to establish that there is no genuine issue as to any material fact. *Holley v. Burroughs Welcome, Co.*, 318 N.C. 352, 355, 348 S.E.2d 772, 774 (1986); *Toole v. State Farm Mut. Auto. Ins. Co.*, 127 N.C. App. 291, 294, 488 S.E.2d 833, 835 (1997). "Once the moving party has met its burden, the nonmoving party must 'produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial.' " *Toole*, 127 N.C. App. at 294, 488 S.E.2d at 835 (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). If the non-moving party fails to meet this burden, summary judgment is properly granted for the movant. Here, we conclude that because there are no genuine issues of material fact and the City was entitled to judgment as a matter of law, summary judgment was proper.

[1] Potter first argues that the trial court erred in finding that his challenge to the validity of the ordinance creating the extraterritorial jurisdiction (ETJ) was barred by the Statute of Limitations. Potter argues that because the City failed to record the ETJ map at the Register of Deeds, the zoning ordinance creating the ETJ is void, and the Statute of Limitations should not apply to his cause of action. We disagree.

G.S. § 160A-360 authorizes cities to exercise certain powers within their city limits and "within a defined area extending not more than one mile beyond its limits." G.S. § 160A-360(a). The statute further provides that any city wishing to exercise such "extraterritorial jurisdiction"

> shall adopt . . . an ordinance specifying the area to be included . . . . Boundaries shall be defined, to the extent feasible in terms of geographical features identifiable on the ground . . . . The boundaries specified in the ordinance shall at all times be drawn on a map, set forth in a written description, or shown by a combination of these techniques. This delineation shall be maintained in the manner provided in G.S. 160A-22 . . . and shall be recorded in the office of the register of deeds of each county in which any portion of the area lies.

G.S. § 160A-360(b). G.S. § 160A-22 provides that "[t]he current city boundaries shall at all times be drawn on a map, or set out in a written description, or shown by a combination of these techniques. This delineation shall be retained permanently in the office of the city clerk."

In 1994, the City enacted an ordinance creating an ETJ. The ETJ extended the City's zoning jurisdiction one mile outside the city limits. Before the ordinance was enacted, notice was given to all property owners within the boundaries of the proposed ETJ of public hearings on the issue. Green, from whom Potter purchased the store in 1997, was mailed a letter from the City's Office of the City Manager on 16 December 1993 notifying him of the proposed ETJ. Several public hearings were held, after which the ordinance creating the ETJ was adopted on 8 February 1994. A map depicting the ETJ boundaries is displayed in the Hamlet City Hall in the Clerk's office, and a metes and bounds description of the ETJ is attached to the ordinance which is part of the Hamlet zoning ordinance. However, prior to April, 1999, neither the ETJ map nor the written description were recorded at the Richmond County Register of Deeds Office as required by the statute.

The statutory requirement that a map and/or written description depicting the ETJ be recorded in the register of deeds office is to give property owners notice as to whether their property is within the extraterritorial zoning authority of a city. *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E.2d 283 (1977) (holding that the purpose of the statutory mandate in subsection (b) that boundaries be defined,

to the extent feasible, is so owners of property outside the city can easily and accurately ascertain whether their property is within the city's zoning authority). Here, the City's actions both before and after the ordinance creating the ETJ was adopted gave all persons with an interest in property affected by the ordinance sufficient notice of the ETJ's existence. Moreover, except for the City's failure to timely record the map or written description of the ETJ at the Richmond County Register of Deeds Office the City fulfilled all the requirements under G.S. § 160A-360(b). Therefore, we hold that the City substantially complied with G.S. § 160A-360(b).

Because the City substantially complied with G.S. § 160A-360(b) Potter is barred from attacking the validity of the ordinance based on procedural grounds by the Statute of Limitations provided in G.S. § 160A-364.1. G.S. § 160A-364.1 creates a Statute of Limitations, providing that any "cause of action as to the validity of any zoning ordinance . . . shall accrue upon the adoption of the ordinance . . . and shall be brought within two months . . . ." Under the statute, Potter's cause of action arose when the ordinance was enacted in 1994. Potter filed his complaint four years later in 1998, well outside the two month Statute of Limitations period set out in G.S. § 160A-364.1.

Potter argues that the Statute of Limitations should not apply to him because the City failed to file a copy of the ETJ map at the Register of Deeds Office. "There is a strong need for finality with respect to zoning matters so that landowners may use their property without fear of a challenge years after zoning has apparently been determined." *Pinehurst Area Realty, Inc. v. Village of Pinehurst*, 100 N.C. App. 77, 80-81, 394 S.E.2d 251, 253 (1990), *disc. rev. denied*, 328 N.C. 92, 402 S.E.2d 417, *cert. denied*, 501 U.S. 1251, 115 L.Ed. 2d 1055 (1991). As such, our courts have strictly applied Statutes of Limitation in zoning cases. *Id.*; *Thompson v. Town of Warsaw*, 120 N.C. App. 471, 473, 462 S.E.2d 691, 692 (1995). Therefore, the trial court properly found Potter's action barred by the Statute of Limitations.

Parenthetically we note that G.S. § 160A-366 validates city ordinances adopted since 1 January 1972 under "Chapter 160A, Article 19 . . . notwithstanding the fact that such ordinances were not recorded pursuant to G.S. 160A-360(b) . . . ."

[2] Potter next argues that the trial court erred in finding that it lacked jurisdiction over Vierling's determination that the sale of beer in the store would constitute an unlawful expansion of a nonconforming use. We are not persuaded.

The statutory procedure for challenging a decision of a zoning officer is contained in G.S. § 160A-388. The statute provides, in pertinent part:

> The board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this Part . . . .

G.S. § 160A-388(b). Any party not satisfied with the ruling of the board may in turn appeal to superior court, and the review is in the nature of certiorari review. G.S. § 160A-388(e); *Midgette v. Pate*, 94 N.C. App. 498, 502-03, 380 S.E.2d 572, 575 (1989); *Wil-Hol Corp. v. Marshall*, 71 N.C. App. 611, 613, 322 S.E.2d 655, 657 (1984). On certiorari review, the superior court is not the trier of fact. *Grandfather Village v. Worsley*, 111 N.C. App. 686, 688, 433 S.E.2d 13, 15 (1993). "The board of adjustment is the final arbiter of fact." *Id.*

Here it is uncontested that Potter failed to file an appeal with the City's Board of Adjustment contesting Vierling's determination that the sale of beer in the store would constitute an unlawful expansion of a non-conforming use. Instead, Potter filed a rezoning petition requesting that his property be rezoned from I-2 to B-3. Thus, Potter failed to avail himself of the only judicial review authorized by statute and may not otherwise collaterally attack the determination of the zoning officer. *Grandfather Village*, 111 N.C. App. at 689, 433 S.E.2d at 15; *Wil-Hol Corp.*, 71 N.C. App. at 614, 322 S.E.2d at 657. Accordingly, this assignment of error fails.

We have reviewed defendant's remaining assignments of error and find them without merit. We affirm the trial court's order of 16 July 1999.

Affirmed.

Judges WALKER and HUNTER concur.

MARY EVELYN JAMES, PLAINTIFF v. WAL-MART STORES, INC., DEFENDANT

No. COA99-1465

(Filed 16 January 2001)

Premises Liability— slip and fall—error to fail to give requested instruction

Plaintiff is entitled to a new trial in a slip and fall case based on the trial court's failure to give plaintiff's requested instruction that the store owner is required to give adequate warning to all lawful visitors of any hidden or concealed dangerous condition about which the owner knows or, in the exercise of ordinary care, should have known, because: (1) plaintiff's request reflects a correct statement of the relevant law and is supported by the evidence; and (2) the instruction provided in the case was inadequate since it fails to advise the jury that the landowner's duty of reasonable care may include a duty to warn of foreseeable dangers.

Judge EDMUNDS dissenting.

Appeal by plaintiff from judgment filed 16 June 1999 by Judge W. Allen Cobb, Jr. in Pender County Superior Court. Heard in the Court of Appeals 17 October 2000.

Sherman, Smith and Slaughter, P.L.L.C., by L. Bryan Smith and Kim E. Taylor, for plaintiff-appellant.

Poyner & Spruill L.L.P., by Timothy W. Wilson, for defendant-appellee.

GREENE, Judge.

Mary Evelyn James (Plaintiff) appeals from a jury verdict finding Wal-Mart Stores, Inc. (Defendant) was not negligent in causing her fall at Defendant's store in Jacksonville, North Carolina. Defendant cross-assigns as error the trial court's denial of its motion for summary judgment and motions for directed verdict made at the close of Plaintiff's evidence and at the close of all the evidence.

On 27 October 1995 at approximately 11:30 a.m., Plaintiff entered the Jacksonville Wal-Mart. A drizzling rain was falling, and Plaintiff noticed some small puddles in the parking lot. Plaintiff entered a vestibule outside the main entrance of the store, where she noticed a

yellow sign urging caution because the floor was wet. Plaintiff wiped her feet on a large red mat before going into the store and then wiped her feet again on a mat inside the store. After completing her shopping and returning to her car, Plaintiff realized she had forgotten to purchase an item and went back into the store. She again saw the yellow caution sign in the vestibule so she again "dried [her] feet off." Upon entering the store, she once more wiped her feet on a mat, even though she testified that she did not see any other caution signs. She took two steps off the mat and then fell onto the floor. Plaintiff felt with her hand that her pants were wet and she determined the moisture was water. Plaintiff, however, never saw any water or other substance on the floor where she fell. As a result of the fall, Plaintiff's tibia and fibula were broken near her ankle.

Amber Brown (Brown), an employee of Defendant, witnessed Plaintiff's fall. She was positioned just inside the entrance to the store working as a greeter. She testified that she had finished dry mopping the area where Plaintiff fell moments before the accident. Brown stated: "I was putting the mop back up against the cart rail, and I turned around and [Plaintiff] came in." Brown described a dry mop as "a mop with a brand new mop head on it that's dry, that's never been wet, so that it will absorb the water on the floor." In contrast to Plaintiff's testimony, Brown testified there was a caution sign inside the store in the area where Plaintiff fell in addition to the warning sign in the vestibule. In an affidavit and at trial, Brown indicated that the floor was damp but she denied there was standing water.

Plaintiff contends the trial court erred in refusing to give her requested jury instruction relating to Defendant's duty of care. Although Plaintiff admitted she observed a sign warning of a wet floor in the vestibule of Defendant's store, she did not see any signs inside the store where she fell. Accordingly, Plaintiff sought the following instruction:

> The owner is required to give adequate warning to all lawful visitors of any hidden or concealed dangerous condition about which the owner knows or, in the exercise of ordinary care, should have known. (A warning is adequate when, by placement, size, and content, it would bring the existence of the dangerous condition to the attention of a reasonably prudent person.)

The trial court denied Plaintiff's request and instead gave the following instruction: "The duty imposed upon owners and occupiers of land is the duty to exercise reasonable care in the maintenance of

their premises for the protection of lawful visitors and to prevent them from injury."

The dispositive issue is whether the jury instructions adequately informed the jury of an owner's duty of care to visitors lawfully on it premises.

A landowner is "required to exercise reasonable care to provide for the safety of all lawful visitors on [its] property," and thus must "take reasonable precautions to ascertain the condition of the property *and* to either make it reasonably safe or give warnings as may be reasonably necessary to inform the [lawful visitor] of any foreseeable danger." *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161-62, 516 S.E.2d 643, 646, *cert. denied*, 351 N.C. 107, — S.E.2d — (1999). 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." *Id.* at 162, 516 S.E.2d at 646. 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)), *disc. review denied*, 307 N.C. 270, 299 S.E.2d 215 (1982).

In this case, the instruction requested by Plaintiff, who was a lawful visitor on Defendant's property, reflects a correct statement of the relevant law and is supported by the evidence. The trial court was thus required to give the instruction, at least in substance.[1] *Calhoun v. State Highway and Public Works Comm'n*, 208 N.C. 424, 426, 181 S.E. 271, 272 (1935). The instruction provided in this case is inadequate because it fails to advise the jury that the landowner's duty of reasonable care may include a duty to warn of foreseeable dangers. This constitutes error and requires a new trial.

We have reviewed Defendant's cross-assignments of error and reject them as a basis for affirming a judgment for Defendant.

New trial.

Judge WALKER concurs.

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1. *See* N.C.P.I., Civ. 805.55.

Judge EDMUNDS dissented prior to 31 December 2000.

EDMUNDS, Judge, dissenting.

As the majority notes, a trial court must provide the substance of a requested instruction where that instruction is a correct statement of the relevant law and is supported by evidence. The instruction given here properly advised the jury that defendant owed plaintiff a duty of reasonable care. *See Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). The majority holds that the court also should have instructed that defendant had a duty to warn plaintiff of "any hidden or concealed dangerous condition about which the owner knows or, in the exercise of ordinary care, should have known." However, this Court held that "a landowner need not warn of any 'apparent hazards or circumstances of which the [plaintiff] has equal or superior knowledge.' " *Viczay v. Thoms*, 140 N.C. App. 737, 739, 538 S.E.2d 629, 631 (2000) (alteration in original) (quoting *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 105, 479 S.E.2d 259, 262 (1997)) *aff'd per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001). The evidence in the case at bar is uncontested that the condition that led to plaintiff's fall was not concealed or hidden, that plaintiff had full knowledge rain was falling, that defendant had put out at least one warning sign, that plaintiff heeded the warning sign by wiping her feet several times, and that defendant took steps to remove moisture from the floor where plaintiff fell. *See Stafford v. Food World*, 31 N.C. App. 213, 228 S.E.2d 756 (1976); *Gaskill v. A. and P. Tea Co.*, 6 N.C. App. 690, 161 S.E.2d 95 (1969). "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." *Byrd v. Arrowood*, 118 N.C. App. 418, 421, 455 S.E.2d 672, 674 (1995). The instruction given by the trial court was proper and adequate. Accordingly, I respectfully dissent.

JIMMY L. WATTS, PLAINTIFF v. HEMLOCK HOMES OF THE HIGHLANDS, INC. AND BUILDERS MUTUAL INSURANCE COMPANY, INC., DEFENDANTS

No. COA99-1630

(Filed 16 January 2001)

Workers' Compensation— compensability—disputed amount—exclusive jurisdiction of Industrial Commission

The superior court erred in a workers' compensation case by entering judgment enforcing payment of an amount of compensation that was in dispute. A defendant admits only the compensability of an injury by executing a Form 60 and paying compensation; that admission becomes an award of the Commission as to compensability and the superior court has jurisdiction to enter a judgment enforcing the award. Disputed issues other than compensability are within the exclusive jurisdiction of the Industrial Commission.

Judge EDMUNDS concurred in this opinion prior to 31 December 2000.

Appeal by defendants from judgment entered 19 July 1999 by Judge J. Marlene Hyatt in Jackson County Superior Court. Heard in the Court of Appeals 9 November 2000.

Kenneth Clayton Dawson for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Timothy S. Riordan and John H. Ruocchio, for defendant-appellants.

Teague, Campbell, Dennis & Gorham, L.L.P., by Linda Stephens and Tracey L. Jones, amicus curiae, for the North Carolina Association of Defense Attorneys.

MARTIN, Judge.

Plaintiff, Jimmy Lewis Watts, injured his left shoulder on 26 September 1995 when he fell off a log while working for Hemlock Homes of the Highlands, Inc. ("Hemlock"). In response to the accident, defendant Hemlock completed a North Carolina Industrial Commission Form 19 on 2 October 1995. The Form 19 stated that plaintiff was a carpenter with an average weekly wage of $480.00, based on a 40-hour work week and wages of $12.00 per hour. On 6 October 1995, a claims representative from Hemlock's carrier,

Consolidated Administrators, Inc., a predecessor of defendant Builders Mutual, filed a North Carolina Industrial Commission Form 60, "Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. § 97-18(b)." The Form 60 admitted Hemlock's liability for the injury and plaintiff's right to compensation. The Form 60 recited that plaintiff's average weekly wage was $480.00, which resulted in a weekly compensation rate of $320.01. Plaintiff was paid compensation at this rate until January 1996. Compensation at the same rate was reinstated on 22 February 1996. On 26 February 1996, defendants executed another Industrial Commission Form, Form 62, "Notice of Reinstatement of Compensation Pursuant to N.C. Gen. Stat. § 97-32.1 or N.C. Gen. Stat. § 97-18(b)," again stating the plaintiff's average weekly wage as $480.00 with a weekly compensation rate of $320.01. On the same date defendants executed the Form 62, defendant Builders Mutual prepared a letter to defendant Hemlock, which stated the following:

> We have received the Wage Transcript on the above employee. Agreements previously signed by this employee indicated that his Average Weekly Wages were $480.00. After computation of this Wage Transcript, we have determined that the Average Weekly Wage has now been changed to $244.73. Thus the Compensation Rate for this employee has been corrected from $320.01 to $163.16.
>
> Please have the employee above [Mr. Watts] sign this letter below and return to the address shown below of [sic] this letter.

Plaintiff signed the letter as directed by defendant Hemlock. Defendants sent a copy of the letter to the Industrial Commission on 18 March 1996 and again on 21 March 1996.

On 21 October 1998, plaintiff filed a certified copy of the Form 60 with the Clerk of Superior Court for Jackson County and served a copy on defendants. On 25 February 1999, plaintiff moved for the entry of judgment in the amount of $26,691.70, which is the difference between the amount due plaintiff at the compensation rate shown on the Form 60 and the amount actually paid by defendants. The Superior Court rendered judgment in favor of plaintiff, requiring defendants to pay plaintiff $29,571.88 in past due compensation and to pay "ongoing compensation to Plaintiff consistent with the Form 60 in the amount of $320.01." Defendants appeal.

Defendants argue that the Superior Court of Jackson County lacked subject matter jurisdiction to enter judgment in this matter because the dispute involves issues within the exclusive jurisdiction of the Industrial Commission. We agree.

Pursuant to G.S. § 97-91, "[a]ll questions arising under this Article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided." Once the Industrial Commission makes an award, however, the superior court has jurisdiction to enforce the award. G.S. § 97-87 provides in relevant part:

> [a]ny party in interest may file in the superior court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, *or of an award of the Commission* unappealed from or of an award of the Commission affirmed upon appeal, whereupon said court shall render judgment in accordance therewith, and notify the parties.

N.C. Gen. Stat. § 97-87 (emphasis added).

North Carolina Industrial Commission Form 60 was promulgated by the Commission pursuant to G.S. § 97-18(b) which permits an employer to admit the compensability of an employee's injury, to pay compensation, and to notify the Commission by the Form 60, "Employer's Admission of Employee's Right to Compensation," of such action. In *Calhoun v. Wayne Dennis Heating & Air Conditioning*, 129 N.C. App. 794, 798, 501 S.E.2d 346, 349 (1998), *review dismissed*, 350 N.C. 92, 532 S.E.2d 524 (1999), this Court held that a Form 60, properly executed by the employer, is an "award" within the meaning of G.S. § 97-87 and may be converted into a court judgment.

Though plaintiff contends *Calhoun* controls the decision in the present case, we construe the holding in *Calhoun* more narrowly and believe its applicability is limited to the facts then before the Court. In *Calhoun*, the employer executed a Form 60 agreeing the employee was entitled to compensation, but then did not pay any compensation. The employee sought to enforce the payment of compensation. The employer moved to dismiss the action for failure to state a claim and contended plaintiff was not entitled to benefits. The employer made no issue as to the rate of compensation to which the employee

was entitled. This Court held that the Form 60 constituted an "award" of the Commission and that plaintiff had followed the proper procedure to have a judgment entered by the superior court. The Court noted parenthetically that pursuant to G.S. § 97-83, if the parties disagree as to "benefits," either may request a hearing before the Commission.

In the present case, there is no dispute as to compensability and the record shows that defendants have paid plaintiff compensation on a weekly basis since executing the Form 60. The issue raised by defendants is not whether the superior court had jurisdiction to enter judgment enforcing the award that plaintiff's injury is compensable pursuant to the Form 60; rather, defendants question whether the superior court had jurisdiction to resolve the dispute between the parties as to the amount, or rate, of compensation to which plaintiff is entitled, which depends on a determination of his average weekly wage. We hold this to be a question within the exclusive jurisdiction of the Commission.

G.S. § 97-82(b) specifically states that payment pursuant to G.S. § 97-18(b) (a Form 60 Payment) "shall constitute an award of the Commission *on the question of compensability of and the insurer's liability for the injury* for which payment was made." (emphasis added). Moreover, Form 60 states only "[y]our employer admits your right to compensation for an injury by accident on (date) . . . ." Below this acknowledgment of liability is a section provided for a description of the accident, the average weekly wage and resulting compensation rate, and the date which disability begins and ends. The section is captioned, in bold print and capital letters: **"THE FOLLOWING IS PROVIDED FOR INFORMATIONAL PURPOSES ONLY AND DOES NOT CONSTITUTE AN AGREEMENT."**

In contrast, the North Carolina Industrial Commission Form 21, which constitutes an award of the Commission as to both compensability and amount when properly approved, *see Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 77, 476 S.E.2d 434, 436 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997), states explicitly that the parties agree and stipulate not only as to compensability but also to the employee's average weekly wage. "Once the Form 21 agreement [is] reached and approved 'no party . . . [can] thereafter be heard to deny the truth of the matters therein set forth . . . .' " *Id.* (quoting *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 282, 458 S.E.2d 251, 257 (1995)).

By executing a Form 60 and paying compensation pursuant thereto, a defendant admits only the compensability of the employee's injury. Such admission becomes an award of the Commission as to compensability and the superior court has jurisdiction to enter a judgment pursuant to G.S. § 97-87 enforcing such award. However, where disputes arise regarding issues other than compensability, as in this case, such issues are within the exclusive jurisdiction of the North Carolina Industrial Commission.

The Superior Court exceeded its jurisdiction in entering judgment enforcing payment of an amount of compensation when such amount was in dispute, and the judgment must be vacated. The issue of the amount of compensation to which plaintiff is entitled based on his average weekly wage must be determined by the Industrial Commission. In reaching this decision, we express no opinion as to the merits of the parties' respective contentions with respect to plaintiff's average weekly wage and the amount of compensation to which he is entitled.

Vacated.

Judges TIMMONS-GOODSON and EDMUNDS concur.

Judge EDMUNDS concurred in this opinion prior to 31 December 2000.

MICHAEL EVERETTE BOWERS, PLAINTIFF-APPELLANT v. JANICE MAULDIN BOWERS, DEFENDANT-APPELLEE

No. COA99-1509

(Filed 16 January 2001)

Child Support, Custody, and Visitation— support—earning capacity—required findings

A child support order was reversed and remanded where the trial court used "earning capacity" to determine the child support obligation, but did not include any findings as to whether either party deliberately suppressed his or her income to avoid support obligations and a transcript of the hearing was not included in the

record on appeal. "Earning capacity" can be used to determine child support only where there are findings based upon competent evidence to support a conclusion that the supporting spouse or parent is deliberately suppressing his or her income to avoid family responsibilities.

Appeal by plaintiff from judgment entered 17 May 1999 by Judge William G. Jones and filed 21 May 1999 in Mecklenburg County District Court. Heard in the Court of Appeals 6 November 2000.

Helms, Cannon, Henderson & Porter, P.A., by Thomas R. Cannon and Christian R. Troy, for plaintiff-appellant.

No brief filed by defendant-appellee.

WALKER, Judge.

Plaintiff appeals from an order awarding defendant $591.00 per month in on-going child support, support arrearages of $19,654.00 plus interest to be paid at $323.96 per month and attorney's fees of $5,000.00 plus interest to be paid at $82.42 per month, in addition to certain medical expenses and insurance.

The parties were married on 3 February 1983 and a child, Mykel Elizabeth Bowers (Mykel), was born 7 September 1983. The parties later separated and divorced. Mykel has lived with each parent for various periods of time and was placed in residential care from August, 1996 until August, 1998, as a result of being certified as a "Willie M" class member.

Plaintiff filed this action on 3 April 1997 seeking custody of Mykel. Defendant answered and counterclaimed on 1 May 1997 seeking custody and child support pursuant to the terms of the custody and separation agreement previously executed by the parties. The trial court found that neither plaintiff nor defendant was gainfully employed at the time of the hearing and calculated child support based on each party's "earning capacity," which was determined from their last monthly salaries multiplied by twelve months.

In his first assignment of error, plaintiff contends the trial court erred in awarding child support based upon each party's "earning capacity" without a showing that there had been an intentional or bad faith suppression of either party's income.

At the outset, we note "[a]bsent a clear abuse of discretion, a judge's determination of what is a proper amount of [child] support will not be disturbed on appeal. . . . 'A judge is subject to reversal for abuse of discretion only upon a showing by the litigant that the challenged actions are manifestly unsupported by reason.' " *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985)(citations omitted).

In determining the amount of a child support obligation, "[t]he judge must evaluate the circumstances of each family and also consider certain statutory requirements[.]" *Id.* at 68, 326 S.E.2d at 867 (citation omitted). N.C. Gen. Stat. § 50-13.4(c)(1999) sets forth the circumstances to be considered:

> (c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

Thus, a determination of child support obligation amounts must be made on a case by case basis. *Plott*, 313 N.C. 68, 326 S.E.2d 863. In *Plott*, this Court articulated in great detail a trial court's duty in this regard:

> To comply with G.S. 50-13.4(c), the order for child support must be premised upon the interplay of the trial court's conclusions of law as to the amount of support necessary 'to meet the reasonable needs of the child' and the relative ability of the parties to provide that amount. To support these conclusions of law, the court must also make specific findings of fact so that an appellate court can ascertain whether the judge below gave 'due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.' Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence. If the record discloses sufficient evidence to support the findings, it is not this Court's task to determine *de novo* the weight and credibility to be given the evidence contained in the record on appeal.

Id. at 68-69, 326 S.E.2d at 867, *quoting* N.C. Gen. Stat. § 50-13.4(c); *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (citations

omitted). *See* also *Dishmon v. Dishmon*, 57 N.C. App. 657, 292 S.E.2d 293 (1982) (holding that plaintiff's evidence and trial court's findings of fact fell seriously short of supporting a court-ordered increase in child support payments).

Our Supreme Court has held that "earning capacity" to determine child support can only be used where there are findings, based on competent evidence, to support a conclusion that the supporting spouse or parent is deliberately suppressing his or her income to avoid family responsibilities. *See Sharpe v. Nobles*, 127 N.C. App. 705, 493 S.E.2d 288 (1997) (holding that father's failure to look for higher paying job after his position was eliminated was not deliberate suppression of income or other bad faith action, and, thus, his former "earning capacity" could not be used to impute income to him for determining amount of child support); *Ellis v. Ellis*, 126 N.C. App. 362, 485 S.E.2d 82 (1997) (holding that before "earning capacity" rule is imposed for purposes of determining parent's child support obligations, it must be shown that a parent's actions which reduced his or her income was not taken in good faith); *Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E.2d 47 (1985) (holding that "only when there are findings based on competent evidence to support a conclusion that the supporting spouse or parent is deliberately suppressing his or her income or indulging in excessive spending to avoid family responsibilities, can a party's capacity to earn be considered);" *Whitley v. Whitley*, 46 N.C. App. 810, 266 S.E.2d 23 (1980) (holding the trial court erred in computing child support payment on plaintiff's capacity to earn, as opposed to actual earnings because there was no evidence to indicate that plaintiff intentionally suppressed his income to avoid support obligations).

In the instant case, although the trial court used "earning capacity" to determine the child support obligation, its order does not include any findings as to whether either party deliberately suppressed his or her income to avoid his or her support obligation. A transcript of the hearing is not included in the record on appeal. Thus, we are unable to determine what evidence was offered to show the circumstances under which plaintiff and defendant were unemployed at the time of the hearing, or whether plaintiff was deliberately suppressing his income or acting in disregard of his obligation to provide support.

We therefore vacate the trial court's order and remand for a further hearing at which time either party may offer additional evidence

on these issues raised in this appeal. We therefore need not address the other issues raised on appeal.

Reversed and remanded.

Chief Judge EAGLES and Judge HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 JANUARY 2001

BROTHERTON v. POINT ON NORMAN, LLC No. 99-1442	Iredell (99CVS00914)	Affirmed in part, reversed in part and remanded
IN RE KOONTZ No. 00-109	Burke (98J229)	Affirmed
STATE v. BRISTOL No. 00-248	Forsyth (98CRS050576) (98CRS050577)	No error
STATE v. BULLINS No. 00-617	Guilford (98CRS102950) (99CRS23438)	No error
STATE v. CAMERON No. 00-648	Durham (98CRS14614) (99CRS8026)	Dismissed
STATE v. FELTS No. 00-716	Buncombe (99CRS55053) (99CRS52980) (99CRS52981)	No error
STATE v. FLOWE No. 00-376	Cabarrus (99CRS5912) (99CRS5913) (99CRS5914) (99CRS5915)	No error
STATE v. JONES No. 00-657	Mecklenburg (99CRS17645)	No error
STATE v. MASSEY No. 00-384	Wake (97CRS23122)	No error
STATE v. UTT No. 00-593	Surry (99CRS5520) (99CRS5522)	No error
WHITTEMORE v. ALLSTATE INS. CO. No. 00-9	Buncombe (97CVS4244)	No error
WILKINS v. ASHEBORO ELASTICS No. 00-580	Ind. Comm. (817021)	Affirmed

FILED 16 JANUARY 2001

BRAY v. BRAY No. 99-1451	Rockingham (97CVD853)	Affirmed

POWERS v. POWERS No. 99-1443	Ashe (93CVD229) (96J26) (96J27)	Affirmed
TURNER v. S.I.T.B.R. CORP. No. 99-1446	New Hanover (98CVS593)	Dismissed
WHITE v. SNOW No. 99-1540	Surry (96CVD1494)	Dismissed

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APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

DECLARATORY JUDGMENTS—Continued

ing; a defendant in a pending lawsuit should not be permitted to bring a declaratory judgment suit involving overlapping issues in a different jurisdiction as a strategic means of obtaining a more preferable forum. Moreover, priority should not necessarily be given to a declaratory suit simply because it was filed earlier in situations where two suits involving overlapping issues are pending in separate jurisdictions. **Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 569.**

Not by natural plaintiff—forum shopping—dismissed—A declaratory judgment action by Consolidated arising from efforts to purchase a soft drink bottling company by Consolidated and a competing company (Durham) should have been dismissed where the issues were whether letters exchanged between Reidsville (the company being bought) and Durham constituted a binding contract of sale; whether Reidsville breached its contract with Durham; and whether Consolidated tortiously interfered with a contractual relationship between Reidsville and Durham. The natural plaintiff is Durham since Durham alleges damages from its unsuccessful efforts to purchase Reidsville and Durham's suit addresses all of the issues and includes all of the parties, while Consolidated's does not. **Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 569.**

Plaintiff not a party to contract—cognizable interest—In a dispute over the purchase of a soft drink bottling company, a third-party was not precluded from maintaining a declaratory judgment action simply because it sought to determine the validity of a contract to which it was not a party. Plaintiff has a cognizable interest under the alleged contract as a result of having purportedly purchased one of the parties to the contract. **Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 569.**

Right to dissent from will—subject matter jurisdiction—In an opinion superceding the previous opinion of the Court of Appeals, the trial court was held to have correctly granted summary judgment in favor of defendant Day in a declaratory judgment action contesting Day's right to dissent from her husband's will. Because plaintiff's complaint contested the right to dissent based upon valuations, which has nothing to do with the will instrument, the provisions of N.C.G.S. § 1-254 do not confer subject matter jurisdiction. **Ripley v. Day, 546.**

Validity of guaranty—determination under Act—The trial court erred by granting a Rule 12(b)(6) dismissal of plaintiff's claim for declaratory judgment that his personal guaranty is unenforceable. An actual controversy exists because defendant has demanded repayment of the guaranteed loans and, while defendant contends that a declaratory judgment is unavailable where a plaintiff seeks to have his personal guaranty declared invalid rather than merely interpreted, a trial court may determine the validity and enforceability of a contract under the Declaratory Judgment Act. **Allen v. Ferrera, 284.**

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Railroad—failure to show property located outside easement owned by another—In an action where plaintiffs sought to establish that they are the successors in interest of the property where the Whiteville depot is located based on allegations that the Railroad had ceased to use the property in the manner described in an 1882 deed, the trial court property granted summary judgment for

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SEARCH AND SEIZURE—Continued

Traffic stop—motion to suppress—reasonable suspicion—The trial court's finding that an officer had a reasonable suspicion to detain defendant after a traffic stop of defendant's truck which was transporting two cars was supported by the evidence. **State v. Munoz, 675.**

Traffic stop—voir dire hearing—finding defendant cooperated with police not required—The trial court did not err by denying defendant's motion to suppress the evidence of cocaine obtained in the search of defendant's truck and the two cars being transported on the truck even though defendant contends the trial court should have been required to make a finding at a voir dire hearing that defendant cooperated with the police when a trooper asked if he could search defendant's truck. **State v. Munoz, 675.**

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Aggravating factor—especially heinous, atrocious, or cruel—The trial court did not err in aggravating defendant's sentences for felonious assault and attempted murder on the basis that the offenses were especially heinous, atrocious, or cruel. **State v. Choppy, 32.**

Aggravating factor—victim's race—The trial court did not err by finding that defendant committed the crimes of conspiring to murder, attempting to murder, and feloniously assaulting one victim under the aggravating factor that defendant committed these crimes based on the victim's race in violation of N.C.G.S. § 15A-1340.16(d)(17). **State v. Choppy, 32.**

Firearm enhancement—statute violates due process—A kidnapping defendant's motion for appropriate relief in the Court of Appeals was granted insofar as it requested a determination that the firearm sentencing enhancement is facially unconstitutional. The statute removed from the jury the assessment of facts that increase the prescribed range of penalties to which the criminal defendant is exposed and is facially unconstitutional as violative of due process. **State v. Guice, 177.**

Firearm enhancement—underlying crimes—use of firearm not an essential element—The trial court did not err by enhancing a second-degree kidnapping defendant's sentence based upon use of a firearm where defendant argued that use of the gun was necessary to the essential element of terrorizing the victim and that defendant was contemporaneously convicted of possession of a firearm by a convicted felon and assault by pointing a gun. **State v. Guice, 177.**

Firearm enhancement—underlying facts not alleged—A kidnapping defendant's argument that the trial court was without jurisdiction to impose the 60-month firearm sentencing enhancement because the facts underlying the enhancement were not alleged in the indictment was without merit. **State v. Guice, 177.**

Habitual felon—evidence—faxed copy of prior conviction—The trial court in an habitual felon prosecution properly admitted a faxed certified copy of a prior conviction. Defendant challenged the exhibit only under N.C.G.S. § 14-7.4, not under the Rules of Evidence; although N.C.G.S. § 14-7.4 contemplates the most appropriate means to prove prior convictions, it does not exclude other methods of proof. **State v. Wall, 529.**

WORKERS' COMPENSATION—Continued

employment not required—The Industrial Commission did not err in a workers' compensation asbestosis case by its application of N.C.G.S. §§ 97-60 to -61.7, even though defendant employer contends it was never classified as a "dusty trade" and plaintiff retired employee is neither a current nor a prospective employee. **Austin v. Continental Gen. Tire, 397.**

Asbestosis—average weekly wage—calculation—The Industrial Commission's findings in a workers' compensation case were insufficient to support its conclusion regarding an asbestosis plaintiff's average weekly wage and the matter was remanded to the Industrial Commission. **Clark v. ITT Grinell Ind. Piping, Inc., 417.**

Asbestosis—dusty trades—compensation scheme—The Industrial Commission did not err in a workers' compensation asbestos case by applying N.C.G.S. § 97-60 through 61.7 even though there was no evidence that plaintiff was engaged or about to engage in an occupation that the Commission had found to expose employees to the hazards of asbestosis. **Clark v. ITT Grinell Ind. Piping, Inc., 417.**

Asbestosis—last injurious exposure—sufficiency of evidence—There was sufficient evidence in a workers' compensation action to support the Industrial Commission's findings that plaintiff was injuriously exposed to the hazards of asbestos while employed by defendant-ITT. **Clark v. ITT Grinell Ind. Piping, Inc., 417.**

Asbestosis—removal from industry—not required—An employee suffering from an asbestos-related disease need not be removed from employment to be entitled to the 104 weeks of compensation set forth in N.C.G.S. § 97-61.5. The language of N.C.G.S. § 97-61.5(b), read alone, appears to require that an employee be removed from the industry, but construing that statute in pari materia with N.C.G.S. § 97-61.7 evidences the General Assembly's intent to allow an injured worker to remain in the harmful work environment and receive the 104 weeks of compensation. **Clark v. ITT Grinell Ind. Piping, Inc., 417.**

Asbestosis—sufficiency of evidence—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff retired employee had asbestosis as defined in N.C.G.S. § 97-62. **Austin v. Continental Gen. Tire, 397.**

Asbestosis—sufficiency of evidence—The Industrial Commission did not err in a workers' compensation action by finding that plaintiff had asbestosis as defined by N.C.G.S. § 97-62 where the record contained the opinions of three doctors that plaintiff had lung conditions consistent with or characteristic of asbestos exposure. **Clark v. ITT Grinell Ind. Piping, Inc., 417.**

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Average weekly wage—football player—The Industrial Commission did not err in a workers' compensation action in its determination of the average week-

WORKERS' COMPENSATION—Continued

ZONING—Continued

petitioners failed to satisfy all of the general requirements of the city code for a conditional use permit, and the findings were squarely based on evidence presented at the hearing. **SBA, Inc. v. City of Asheville City Council, 19.**

Conditional use permit—telecommunications tower—federal act—The denial of a conditional use permit for a telecommunications tower did not violate the federal Telecommunications Act of 1996. **SBA, Inc. v. City of Asheville City Council, 19.**

Conditional use permit—telecommunications tower—prohibition of wireless services—discrimination among providers—Respondent-city council's denial of a conditional use permit for a telecommunications tower did not violate the federal Telecommunications Act by prohibiting the provision of personal wireless services and unreasonably discriminating among providers of functionally equivalent services. **SBA, Inc. v. City of Asheville City Council, 19.**

Conditional use permit—telecommunications tower—sufficiency of evidence—Although petitioners who had been unsuccessful in obtaining a conditional use permit for a telecommunications tower argued that the vast amount and perceived quality of their evidence required the issuance of the permit, they failed to carry their burden of meeting all requirements for issuance of the permit under the City Code. **SBA, Inc. v. City of Asheville City Council, 19.**

Denial of conditional use permit—review by superior court—A city council acted as a quasi-judicial body in denying an application for a conditional use permit; review by the superior court of that decision is as an appellate court rather than a fact finder. The provisions of the Administrative Procedure Act are highly pertinent to the superior court's review. **SBA, Inc. v. City of Asheville City Council, 19.**

De novo standard of review—The trial court appropriately applied the de novo standard of review to the decision of a board of adjustment where petitioner contended that the board erroneously concluded that his video store was an "adult establishment" based on his refusal to testify. This presents a question of law. **Davis v. Town of Stallings Bd. of Adjust., 489.**

Jurisdiction—review of zoning officer's determination—failure to avail self of judicial review—The trial court did not err in a zoning case by finding that it lacked jurisdiction over the zoning officer's determination that the sale of beer in the store would constitute an unlawful expansion of a non-conforming use because plaintiff failed to file an appeal with the board of adjustment contesting the zoning officer's determination. **Potter v. City of Hamlet, 714.**

Refusal to testify—inference of permit violation—It was proper for a board of adjustment to infer a violation of a zoning permit from a video store owner's refusal to testify and to conclude that the store qualified as an adult bookstore where there was evidence giving rise to the probability that a majority of his gross income was derived from the sale or rental of adult publications. The owner's refusal to attempt to refute this evidence is tantamount to a silent admission of the charge against him. It is well established that a trier of fact may infer guilt where a civil party has the opportunity to refute damaging evidence but chooses not to do so. **Davis v. Town of Stallings Bd. of Adjust., 489.**

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Validity of ordinance creating extraterritorial jurisdiction—barred by statute of limitations—The trial court did not err in a zoning case by granting summary judgment in favor of defendant City of Hamlet based on plaintiff's challenge to the validity of the ordinance creating extraterritorial jurisdiction (ETJ) being barred by the two-month statute of limitations under N.C.G.S. § 160A-364.1 even though the City failed to record the ETJ map at the register of deeds. **Potter v. City of Hamlet, 714.**

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